

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Denise Carey (First Applicant)  
**AND** Cesare Stella (Second Applicant)

**AND** Uno Where Limited (Respondent)

**REPRESENTATIVES** Lynda Emmerson, Counsel for Applicant  
S Ferial Yasmin, Advocate for Respondent

**MEMBER OF AUTHORITY** R A Monaghan

**INVESTIGATION MEETING** 14 and 15 November 2005

**SUBMISSIONS RECEIVED** 9 December 2005, 4 January 2006

**DATE OF DETERMINATION** 2 March 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Uno Where Limited (“Uno Where”) employed Cesare Stella and Denise Carey as chef/manager and manager respectively at its Uno Restaurant and Bar in Dargaville, commencing in or about September 2004.

[2] Mr Stella and Ms Carey say they were constructively and unjustifiably dismissed. They rely on the accumulation of stress caused by what they say was the employer’s mismanagement of the business, its frustration of their attempts to carry out their own managerial responsibilities, and their long hours of work. They also refer to Uno Where’s purporting to initiate a disciplinary procedure just before the end of their employment, and to its making a complaint to the Police that they were in unauthorised possession of company property.

[3] The statements of problem also alleged personal grievances on the ground that Mr Stella’s and Ms Carey’s employment was affected to their disadvantage by unjustifiable actions of their employer. Broadly speaking, the actions said to be the subject of these personal grievances were the ones raised in support of the unjustified dismissal grievances.

[4] Both Mr Stella and Ms Carey say further that they did not receive holiday pay owing when their employment ended.

[5] Uno Where denies there was a dismissal and that it was guilty of unjustifiable action towards Mr Stella and Ms Carey. It has also counterclaimed for damages, saying Mr Stella and Ms Carey:

- (a) failed to provide the required notice of termination of their employment;

- (b) breached their duty of fidelity to it by, -
  - (i) setting up a pizza business named Art of Pizza after their employment ended, when they knew Uno Where was planning to incorporate a pizza menu in its restaurant operation, and
  - (ii) advising customers they were not operating the Uno restaurant because of stress-related illness;
- (c) breached their duty of good faith by, -
  - (i) their failures to provide the required notice of termination,
  - (ii) their failures to communicate with and report fully to the employer during their employment,
  - (iii) making themselves unavailable to receive restaurant supplies, and
  - (iv) making a complaint to OSH in bad faith;
- (c) breached a confidentiality agreement and misused confidential information belonging to Uno Where;
- (d) caused damage to a wall on the restaurant premises;
- (e) failed to return company property; and
- (f) caused it to lose profit over the Christmas-New Year period 2004-2005.

[6] A further allegation that Mr Stella and Ms Carey solicited employees for their own business, in breach of their obligations to Uno Where, was very properly abandoned at the investigation meeting. There was no evidence such soliciting occurred during their employment. If there was any such soliciting after the end of Mr Stella's and Ms Carey's employment, there was nothing to prevent it.

[7] By arrangement with the parties the Authority's investigation of Uno Where's counterclaims addressed liability only, with quantum being reserved for a later date should that become necessary.

### **The parties' employment relationship**

[8] Mr Stella is an experienced chef who owned and operated his own restaurant near Auckland for over 8 years before it was sold in late 2003. Ms Carey was a partner in the restaurant for some four years leading up to the sale. After the sale both had been working in other positions for a few months when, in July 2004, they saw an advertisement for positions at 'Uno Brasserie and Bar'.

[9] They contacted Frank D Nola, a director and shareholder in Uno Where, and interviews were arranged. Mr Stella accepted the position of manager, with particular responsibility for the running of the kitchen. Ms Carey accepted the position of restaurant manager, with particular responsibility for the bar and restaurant. Their employment commenced on 17 August 2004.

[10] Mr Nola said in evidence that he intended Mr Stella and Ms Carey to run the kitchen and front of house but they would not have responsibility for any financial matters. He told them he would not take a 'hands on' role although he expected regular reports about matters such as the business takings. He also told them the restaurant would be 'their baby', and they had reasonable grounds to expect a relatively free hand when it came to the mutual aim of rebuilding the restaurant after the departure of the previous managers. In effect, Mr Stella and Ms Carey would have responsibility for operational matters.

[11] Financial aspects of the business would be the responsibility of Mr Nola's and of Bernie Mudgway – a consultant who provided accounting and IT services to Uno Where. In practice, however, Mr Nola's and Mr Mudgway's activities encroached increasingly on operational matters, with Mr Stella's and Ms Carey's actual managerial discretion being very limited.

[12] It can be expected that, in any business where operational and financial responsibilities are separated, there will be grey or overlapping areas in the practical observance of those responsibilities. Good communication, complementary styles, and clear mutual understanding of the respective responsibilities of the parties can pre-empt any serious problem and ensure the business runs relatively smoothly. Unfortunately none of those features was present here.

#### 1. Early and ongoing disputes

[13] Between September and December 2004 there was an increasing number of disputes about the running of the restaurant. These disputes formed the basis for Mr Stella's and Ms Carey's allegations that Uno Where mismanaged the business, frustrated their attempts to carry out their managerial responsibilities, and that long hours of work were required. I detail only some of them.

##### (a) The flow of financial information

[14] Disputes about the flow of financial information underlay both parties' claims, with both complaining of not receiving adequate information from the other.

[15] From their point of view, Mr Stella and Ms Carey had no access to the restaurant's bank accounts or banking records, did not hold a company chequebook and did not have signing rights on a company cheque account, played no role in debtor and creditor management and did not receive or issue invoices, and played no role in the overall budgeting and financial planning for the business. In a financial sense they operated at a limited and basic clerical level. Indeed their concern was that they needed more financial information about the business, to allow them to make the operational decisions to create the success Mr Nola had indicated would be 'their baby'.

