IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA237/09
5129653

	BETWEEN	CHRISTIAN BREGMEN-LYON Applicant
	AND	ZHAO & DAI LIMITED T/A "PIZZA FRESCO" Respondent

Member of Authority:	Robin Arthur
Representatives:	Michael Single for Applicant No appearance for Respondent
Investigation Meeting:	9 July 2009
Determination:	16 July 2009

DETERMINATION OF THE AUTHORITY

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[1] In September 2008 Christian Bregmen-Lyon resigned from his job at the Zhao & Dai Limited's "Pizza Fresco" restaurant in downtown Auckland after having worked there for around 15 months.

[2] He says this resignation was not voluntary but a result of unfair treatment of him by the company's directors at the time. He says this treatment included:

(i) cutting his hours from around 55 a week to around 30 without discussing those changes with him; and

(ii) removing him from his role as front-of-house manager without discussing that change with him; and

(iii) issuing him two warnings in writing (dated 25 June 2008 and 16 July 2008) without first telling him of the alleged unsatisfactory conduct, or giving him the opportunity to give an explanation, or having that explanation properly considered before any warnings were issued.

[3] Mr Bregmen-Lyon first lodged an unjustified disadvantage claim in July 2008. By the time of the Authority's investigation meeting in July 2009, his claim had become one of constructive dismissal, alleging his resignation was not voluntary but forced by breaches of his terms of his employment by the company and foreseeable that he would resign in such circumstances.

[4] The parties had met in mediation in September 2008 and January 2009 but had not resolved matters between them.

The investigation

[5] At a telephone conference in April 2009 to make arrangements for the Authority's investigation the company was represented by one of its directors, Yi Zhou Luo, also known as Zoe Luo.

[6] Ms Luo agreed to the investigation meeting date and to a timetable to provide witness statements and copies of store security camera footage she said would support the company's claim of unacceptable conduct by Mr Bregmen-Lyon at work.

[7] The company did not provide witness statements or any camera footage in accordance with that timetable or in response to several subsequent follow-up calls by an Authority support officer.

[8] Neither Ms Luo nor any other company representative attended the Authority's investigation meeting. Shortly after the appointed starting time an Authority support officer contacted Ms Luo by telephone. I was advised that Ms Luo said she would not attend as, although she remained a shareholder, she was no longer a director and had passed information about Mr Bregmen-Lyon's claim to a new director.

[9] Companies Office records accessed electronically on the morning of 9 July 2009 showed Ms Luo registered as the sole director of the company with a new shareholder identified as having bought shares from a different and previous director in June 2009. (A further check of those records on 16 July showed on-line

registration of a new director was made on the afternoon of 9 July and Ms Lou's resignation as a director on 10 July.)

[10] I have exercised the power under clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) to proceed to investigate and determine this matter where a party fails to attend or be represented without good cause shown.

[11] Mr Bregmen-Lyon and his mother Donna Lyon, who had acted as his advocate in 2008, gave affirmed evidence confirming their written witness statements and answering additional questions. Written statements said to be from two other former employees of the company were also provided but I have taken no account of them as they did not attend the investigation meeting.

How the employment relationship problem arose

[12] In November 2007 Mr Bregmen-Lyon was offered and accepted a promotion to the role of front-of-house manager in the pizza store. This role included preparing weekly rosters for himself and other staff.

[13] In March 2008 Ms Luo became a director in the business. In June 2008 she issued a new roster that reduced Mr Bregmen-Lyon's hours from 55.5 a week to 30.5 a week.

[14] Around this time Mr Bregmen-Lyon's designation on the store computer system was changed, with his prior knowledge, from 'manager' to 'cashier'.

[15] When Mr Bregmen-Lyon sent Ms Luo a text protesting the changes to hours and his role in drawing up rosters, Ms Luo relied that she and the company's other director would prepare the roster and the new roster would start from the following week.

[16] Neither the change of hours nor the change to his role had been discussed with Mr Bregmen-Lyon before being implemented.

[17] Ms Lyon had become involved in Mr Bregmen-Lyon's work issues in April

2008 when there was a dispute about his entitlement to leave. She also wrote to and telephoned Ms Luo about the issues in June but was not able to resolve matters. On 7 July 2008 Mr Bregmen-Lyon lodged a personal grievance application in the Authority.

[18] Ten days later, and before the company lodged its statement of reply, he received a letter from Ms Luo which included a subject heading reading "*written warning letter*". Attached was another document that purported to record a verbal warning on 25 June 2008.

Determination

[19] The allegations made in those two warnings had not been put to him for comment and explanation. In his written witness statement and answers to questions at the investigation meeting Mr Bregmen-Lyon set out some of the information that the company would have needed to consider in relation to those allegations. However it had never asked him for that information or explanations before issuing the warnings. Consequently they are unjustified.

