

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Serge Antonin Bonnafoux (Applicant)
AND Zico Limited (Respondent)
REPRESENTATIVES Serge Bonnafoux In person
Simon Cowles, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 20 April 2006
DATE OF DETERMINATION 25 May 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Serge Bonnafoux, commenced his employment with the respondent on 27 December 2003.

[2] The respondent, Zico Limited (“Zico”), is a duly incorporated company and carried on business at the material time as a bar and restaurant known as Zico Bar and Restaurant in the resort town of Hanmer Springs.

[3] Mr Bonnafoux was initially employed to manage the front of house at Zico Bar and Restaurant and was party to an individual employment agreement with Zico. Mr Bonnafoux undertook this front of house role until in or about April 2004 when the executive chef resigned from his position.

[4] Mr Bonnafoux was then offered and accepted a management role for the whole restaurant establishment. There was no change in his salary of \$42,000.00 per annum but there was a verbal agreement that he would receive a payment of 10% on the restaurant profit. Mr Bonnafoux knew at that time that the restaurant was not performing well but accepted *the challenge*.

[5] Mr Bonnafoux resigned from his position effective from 28 December 2004 having given one month’s notice in late November 2005 of his intention to do so. He initially claimed two sums were due and owing to him from Zico. The first sum was for nine days worked without payment and the second was a performance bonus payment of \$2100.00.

[6] At the start of the investigation meeting Mr Bonnafoux withdrew his claim for payment for nine days worked and the remaining claim against Zico is for a performance bonus payment of \$2100.00.

[7] Zico says that Mr Bonnafoux's performance as a manager was not satisfactory. It says that performance issues were discussed with Mr Bonnafoux and that as the performance bonus requires satisfactory performance Mr Bonnafoux did not qualify for payment of the bonus. Zico maintains that the decision whether or not to pay a bonus rests with the directors and shareholders of the company.

[8] Zico ceased trading on 30 April 2005. Simon Cowles who represented Zico at the investigation meeting is a director and shareholder of Zico. He advised that Zico has no assets and no money.

The issues

[9] The following issues require determination as to whether Mr Bonnafoux should have been paid a bonus or not?

- What were the relevant provisions of the employment agreement?
- Why did Zico decide that Mr Bonnafoux should not be paid a bonus?
- Did Mr Bonnafoux understand that there was dissatisfaction with his performance?
- Is Mr Bonnafoux entitled to any payment from Zico?

The relevant provisions of the employment agreement

[10] The entitlement to a performance bonus was contained in the first schedule of Mr Bonnafoux's employment agreement where it was provided for under *additional employee benefits*:

You will be entitled to a performance bonus payment equal to five percent of your annual salary for each completed six month period of current continuous service. This payment, which is subject to satisfactory performance, will be paid to you within one month of you qualifying for it.

[11] Mr Bonnafoux had been paid a performance bonus after his first completed six month period of employment in accordance with the above provision.

[12] Clause 3 of the employment agreement includes the following obligations for each party to the employment agreement:

3.1.1 As a good Employer, we will act in good faith, providing fair and proper treatment in all aspects of your employment.

3.2 You agree to carry out your responsibilities honestly and diligently and to the best of your ability during your normal working hours.

3.3 You also agree not to make any statement or take any actions at any time which are intended to or likely to adversely affect our business or reputation.

...

3.5 *We will periodically discuss your performance with you, and in the case of permanent employees, each year we will carry out a formal review taking into account the duties and responsibilities set out in the Second Schedule of this agreement. If we are dissatisfied at any time with your performance we will follow the procedures set out in Clause 17.1 of this agreement.*

[13] The performance review is linked to the additional employment benefits in clause 5. Clause 5.2 provides:

If you are employed by us in a permanent capacity, we will review your remuneration and additional employment benefits annually in conjunction with the performance review set out in Clause 3.5. Any change/s which we agree to will take effect from 1 July of the applicable year.

[14] Clause 17 of the employment agreement is about performance management and subclause 17.1 provided a process where an employee was not performing their duties to Zico's satisfaction.

Why did Zico decide that Mr Bonnafoux should not be paid a bonus?

[15] Mr Bonnafoux sent Mr Cowles an email on 31 December 2004 requesting that various amounts be paid to him including his bonus.

[16] Mr Cowles responded to Mr Bonnafoux by email of the same date. In terms of the request for payment of a performance bonus Mr Cowles accepted that Mr Bonnafoux had worked the required period of six months but said that Zico was not happy with his performance.

[17] In particular Mr Cowles set out matters of concern as follows:

- Mr Bonnafoux left work early leaving staff to lock up and the staff brought friends back to the restaurant for drinks.
- Mr Bonnafoux did not work key weekends without discussing this with the directors of Zico first.
- Mr Bonnafoux and staff left early in busy periods turning away prospective diners.
- There was an independent assessment of Zico done by Steve Holmes in November 2005 and the assessment confirmed observations to Mr Bonnafoux that he had run overstuffed rosters with substantially higher than *industry average* staff cost as well as producing a substantial loss.