[16] In addition, although Mr Stella and Ms Carey were permitted to engage staff, and were at least aware of staff hours of work and wage costs, they were not responsible for any other financial aspect arising from the employment of staff. I add, here, that there was an ongoing dispute about Mr Nola's attempts to place a limit on the proportion of wage costs to turnover. Mr Stella's and Ms Carey's attempts to keep to a limit anyway led them to work longer hours than they would otherwise have done by carrying out extra duties themselves.

[17] As for Mr Nola's concerns, to the extent I could identify a settled reporting procedure, it seemed to be this. From the outset Ms Carey was providing information in the form of a spreadsheet format suggested by Mr Nola. The spreadsheet included details of employees' pay and hours of work, and total daily income received through the till. The till information did no more than break the income down according to whether payment was made by cash, eftpos, cheque, credit card or on account. The spreadsheet also listed the total number of customers at the restaurant each day. Ms Carey used till receipts and wage records to complete the spreadsheets.

[18] That information was bare. It became even barer over the early months of the employment relationship when problems with the till system caused problems in obtaining the till receipts Ms Carey used in making her reports. Unfortunately, when Mr Nola began expressing his concerns about the financial position of the business and the amount of information he was receiving, Mr Stella responded in an increasingly aggressive and insubordinate tone. The less information Mr Nola received and the more he expressed his concerns, the more insubordinate Mr Stella became. He even began refusing reasonable requests for information about staffing, and to dictate when the information would be provided. The responses were unreasonable, and although the responsibility for failing to introduce an effective reporting system was Mr Nola's, the increase in his concerns in the face of Mr Stella's responses was justified.

[19] Another aspect of the problem became apparent during the investigation meeting. Although Ms Carey was completing her spreadsheets from till receipts generated directly from the till, the till itself was a dummy terminal linked to a full software system and database with a terminal in the restaurant office. Ms Carey was aware of that, but she had never been shown how to use the system to create the full and detailed financial reports it was capable of generating. Nor had that facility been pointed out to her. Nor had anyone asked her to use the facility in making her financial reports. Instead, when Mr Mudgway demonstrated the system at the commencement of her employment, he had done no more than focus on inputting stock details.

[20] In November 2004 Mr Nola starting referring in his requests for information to the much fuller reports generated by the computer system. By December he was expressly requiring these computer reports. Had he been that specific when he began raising concerns in September and October - and ensured Ms Carey understood what he was asking for and was able to use the computer system to provide it - the problem should not have arisen. Had the parties' relationship been more cordial by December, the problem should have been capable of amicable resolution.

[21] An associated feature of the problem was Mr Nola's persistent reference to 'till reports' in his requests for information. From about November he probably meant the full computer-generated reports, but since these had not been pointed out to Ms Carey she understood the references were to the 'till receipts' she had been using.

[22] In or about November Mr Nola did at least recognise some assistance might be required, and he put that matter in Mr Mudgway's hands. However Mr Mudgway simply asked Mr Stella and Ms Carey if they wanted assistance with the 'till reports'. They thought he was referring to 'till receipts' (and presumably to the separate problems with the operation of the till) and declined the offer of help. Mr Mudgway did not press the matter. This loose terminology contributed to the misunderstandings about the provision of financial information. It did not help, either, that by then Mr Stella was openly contemptuous of Mr Mudgway.

#### (b) Problems with suppliers

[23] Another of the sources of discontent arose out of the astonishingly inefficient system applying to the ordering and receipt of restaurant supplies, and the payment of suppliers. Responsibility for these aspects was split between Mr Stella (placing orders), and Mr Mudgway and Mr Nola (receipt of invoices and ensuring payment on delivery, and later the receipt of deliveries as well). Worse, Mr Nola and Mr Mudgway were based in Whangarei and tended to exercise their responsibilities from there, although Mr Mudgway would visit the restaurant. It is no wonder there were problems with suppliers not being paid, deliveries not being made, and unhappiness all around.

[24] I regard the minimal level of control Mr Stella and Ms Carey were able to exercise over the fate of orders once they were placed as a reasonable ground for the wider concern they expressed about the limits on their ability to manage. That is also the reason why I did not find persuasive attempts to blame them for some of the supplier problems by saying their presence at the restaurant when deliveries were due could not be relied on. Not only that, neither Mr Stella nor Ms Carey was responsible for a number of errors and oversights which underlay many of the problems with suppliers.

#### (c) The placement of bar stools

[25] I refer to this dispute because it was raised in Uno Where's later attempt to discipline Mr Stella and Ms Carey. It arose in late November and concerned the positioning of bar stools in the restaurant. Such an issue should not have become the subject of a dispute at all, and the fact that it

did reflect the poor state of the relationship by then. Mr Stella and Ms Carey believed the stools should have a certain placement in the interests of encouraging people into the restaurant. Mr Nola believed they should have a different placement in order to meet what he said were obligations to the brewery which supplied the bar.

[26] The placement of the stools should have been a matter for Mr Stella and Ms Carey in their role as managers. If the obligations to the brewery had any real substance they could have been raised for discussion with Mr Stella and Ms Carey. Instead, without reference to them, Mr Nola caused the stools to be moved. For no real reason, the rest of the restaurant furniture was moved too. When they found that had happened, Mr Stella and Ms Carey moved it all back. Mr Nola considered their action unsatisfactory and instructed that the stools be left where they had been placed. Mr Stella in particular was angry about the instruction, and conveyed that to Mr Nola.