[20] Mr Bregmen-Lyon did not have a written employment agreement but had the benefit of an implied term of mutual trust, confidence and fair dealing. It was a breach of that term to change his role and hours and unfairly issue him with written warnings. In such circumstances it was reasonably foreseeable that he would resign. I do not accept that he accepted reduced hours by continuing to work for the company on that basis from July through to September. He had promptly lodged a personal grievance and clearly only worked reduced hours 'under protest' through that period.

[21] Accordingly I find that Mr Bregmen-Lyon was constructively dismissed and has a personal grievance for unjustified dismissal.

[22] He seeks the following remedies:

a. Compensation for wages for the period from June to September 2008 as a result of the roster change about which he was not consulted and for reduced earnings in subsequent jobs following his resignation in September 2008; and

b. Compensation for distress and injury to feelings as a result of the change to his role and the constructive dismissal; and

c. Penalties against the company for not providing him with a written employment agreement, not providing wage and time records, not forwarding PAYE deductions to Inland Revenue and not complying with directions from the Authority.

d. His legal costs in bringing this claim.

Remedies

Compensation for lost wages

[23] Mr Bregmen-Lyon seeks $4792 for wages lost as a result of the roster change in the period from late June to September 2008. He also seeks lost wages as his subsequent employment was at a rate of $1.50 an hour less than he was paid by the company.

[24] While there was no agreed written term, an implied term can reasonably be inferred that the company would be entitled to change Mr Bregmen-Lyon's hours after fair consultation and reasonable notice to him. Although his typical weekly hours had increased when other staff left, there was no intended and agreed guarantee of minimum hours or continuation of the 50 or more hours a week he was working by June 2008. It is for only the notional period of proper consultation and notice that I find he is entitled to lost wages. I take that period to be no longer than one month and assess the amount of loss as $1500 – that is the difference between 55 and 30 hours a week at $15 an hour for four weeks.

[25] He was fortunate to secure some other part-time work immediately on his resignation and for that role to expand within a few weeks to provide more hours, albeit at a lower rate of $13.50 an hour. On that basis a further award for lost wages is made for an additional eight weeks for the difference of 1.50 an hour, at 40 hours a week, totalling $480.

Compensation for hurt and humiliation

[26] Mr Bregmen-Lyon gave evidence about the distress caused to him by losing a

job that he had enjoyed and spent long hours at through late 2007 and early 2008. He enjoyed the status of being a manager and had featured, with acknowledgement of that role, in newspaper articles about the store and a hospitality national diploma course he was doing at the time. His confidence for seeking work in the hospitality industry has been undermined by the company's treatment of him. I accept Ms Lyon's evidence of the distress she observed as a result of Mr Bregmen-Lyon's treatment by company representatives.

[27] Considering the particular circumstances of the case and the modest range of awards made generally, Mr Bregmen-Lyon is awarded $3000 as compensation for the humiliation, loss of dignity and injury to feelings caused by the company's actions.

Contribution

[28] I have considered whether any of remedies awarded should be reduced under s124 of the Act but there is no confirmed evidence of blameworthy conduct by Mr Bregmen-Lyon contributing to the situation giving rise to his personal grievance. No reduction is required.

Penalties

[29] No penalties are awarded for the following reasons:

a. The Act has no specific penalty provision for not providing a written employment agreement. Rather s63A has requirements for intended agreements and there was no evidence of an intention expressed by the company to provide a written agreement when Mr Bregmen-Lyon began work in June 2007. Even if there were, such a claim falls outside the 12 month period for seeking a penalty: s135(5).

b. Ms Lyon gave evidence that the company has provided wage and time records, although it took some months and their accuracy is disputed; and

c. It is for the Inland Revenue Department to take action against the company if PAYE deducted from wages has not been properly forwarded to it.

d. The company's failure to follow Authority directions regarding lodging evidence has already operated to its detriment.

Costs

[30] Neither Mr Single nor Ms Lyon has charged Mr Bregman-Lyon for the costs of their time acting as his advocate however he incurred costs of $589.24 for earlier legal advice about his claim. That is a reasonable amount in costs in light of his claim and he is awarded $400 as a reasonable contribution towards those costs along with reimbursement of his $70 fee for lodging this matter in the Authority.

Summary of determination and orders

[31] Mr Bregmen-Lyon was constructively dismissed by the company.

[32] Zhao & Dai Limited is ordered to pay to Mr Bregmen-Lyon the following sums within 28 days of the date of this determination:

a. $1500 as compensation for wages lost in the period from June to September 2008; and
b. $480 as compensation for wages lost after September 2008; and
c. $3000 as compensation for distress and injury to feelings; and
d. $400 towards his costs; and
e. $70 in reimbursement of his fee for lodging this matter in the Authority.

Robin Arthur
Member of the Employment Relations Authority