[18] Mr Cowles also said in his email that the company had taken a liberal view on Mr Bonnafoux's first six months performance and was not inclined to do the same for the second six months.

[19] He said that Mr Bonnafoux would need to justify why he should receive a bonus for the previous six months. He also said *we are of the view that you knew you were struggling, did not have confidence in your ability to rectify the situation, and that is why you resigned. Despite the fact that you committed to implementing the Steve Holmes' plan, you clearly did not, evidenced by your continuation of the previous staffing level rosters.* He said that *accordingly we believe you should not receive any bonus payment for the period.*

[20] At the investigation meeting Mr Cowles said that one of the most significant issues for the company was that Mr Bonnafoux did not control the staffing costs. The other key issue for the company was that it wanted to see a profit from the restaurant or a trend toward profitability.

[21] Mr Cowles said that Mr Bonnafoux was provided with support in terms of visits from an accountant, email and telephone calls. He also said that there was marketing and promotional support and that Mr Bonnafoux had a regular monthly meeting with the directors. Mr Cowles said that he made regular visits to Hanmer with other business interests and saw Mr Bonnafoux during those visits.

Did Mr Bonnafoux understand that there was dissatisfaction with his employment?

[22] Mr Bonnafoux strenuously maintained that he was unaware there were issues about his performance until after he resigned from his employment. Mr Bonnafoux did not accept the matters in Mr Cowles' emails. He responded by way of further emails to Mr Cowles. He said amongst other matters that his resignation was for different reasons than those put forward by Mr Cowles, that his performance was never discussed or assessed in writing and that he considered there to be a breach of clause 3.5 and 17.1 of his employment agreement in terms of the performance bonus.

[23] Mr Bonnafoux's evidence was that he thought the owners were trying to keep him in the position of manager and he did not get the feeling from them that they felt he was not performing. He said that he felt he was good with staff and customers and believed that he performed well.

[24] Whilst the business commenced with a large number of staff Mr Bonnafoux says staff numbers were considerably reduced in or about March/April 2004 and he had a goal to manage staff costs. He disputed the amount of assistance or input he received from others.

[25] There were some matters that Mr Bonnafoux recalls discussing with Mr Cowles.

[26] He recalled discussing the weekend when he took leave. Although Mr Bonnafoux had organised a replacement whilst he was absent there was a misunderstanding following a telephone call about a temporary chef for the following week. Mr Cowles became involved. Mr Bonnafoux returned to the restaurant by helicopter.

[27] Mr Bonnafoux accepted that he had talked to Mr Cowles about allegations that staff were staying after hours, bringing back friends and drinking. Mr Bonnafoux said that he then in turn talked directly to the staff. Mr Bonnafoux said that the accusations were incorrect. He said after that discussion the staff locked up immediately the restaurant closed.

[28] Mr Bonnafoux denied ever turning customers away himself although said that he may have advised that there would be thirty minutes to an hour wait for a table. He did not accept that there was a discussion about him leaving early.

[29] Mr Bonnafoux agreed that there was a meeting with the owners of the restaurant on 16 November 2004 to talk about Steve Holmes report but was adamant that the report and the meeting following the report was not an appraisal of his performance. He agreed to implement some changes discussed when he returned to Hanmer and said that he did but the full effect of the changes would not have been evident when he resigned.

Is Mr Bonnafoux entitled to his performance bonus?

[30] The performance bonus provided for in Mr Bonnafoux's employment agreement required the fulfilment of two criteria. The first was six months service and the second was satisfactory performance.

[31] I do not find that payment of the performance bonus was truly discretionary but that the provisions in the employment agreement required Mr Bonnafoux's performance to be objectively assessed in terms of his duties and responsibilities. This is supported by the provision in the employment agreement for periodic discussions about performance and a formal review of performance each year taking into account the duties and responsibilities of the employee.

[32] There is also the express provision of the employment agreement in clause 3.1 that Zico will act in good faith, providing fair and proper treatment in all aspects of Mr Bonnafoux's employment. Mr Bonnafoux likewise agreed under the employment agreement to carry out his responsibilities honestly and diligently and to the best of his ability during his normal working hours. There is an implied term that neither party conduct themselves so as to undermine trust and confidence.

[33] There was no formal performance review carried out because Zico received Mr Bonnafoux's resignation.

[34] I am not satisfied that Mr Bonnafoux was advised clearly about the performance measures that he was expected to achieve and was ultimately judged not to have achieved for the material second part of his employment.