(d) The difficulties escalate

[27] In late November 2004 Mr Nola began to arrange the performance reviews due in mid-December in terms of the schedules to the parties' employment agreements. Both parties acknowledged the usefulness of a form of mediated assistance, but could not arrange assistance soon enough for Mr Nola. He was becoming more concerned than ever about the lack of adequate financial information, and wanted to advance that and other issues. A stand off developed in November and early December over the timing of the meeting and the identity of the mediator.

[28] Also in early December 2004 Mr Stella complained to the Occupational Safety and Health service about a slippery safety mat (which could have been cleaned although the parties disagreed about how), sunstrike affecting the ability of staff to work safely at certain times of day (which I discuss later in this determination), and the layout of his work bench. In a report dated 18 February 2005 an OSH inspector concluded that, despite Mr Stella's belief that the matters raised were significant, they were not. The inspector commented - and after hearing the evidence I agree - that the problems could easily have been addressed. Some could have been addressed by Mr Stella himself. Again the fact that they were not is indicative of the extent of the dysfunction in the employment relationship, and the extent to which consultation seemed to have been required for even the most minor matters.

[29] Aside from the way the OSH complaint illustrated the extent of the relationship breakdown, I found nothing in the evidence to suggest Uno Where was in breach of its obligations to Mr Stella and Ms Carey regarding health and safety in the workplace. Later in this determination I return to Uno Where's claim that the complaint to OSH was made in bad faith.

2. Attempts to initiate a disciplinary procedure

[30] On 14 December 2004 Mr Nola sought a disciplinary meeting with Mr Stella and Ms Carey. Mr Nola advised a meeting would be held on 17 December to address their alleged refusals to:

- (a) provide 'till reconciliation' reports (which was not an accurate description of the information he really wanted);
- (b) adhere to requirements regarding wage costs as a percentage of turnover; and
- (c) place bar stools where Mr Nola instructed.

[31] The 17 December meeting did not go ahead. Mr Stella gave a brief reply by email message on 14 December, with another message dated 15 December 2004 expressing the hope that Mr Nola was not 'deliberately trying to make our work situation so intolerable as to try and induce us to resign.' For his part

Mr Nola sought an alternative meeting date of 21 December, and said 'we are not prepared to wait indefinitely for a response.'

[32] Mr Stella's and Ms Carey's solicitors responded to Mr Nola's concerns by letter dated 20 December 2004. The solicitors indicated they would not be available for a meeting until after 10 January 2005. Mediation was again suggested.

[33] The letter also referred to yet another dispute between the parties, namely the Christmas-New Year opening hours. There had been some exchanges in October and November about staffing, and a suitable menu, but apparently nothing was finalised. In December Mr Stella and Ms Carey complained of not receiving a response to their request for Mr Nola's comments on their proposals. The letter said they would make their own decision, and that the restaurant would be closed from Christmas Day to 28 December inclusive.

[34] By letter dated 21 December 2004 Uno Where indicated it was prepared to attend mediation, but no suitable date was available in the near future and the company did not wish to delay at least obtaining an explanation from Mr Stella and Ms Carey. It sought a meeting on 10 January 2005. The 21 December letter did not comment on the Christmas-New Year opening hours, but at least the financial information Mr Nola required was identified more accurately and specifically than in the 14 December letter.

[35] The parties' relationship went into a steeper decline than ever. On 28 December 2004 Mr Stella and Ms Carey visited their doctor because of the stress they were experiencing at work. Mr Stella in particular was very distressed. Their doctor gave them a medical certificate for 28 days' sick leave, but they decided to return to work.

[36] Almost immediately there was another incident between Mr Nola and Mr Stella when, on or about 29 December, Mr Stella went to Mr Nola's Whangarei premises in order to collect his and Ms Carey's wages. Mr Nola enquired about Mr Stella's intentions regarding New Year opening hours. Mr Stella refused to answer unless his representative was present, which I consider unnecessary as Mr Nola was entitled to an answer. Mr Nola told Mr Stella he would be putting his position in jeopardy if he did not answer, but no answer was forthcoming.

[37] Subsequently, in a letter of 30 December, Mr Nola formally raised a concern about Christmas-New Year opening times.

[38] On 4 January 2005 Ms Carey had a severe stress reaction at work and both she and Mr Stella decided they would take their sick leave. They tidied up and closed the restaurant, leaving on the door a note to customers saying they were taking time off because of stress-related illness. By memorandum dated 5 January 2005 they forwarded their medical certificates to Mr Nola, as well as a memorandum making him aware of their absence and the reason for it.

### 3. The complaint to the Police

[39] In response, on or about 5 or 6 January 2005, Mr Nola and Mr Mudgway visited the restaurant premises. They noted that Mr Stella had accessed the premises - as he had, in order to collect some personal property - and concluded that certain company property was missing. They took the view it had been stolen. They also decided Mr Stella was responsible for damage to a wall in the restaurant, to which I return later in this determination. Mr Nola decided to file a complaint with the Police.

[40] As a result, on 10 January 2005 the Police executed a search warrant of Mr Stella's and Ms Carey's home. The Police were looking for: three quails; a pocket calculator of minimal value; a knife block; and 220 music cds to which I will also return.

[41] The Police did not find any quails although docketts relating to the sale of some quails at the restaurant were found, the pocket calculator was a trivial item and there was nothing inappropriate about its location in any event, and the knife block belonged to Mr Stella. The Police did not find any cds in the possession of Mr Stella or Ms Carey but found 43 in the possession of a kitchen hand, Joshua Tahu, whose home was also searched. Eleven of those cds were no more than empty cases.

#### 4. The rest of January 2005 and the resignation

[42] By letter dated 7 January 2005 Uno Where's representative again raised Uno Where's requirement for a disciplinary meeting, although the representative's unavailability meant the meeting could not be conducted until the end of January. The letter said the concern about wage costs would not be pursued, but raised additional allegations of misconduct. These included more detail in support of the alleged failure to provide financial information as well as alleging unauthorised possession of company property.

[43] That action, the complaint to the Police together with the rumour and gossip surrounding it, and some unfortunate comments of Mr Nola's together with more rumour and gossip arising from his attempts to keep the restaurant open in January, preceded the inevitable announcement of the end of the employment relationship. At or about the expiry of Mr Stella's and Ms Carey's sick leave, their solicitor advised Uno Where's representative that they would not be returning. The relevant conversation occurred on or about 26 January, and the resignations were confirmed in letters dated 2 February 2005.

[44] The reasons for the resignations, as set out in the letters of 2 February 2005, included:

- (a) the execution of the search warrant;
- (b) interference with the day to day running of the business;
- (c) spreading rumours about the theft of money; and
- (d) general aggressive and demeaning conduct.

#### **Whether there were dismissals**

[45] I apply the following legal principles in determining whether the resignations amounted to constructive dismissals:

“... we consider the first relevant question is whether the resignation has been caused by breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. 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: ...” **Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW** [1994] 1 ERNZ 168, 172.

[46] When there are as many accusations and allegations as there have been in the course of this employment relationship problem, it is important to identify which caused the resignation and which formed part of the war of attrition into which matters have descended. As an example of the latter I refer to the health and safety concerns Mr Stella raised with OSH, and additional complaints associated with the state of the kitchen which he aired at the investigation meeting. I am not persuaded health and safety issues of that kind played a causative part in the decisions to resign.

[47] Mr Stella and Ms Carey do, however, say their long hours of work played a part in the decision. The agreed hours of work were for 5 days a week, with the restaurant being closed on Sundays and Mondays. Mr Stella and Ms Carey gave evidence they would start work between about midday and 2 pm, with the restaurant opening for customers at 5 pm. It would stay open until 10 – 10.30 pm on weekdays and midnight – 1 am on Friday and Saturday nights, depending on when the last customer left. For a period in October the restaurant was also open for lunch three days a week, but that became too onerous as the necessary start time then became 9 – 10 am. If Mr Stella and Ms Carey had been obliged to continue opening for lunch I would have accepted their hours were excessive.

[48] Otherwise, although the hours of work were long, on the busiest weekday the maximum number of hours worked would be 10 ½ and on quiet weekdays there could be less than 8. The financial information with which I was provided indicated there was no shortage of quiet weekdays. While I accept that Ms Carey and Mr Stella worked longer hours than they would have liked to in order to minimise wage costs, and that they worked hard, the evidence about their hours of work was too vague to support a finding that they were required to work excessive hours. Indeed, with the exception of the short-lived attempt to open for lunch, it appeared to me the real problem was with the accumulation of the stress and unnecessary drains on time caused by the state of the parties' relationship and disputes such as those discussed in the rest of this determination.

[49] Thus while I accept their concerns about their hours of work were factors in the decisions to resign, there was no evidence of a breach of duty in respect of those hours.

[50] Turning to the reasons in the 2 February resignation letter, I reject for lack of evidence the allegation that Uno Where spread rumours about the theft of money.

[51] Next, I infer that references to 'interference with the day to day running of the business' and 'general aggressive and demeaning conduct' concerned disputes and difficulties of the kind described in this determination. In addition I regard those references as being related to the subsequent assertion that the employer 'mismanaged the business'. I do not know what else was intended by the latter, but if it encompassed Mr Stella's and Mr Carey's allegation that the business was under-funded, there was no evidence of that and I disregard the allegation.

[52] Further to the allegations of interference in the day-to-day running of the business, I accept Mr Nola took a far more hands-on role than he had led Mr Stella and Ms Carey to expect he would take. His idea of having responsibility for financial matters involved a level of micro-management that Mr Stella and Ms Carey understandably resented. Similarly, Mr Nola's idea of the level of management at which they would operate in practice was substantially less sophisticated than theirs. Finally, although Mr Stella made a number of inappropriate comments about Mr Mudgway, I accept that aspects of Mr Mudgway's involvement in the running of the restaurant contributed to the problems by further weakening lines of communication.

[53] Having said that, the use of language such as 'mismanaged the business' and 'interfered in the day to day running of the business' indicate a tendency to judge the way Mr Nola sought to run the business without giving appropriate recognition to his right as the employer (through Uno Where) to run the business as he saw fit. That attitude did not enhance the relationship.

[54] Regarding the attempt to initiate a disciplinary procedure, the reaction of Mr Stella in particular to Uno Where's attempt to set up first the performance review, then the disciplinary meeting, made matters even worse. Whether or not Mr Nola's concerns could be shown to have substance, he was entitled to raise them and was seeking to invoke an appropriate process to at least do that much. Any decision he made as a result could then be open to challenge, but it was

premature for Mr Stella to allege in December that the efforts amounted to attempts to force resignations. Considerations such as the following should have been properly acknowledged:

“[57] It must be possible for employers, in the context of a formal performance appraisal, to hold a frank discussion with employees, including the voicing of dissatisfaction or less than entire satisfaction with the employee’s performance. The employee is entitled, in the context of the subsequent discussion, to advance facts and considerations that might alter or moderate the employer’s adverse views, as indeed happened. ...”