[35] This is illustrated by the email Mr Bonnafoux sent to Mr Cowles on 5 January 2005 in which he says amongst other reasons for resigning from his employment that; *.....lack of support for the operation of Zico, no business plan, no budget, no marketing plan.....*

[36] Mr Cowles in his emailed response of the same date says amongst other matters to Mr Bonnafoux *you seem to forget one simple fact and that is that you were the manager. Business plan, budget and marketing plan were all your responsibility as the manager..... You were responsible for Zico's performance and you ultimately failed to effectively manage the operation.*

[37] Both these emails were sent after Mr Bonnafoux's employment had ended.

[38] During Mr Bonnafoux's employment it would have been open for Zico to say to Mr Bonnafoux that it required a certain level of profitability to be achieved within a certain period for his performance to be satisfactory. There is no evidence it did so.

[39] There was no evidence of Mr Bonnafoux being warned or written to about failing to achieve a profit for the restaurant before he resigned from his employment.

[40] Until the Holmes report there may well have been observations made to Mr Bonnafoux about staff costs. There is no evidence to satisfy me that Mr Bonnafoux was advised his performance would not be viewed as satisfactory unless staff costs were reduced to a particular percentage. Mr Bonnafoux would in all fairness have needed this advice during his employment because there were certain contractual arrangements with staff.

[41] I would have expected very clear evidence about these matters being raised during Mr Bonnafoux's employment given the significance of them to Zico after his employment. After the first six months of Mr Bonnafoux's employment and the payment of a bonus there was an opportunity in looking forward to set goals and targets for the next six months against which performance would be measured. This did not happen.

[42] One would expect that many operational matters would be discussed with Mr Bonnafoux. The owners of the restaurant did not live in Hanmer and would want to talk to Mr Bonnafoux about staffing, financial matters and other issues. Mr Bonnafoux accepts that issues were discussed and

some addressed. He does not accept that he turned customers away or that he was talked to about closing the restaurant early.

[43] Mr Bonnafoux made a suggestion in an email to Mr Cowles dated 26 September 2004 about big parties with kids. I note in that email Mr Bonnafoux says that *we are constantly questioning ourselves about increasing takings we need to set up rules on situations like this one*. Mr Cowles does not in his reply email of 27 September agree with Mr Bonnafoux's suggestion and takes the opportunity to make it clear that customers should be encouraged to wait in the bar until a table becomes available. Mr Cowles relies on that email to support that Mr Bonnafoux was aware that his performance was not satisfactory. I am not satisfied that it was clear enough if that indeed was its intention. The email clarified what was required from staff for the busy season coming up in terms of seating customers in the bar to wait for a table.

[44] I find that Mr Bonnafoux believed he was doing his best and that the owners of Zico wanted him to stay. He attended a meeting with the owners of Zico to discuss the implementation of suggestions in the Holmes report in mid November 2004.

[45] I am of the view that it is significant that Mr Cowles refers to this meeting to discuss the Holmes report as the key meeting in that it was *absolute clarification about improvements and new initiatives required as well as how Serge's own performance had to step up to achieve this*. This meeting however was five months into the second six month period. I do not find that meeting was to review Mr Bonnafoux's performance but to consider new initiatives from the Holmes report.

[46] Shortly after the meeting Mr Bonnafoux gave one month's notice of his intention to resign. It was not until his employment ended that he asked for his bonus and was advised of the level of dissatisfaction Zico had with his employment. I accept that it came as a surprise to Mr Bonnafoux.

[47] There is a likelihood at that point any decision Zico made about whether to pay a bonus or not was tainted by the fact of Mr Bonnafoux's resignation and impacted on the ability of Zico to objectively assess performance over the whole six month period preceding the employment ending.

[48] There was no clear evidence that Mr Bonnafoux was advised his performance was unsatisfactory over the six month period. I do not find that Mr Bonnafoux understood that he was viewed as not having performed satisfactorily until after his employment ended. There was no formal objective performance assessment carried out taking his duties and responsibilities into account. Fair and proper treatment of Mr Bonnafoux would have required that he understood his duties and responsibilities and what his employer's expectations were. He needed to know if he wasn't meeting these expectations during his employment.

[49] In the circumstances I find that Mr Bonnafoux is entitled to a performance bonus for the second six month period of his employment with Zico.

Determination

[50] Mr Bonnafoux is entitled to a performance bonus under his employment agreement of \$2100.00.

[51] Zico Limited is ordered to pay to Serge Antonin Bonnafoux the sum of \$2,100.00 being a performance bonus payable in terms of his employment agreement. For taxation purposes the bonus is to be treated in the same manner as the earlier bonus paid to Mr Bonnafoux.

Costs

[52] Mr Bonnafoux was not represented at the investigation meeting. He is entitled to reimbursement of his filing fee of \$70.00. Zico Limited is ordered to pay to Serge Antonin Bonnafoux the sum of \$70.00 being his filing fee.

Helen Doyle
Member of Employment Relations Authority