**NZ Institute of Fashion Technology v Aitken** [2004] 2 ERNZ 340, 359.

[55] Thus if the reference to ‘general aggressive and demeaning conduct’ was intended to include Mr Nola’s attempts to arrange a performance review and a disciplinary meeting, then I do not accept the attempts should be characterised in that way. Nor do I accept it was appropriate for Mr Stella to allege, in correspondence at the time, that the attempts amounted to ‘harassment’. The allegation was unhelpful and unnecessary.

[56] If the reference to ‘general aggressive and demeaning conduct’ was intended to refer to the effect of Mr Nola’s micro-management, I deal with those acts elsewhere. Otherwise the allegation was stated so vaguely I can take it no further.

[57] Finally I consider the complaint to the Police, which led to the execution of the search warrant, to be poorly-judged. There were no reasonable grounds for the complaint. The accusation regarding damage to the wall was based on assumption, Mr Mudgway could and should have told Mr Nola of discussions he had with Mr Stella about what to do with the cds, and Mr Nola knew Mr Stella was using much of his own kitchen equipment (he had said so in email messages). While the quails might have appeared to be unaccounted for, there were no reasonable grounds for suspecting Mr Stella and Ms Carey had unauthorised possession of them.

[58] I balance this, however, by noting Mr Stella’s evidence that in early January he removed some of his and Ms Carey’s personal possessions from the restaurant because of his own distrust of Mr Nola and Mr Mudgway. He had already been raising the possibility of constructive dismissal. In reality the relationship was moribund even before the complaint to the Police.

[59] Inevitably all of this conflict caused stress. I have given considerable thought to whether the stress and conflict resulted from what was essentially a problem of a mismatch in style, expectations and management philosophy, or whether the difficulties went further and amounted to a breach of duty in terms of the **Auckland Electric Power Board** decision. For the most part I have taken the view that the behaviour on both sides was such that the problem should be seen as one of a profound mismatch rather than of a breach of duty by the employer.

[60] However, on viewing the relationship as a whole, one thing has tipped the balance in favour of my finding that there was a breach of duty making it reasonably foreseeable that Mr Stella and Ms Carey would resign as a result. That is, Mr Nola led Mr Stella and Ms Carey to believe that they would have a degree of managerial freedom they did not experience at all. I accept that they were prevented from doing the jobs they had been led to expect they were hired to do. That was partly because ordering and reporting systems were inefficient, and partly because of the lack of freedom to make even low level decisions. This caused stress and frustration, and was a significant factor in the breakdown of the relationship and the resignations.

[61] For that reason I conclude that Mr Stella and Ms Carey were constructively dismissed. The dismissals were not justified.

### **Remedies for unjustified dismissals**

## 1. Reimbursement of lost earnings

[62] Mr Stella and Ms Carey have personal grievances on the ground of their unjustified dismissal. They have sought three months' wages 'in lieu of notice'. However their contracted entitlement to notice was a period of two weeks, and that is the notice to which they were entitled. It would be more appropriate to address their claims for three months' wages as claims for the reimbursement of remuneration lost as a result of their personal grievances, with particular reference to s 128(2) of the Employment Relations Act 2000.

[63] I take into account, too, that s 124 of the Act requires the Authority to consider the extent to which the actions of an employee contributed to the situation that gave rise to the grievance, and if the actions so require to reduce the remedies that would otherwise be awarded.

[64] I have referred on a number of occasions to aggressive or insubordinate conduct on Mr Stella's part. His conduct was uncalled for and unnecessary, and ensured that the difficulties in the relationship became incapable of resolution. It contributed significantly to the situation that gave rise to his personal grievance. For that reason I reduce his claim for reimbursement of lost earnings to the amount of notice of termination he should have received. Uno Where is ordered to pay him two weeks' wages, being \$762 (gross) x 2 = \$1,524, as reimbursement of lost earnings.

[65] There was no evidence Ms Carey was guilty of that kind of conduct. On the contrary, on occasion she apologised to Mr Nola for Mr Stella's outbursts and made constructive attempts to restore the parties' relationship to a sensible footing. However, and understandably, she was a party to many of the communications in which an unreasonable stance was taken, for example the accusations of harassment which met Mr Nola's reasonable attempts to arrange a performance review and a disciplinary meeting. I reflect that by reducing her claim for reimbursement of lost earnings to one month's wages inclusive of notice. Uno Where is ordered to reimburse her in the sum of \$500 (gross) x 4 = \$2,000.

## 2. Compensation for injury to feelings

[66] There was such a far-reaching failure in the parties' relationship, and so much was attributable to the behaviour of both parties, that I do not consider it appropriate to provide Mr Stella or Ms Carey with any further remedy in respect of injury to their feelings.

### **The disadvantage grievances**

[67] At the start of the investigation meeting I sought clarification from counsel for Mr Stella and Ms Carey of exactly what was being relied on in support of the disadvantage grievances. Counsel referred to the contents of the solicitors' letter of 20 December and the four reasons set out in the resignation letter of 2 February.

[68] In effect, those were the same matters as those raised in support of the allegations of constructive dismissal. To the extent that any of them are capable of supporting a personal grievance, they have been addressed and remedied as part of the unjustified dismissal. There is no need to take them any further.

### **Non-payment of holiday pay**

[69] No holiday pay was paid to Mr Stella or Ms Carey on the termination of their employment. I refer in the next section of this determination to the reasons for this.

[70] For reasons also set out in the next section of this determination, I find Mr Stella and Ms Carey were entitled to payment. Uno Where provided an ‘estimate’ from a payroll company to the effect that Ms Carey is owed \$600 and Mr Stella is owed \$914.40. Better evidence than an ‘estimate’ is necessary here, but Uno Where is ordered to pay those amounts with leave reserved to Mr Stella and Ms Carey to apply to have them corrected if they are not accurate.

## Uno Where’s counterclaims

### 1. Failure to give two weeks’ written notice of resignation

[71] The relevant employment agreements contained the following provisions:

“8. Remuneration

...

(vii) In the event that the employee’s employment is terminated or the employee resigns, the employee hereby authorises the employer to deduct from the employee’s pay whatever monies the employer may be owed under the employment relationship.

..

12. Termination

(i) Either party may terminate this agreement by giving not less than two weeks’ notice in writing to the other party. ...

...

(iv) If the Employee leaves without giving the required notice of termination of employment the Employer shall be entitled to liquidated damages as compensation for breach of contract. The parties agree that the sum of these damages shall be equivalent to the amount of the wages that the Employee would have earned during the whole or part of the notice period that he or she did not work. The Employee agrees that this sum may be deducted from any monies owed to the Employee upon termination.”

[72] To the extent the failure to pay holiday pay relied on these clauses, I do not accept Uno Where was entitled to withhold payment under clause 8 (vii) or clause 12 (iv).

[73] Both clauses allow the deduction from an employee’s pay of monies owed to the employer, but clause 12 (iv) is the basis of the argument here that monies were owed. The subclause provides for the payment of ‘liquidated damages’ as ‘compensation for breach of contract’. The breach in question is the employee’s failure to give ‘the required notice of termination’ when leaving employment. However the employee’s leaving must be at the initiative of the employee before any breach of the notice obligation can be considered. If the departure is at the initiative of the employer it is not reasonable to penalise the employee for any alleged failure to give the required notice, and the subclause must be read accordingly.

[74] Here I have found Mr Stella and Ms Carey were constructively dismissed. That means their leaving their employment was at the initiative of the employer. There was no breach of the notice provision on their part and they are not liable for any payment of ‘liquidated damages’.

### 2. The duty of fidelity

#### (a) The Art of Pizza business

[75] Several months after their employment ended Mr Stella and Ms Carey opened a pizzeria called the Art of Pizza, which is also located in Dargaville. Since there was no relevant restraint of trade provision, Uno Where relies for any remedy in that respect on the breaches of the duty of fidelity and of obligations in respect of confidentiality to which I now turn.

[76] Although identified in a decision on a restraint of trade, the following proposition is applicable:

“The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if this has been acquired in the service of his employer:” ... **Stenhouse Australia Limited v Philips** [1974] 1 All ER 117, 122 (Privy Council).

[77] I mention this because Uno Where’s position seems to rest in part on an assumption that it had an absolute entitlement to the benefit of Mr Stella’s and Ms Carey’s skills and knowledge, and did not acknowledge to any extent that their skills and knowledge could be personal to them. Mr Stella in particular had skills and experience as a pizza chef which were personal to him, and he was entitled to use.

[78] This was so to the extent that, at Mr Stella’s suggestion, late in 2004 the parties had been planning to add pizzas to the Uno restaurant menu. To that end a sous chef/pizza baker named Alessandro Roncabattista was recruited from outside New Zealand. Mr Roncabattista was to begin work in December 2004, but could not be contacted and his employment never commenced. Steps were also taken to prepare the premises for a pizza oven and to promote a new pizza menu. The menu contained pizzas commonly sold at pizza outlets. Mr Stella’s and Ms Carey’s obligation at the time was to pursue the project for the benefit of their employer and not to divert it to their own interests. There was no evidence they breached that obligation while their employment continued.

[79] The mere fact that they subsequently opened a pizzeria is not evidence of a breach. Their company, Art of Pizza Limited, was not registered until June 2005 and their pizzeria was opened at about that time. Both Mr Stella and Ms Carey had more than enough of the skills required to establish the venture on their own account without plundering the resources of Uno Where. There is certainly no evidence they used anything belonging to Uno Where. The mere fact that they had worked on offering pizzas at the Uno restaurant did not prevent them from opening their own pizzeria later, particularly as there was no contractual restraint on their doing so.

[80] Nor was there any evidence of misuse by them of their knowledge that Uno Where planned to offer a pizza menu. Again, the mere fact that they opened a pizza business of their own months after their employment ended does not amount to a misuse of their knowledge of plans being discussed before their employment ended.

[81] In summary, Mr Stella and Ms Carey were entitled to take steps to open such a business once their employment ended, and there was no evidence they attempted to do so or otherwise breached their obligations before it ended. There was no breach of their duty of fidelity.

#### (b) Disloyalty

[82] The notice to customers of 5 January 2005 provided customers with more information than was necessary about why the restaurant was not open, but I do not regard it as amounting to disloyalty to the extent that the duty of fidelity was breached.

#### (c) Conclusion

[83] Accordingly I find there was no breach of the duty of fidelity as it relates to either of the above matters.

### 3. The obligation to deal with the employer in good faith

## (a) Failing to provide the required notice of resignation

[84] For the reasons already set out, I do not accept there was any breach of the employment agreement or of good faith in the way Uno Where was notified of Mr Stella's and Ms Carey's resignations.

## (b) Failing to communicate with and report fully to the employer during employment

[85] There were several generalised allegations about inability to contact Mr Stella and Ms Carey and their failure to respond to messages, but evidence about the email messages and phone calls received and acted on makes it difficult to conclude that Mr Stella and Ms Carey were consistently unresponsive. I accept there may have been delays and hiccups in the flow of communication, and at one point there was a reference to problems with email. Overall I have found nothing of substance in the generalised allegations.

[86] Mr Nola's concerns about the flow of financial information were more specific, and Mr Stella's conduct means they had some merit in the context of the alleged failure to communicate and report. At the same time, for reasons I have discussed Mr Nola has some responsibility for failing to ensure adequate reporting procedures were in place. Overall, I have taken Mr Stella's conduct into account in assessing the remedies for his personal grievance. Even if the conduct amounts to bad faith, it is not appropriate to penalise Mr Stella again for the same acts and I would decline to do so.

## (c) Unavailability to receive restaurant supplies

[87] Although there were allegations that Mr Stella and Ms Carey were unavailable on occasion when supplies were to be delivered, there was no evidence this was deliberate or done in bad faith. If I accept there were problems from time to time in that regard, the sheer inefficiency of the supply system Uno Where sought to operate means I consider it largely the author of its own misfortune.

## (d) Complaint to OSH

[88] I accept there was little merit in Mr Stella's complaint to OSH, but his concerns were genuinely held. I believe the complaint was made in a state of frustration and anger, and some desire to lash out, because of the parties' inability to resolve even those matters themselves.

[89] The concern about sunstrike, for example, should not have escalated to the point where a complaint was made to OSH. There was a problem at certain times of year and at certain times of day, which had been addressed by placing a black cover over the offending window. The cover had fallen away from the window. Mr Stella wanted to paint the window black instead. Doing that, or replacing the cover, required the hire of a ladder because of the height of the window. Hiring a ladder cost money. Mr Stella said he felt he could not go ahead and incur the expenditure without authority from Uno Where because of the reporting and expenditure restraints it was placing on him. The authority was never obtained, the problem was not addressed, and the complaint was made to OSH.

[90] In effect, what happened here was that OSH was probably involved inappropriately in a small part of a more far-reaching problem. Despite the lack of merit, I do not believe Mr Stella's complaint crossed the line into bad faith.

## 4. The confidentiality agreement and obligations concerning confidential information

[91] As well as being under a common law obligation regarding confidential information during their employment, Mr Stella and Ms Carey were subject to express provisions in their employment agreements as well as separate confidentiality agreements and statutory declarations.

[92] In a preamble headed 'in explanation' the confidentiality agreements defined confidential information as follows:

"... information ... involving strategic and development plans for franchising, financial statements, products and services, financial condition, pricing data, business plans, co-developer identities, data, business records, customer lists, project records, correspondence, market reports, employee lists and employee information, suppliers and vendor lists, recipes, formulas, business manuals, policies and procedures, ideas, concepts, systems, practices, methods, techniques, processes, studies, technologies, inventions, discoveries or theory and all other information which may be disclosed by the proprietors ... or to which the employee may be provided access ..., or which is generated as a result of or in connection with the Proprietor's business purposes which is generally not made available to the public."

[93] Another definition in clause 1 of the agreements referred to all information of whatever nature relating to sales, and included any oral description or any visual display including computer graphics. The definitions would have benefited by being more focussed on the kinds of confidential information likely to be generated by a restaurant business. They do, however, incorporate material tests of whether the information in question was generated as a result of or in connection with the proprietor's business purposes and whether the information was generally not made available to the public.

[94] The statutory declaration contained the following further definition and associated assertion:

"1. Frank Nola and Uno Where Limited will be required to pass on to the appointed person commercially sensitive information consisting of margins of profit, data base details, all Formats, spread sheets and/or including sources of contacts, mailing lists, clients, suppliers, representatives, customers as well as systems and procedures that will assist in marketing and increase the sales of the Uno Brasserie products and services.

2. Frank Nola and Uno Where Limited have invested considerable resources, time and money originating this commercially sensitive information including the sourcing of various suppliers for the supply of goods, administration agreements, spreadsheets and marketing information."

[95] There is a further definition of confidential information in clause 9 of the parties' employment agreements, but nothing will be added by setting it out here.

[96] On the evidence the issues are whether Mr Stella and Ms Carey were or are in possession of information belonging to Uno Where at all, and if they are, whether the information has the necessary qualities of confidentiality.

[97] The information with which this head of claim is concerned included:

(a) Pizza menu for the Art of Pizza

[98] The menu in question was no more than a standard restaurant menu and contained a selection of pizzas that any restaurant providing pizzas would be likely to offer. There was nothing in the least confidential about the menu or the makeup of the pizzas. Moreover I do not regard the menu for the Art of Pizza as necessarily having any inappropriate connection with previous discussions at the Uno restaurant about what type of pizza might be included on Uno's menu. The pizzas were simply of too common a type.

[99] As I have already said, there was no evidence that any other confidential information belonging to Uno Where was acquired or used for the purposes of the Art of Pizza.

[100] There was a further attempt to suggest that the menu was intellectual property belonging to Uno Where, and covered by clause 13 of the parties' agreement. While the design and layout of the menu might involve the application of intellectual property, that was not the concern here. The concern was with the contents of the menu. I do not accept the contents were capable of attracting protection.

(b) Documentary information contained on a CD

[101] Uno Where created a CD containing a number of documents it says are confidential to it, but I am not persuaded Mr Stella and Ms Carey were or are in possession of the CD or, if they ever were in possession of it, whether they ever used it. That alone defeats any claim that they are liable to Uno Where for breach of the confidentiality agreement.

[102] Moreover having seen the material contained on the CD, I find little if any of it has the necessary quality of confidentiality. The vast majority of the material amounted to a series of: templates for keeping track of wages and stock costs, identifying costs of menu items, actual and projected sales, and managing inventory; checklists; profit and margin calculators; and standard individual employment agreements, house rules and other lists of expected standards of behaviour.

[103] These may have been the result of a great deal of work on Mr Nola's part but I do not accept there is anything commercially sensitive about them. Anyone taking a methodical approach, and having some knowledge of running a restaurant as a business, could create a substantially similar set of materials without ever having seen Mr Nola's. There was certainly nothing confidential about the standard employment agreements, house rules and expected standards of behaviour. If the various profit, sales and costing templates had been accompanied by any data associated with the restaurant operation I would probably have accepted the material was commercially sensitive. However there was no accompanying data.

[104] Mr Nola was on firmer ground when he said some of the calculators were based on a formula he had created, and for which he had commissioned software. I might have accepted the formula and the software were commercially sensitive, and certainly that copyright issues might arise if Mr Stella and Ms Carey acquired or used that material. However there was no evidence they did so.

[105] Accordingly I conclude there was no breach of any obligation regarding confidential information.

5. Damage to wall

[106] There was relatively minor damage to a wall in the kitchen. Beyond assumption and speculation there was no evidence of what caused it or when it was caused, let alone that Mr Stella or Ms Carey were the culprits or that the damage resulted from any breach of obligation on their part. For that reason I find no liability is established.

6. Failure to return company property

[107] The concern about company property was with 220 music cds. The cds were the subject of the search warrant executed in January 2005, and from Mr Nola's point of view they were intended for use in the restaurant.

[108] No inventory list of the allegedly missing cds has ever been created or provided. Instead Mr Nola's evidence about the cds relied on a diary entry of his, reading only "July 19<sup>th</sup> have loaned 220 cds to UNOs restaurant. All checked in there (sic) original covers".

[109] The evidence of other witnesses for both parties was that there was a cleanup of the restaurant premises in or about late July 2004, prior to the reopening with Mr Stella and Ms Carey as managers. It was common ground that there were two boxes of cds on the premises. There is no evidence Mr Nola gave the cds directly to Mr Stella or Ms Carey, or discussed what was to be done with them. At best he simply left them on the premises, where they were later found.

[110] During the cleanup Mr Stella had a conversation with a member of the Nola family to the effect that he did not want some of the cds, and the family member returned them to Mr Nola at the time. There was also a conversation between Mr Stella and Mr Mudgway about what to do with the remaining cds. Mr Mudgway indicated Mr Stella could do what he liked with them. I was told many were damaged or in poor condition and others were not considered suitable for the restaurant, so Mr Stella and Ms Carey planned to throw them away. Their evidence, which I accept, was that Mr Mudgway agreed to this.

[111] The cds to be thrown away were put in a box, and given to Joshua Tahu to dispose of. Mr Tahu kept some. They were the ones the Police found when the search warrant was executed at his home. That several of those were no more than empty cases supports Mr Stella's account of the state of the cds and his attitude to their usefulness.

[112] From all of this I conclude that not only is there no evidence the cds are in the possession of Mr Stella or Ms Carey, but there is no reason to believe they ever misappropriated them. There are no grounds on which any order can be made in respect of them.

#### 7. Loss of profit in respect of Christmas-New Year opening

[113] This claim was said to relate to the closure of the restaurant at 9 pm on Christmas Eve and 11 pm on New Year's Eve. However there was no evidence of any breach of contract by Mr Stella and Ms Carey in this respect. For valid reasons, and acting within what he was entitled to consider his authority, Mr Stella made decisions about opening and closing times. They were based on the lack of business and an assessment that this would not improve. When giving his evidence Mr Nola disagreed with the assessment. That is not enough to establish a breach of agreement.

[114] At the end of the investigation meeting Mr Nola asserted that Mr Stella and Ms Carey should have tried harder to attract business on the nights in question. That was a last minute reference to Mr Stella's concern that he and Ms Carey were unable to go ahead and promote business for those nights because they were still awaiting a response to their proposals. If it is correct that the lack of business followed from a lack of promotion, I do not regard that as a breach of duty on Mr Stella's and Ms Carey's part.

[115] Accordingly I conclude there was no breach of agreement in the timing of the decisions to close the restaurant on Christmas and New Year's Eve, or in any associated lack of business.

#### 8. Conclusion

[116] There is no need to pursue any issues as to quantum. Regarding liability, the only claim with any merit concerned Mr Stella's conduct in respect of the provision of financial information. The effect of that conduct has been addressed in the remedies for his personal grievance.

**Summary of orders**

[117] Uno Where is ordered to pay to Mr Stella the sum of \$1,524 (gross) in respect of his personal grievance.

[118] Uno Where is ordered to pay to Ms Carey the sum of \$2,000 (gross) in respect of her personal grievance.

[119] Subject to the leave reserved to Mr Stella and Ms Carey to seek an amendment to the amounts, Uno Where is to pay holiday pay to Mr Stella in the sum of \$914.40 and to Ms Carey in the sum of \$600. These amounts are payable on demand from them.

**Costs**

[120] Costs are reserved.

[121] The parties are invited to agree on the matter. They should take into account that both have done themselves a disservice in leaving no stone unthrown in the course of this investigation. I hope they will recognise it is time to close the door on the sorry saga of their association, and take a more measured and principled approach to any discussion on costs than they have in respect of the other issues between them.

[122] If the parties seek a determination of the Authority they are to file and serve memoranda on the matter within 28 days from the date of this determination.

**R A Monaghan**  
**Member, Employment Relations Authority**