

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 438/09
5161242**

BETWEEN JEAN-PHILLIPPE CARRERAS
Applicant

AND BASANI LIMITED T/A CLARET
RESTAURANT
Respondent

Member of Authority: Leon Robinson

Representatives: Eska Hartdegen, Counsel for Applicant
Bronwyn Rolls, Counsel for Respondent

Investigation Meeting: 24 November 2009

Further Information: 1 December 2009

Further Submission: 4 December 2009

Determination: 8 December 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Jean-Phillipe Carreras ("Mr Carreras") claims he was unjustifiably dismissed from his employment as head chef with the respondent Basani Limited trading as Claret restaurant ("Claret"). Claret says Mr Carreras resigned from his employment and it raises a counter-problem against him seeking damages in the form of lost turnover for breach of contract. The parties were unable to resolve the problem between them by mediation.

The facts

[2] Claret is a limited liability company incorporated on 13 July 2007. Its directors and shareholders are Mr Basil Sandy Aholelei ("Mr Aholelei") and his wife Mrs Aniselina Beverley Aholelei ("Mrs Aholelei"). It trades as a restaurant in Onehunga.

[3] Mr Carreras commenced employment with Claret as its Head Chef on 10 March 2009. There is agreement between the parties that the terms of the employment were recorded in a written individual employment agreement although that document was not signed by the parties.

[4] On the evening of Wednesday 6 May 2009 Mr Carreras was working in the kitchen. Mrs Aholelei worked on front of house duties. She returned two meals to Mr Carreras for correction. The diners had asked for extra mashed potato with their fish of the day orders, a menu main fish meal accompanied by tomatoes and beans. Mr Carreras had interpreted Mrs Aholelei's order docket as substituting the mashed potatoes for beans and tomatoes and that is what he prepared. The diners had wanted fish, beans, tomatoes and additional mashed potato.

[5] The Authority finds that Mr Carreras swore at Mrs Aholelei and told her to return the meals to the diners and that he would correct them subsequently. Mrs Aholelei did not return the meals to the diners and left them in the kitchen. The Authority finds that Mr Carreras became angry and began swearing and cursing loudly banging pots, pans and dishes. The Authority finds that this activity could be heard in the restaurant. Mr Aholelei was also working at the restaurant that evening. He was not pleased with Mr Carreras' behaviour and he approached Mr Carreras and informed him that they would discuss the situation at the end of the evening's service. Mr Carreras' erratic behaviour then subsided.

[6] At about 9.30pm after the last diners had left, Mr Aholelei asked Mr Carreras to talk. Mr Aholelei asked Mr Carreras what had happened that evening. I find on the basis of a statement Mr Carreras later made to the Police and Mr Aholelei's evidence to the Authority, that Mr Carreras immediately began criticising Mrs Aholelei saying "we don't have time for this kind of bullshit messing up the orders". I find that Mr Carreras was openly disrespectful and hostile towards Mrs Aholelei. I find that Mr Aholelei did not appreciate Mr Carreras' behaving that way towards his wife. I find that Mr Aholelei lost his self-control and grabbed Mr Carreras by his collar lifting him off the ground and swinging him around. I find that as Mr Carreras resisted, the two

men fell to the ground and continued to struggle as Mr Aholelei restrained Mr Carreras. As they struggled they hit against walls and restaurant furniture. Mrs Aholelei yelled at the two men "stop it, stop it". Mr Carreras was injured during the struggle. When they eventually broke apart they both searched for their glasses. Mr Carreras tells the Authority he got up and said to Mr Aholelei "you're a fucking dickhead". He fetched his bag which contained his own knives and recipes and then he left the restaurant.

[7] Mr Aholelei says that before he left Mr Carreras said "Fucking find yourself a new chef". Mr Carreras denies that evidence.

[8] Mr Carreras drove to his home in Milford. He went to the North Shore hospital to have his injuries treated. He asked the medical professionals he saw about making a police complaint and he was advised to go to the Takapuna Police station. The Takapuna Police station was unattended and so Mr Carreras phoned the "111" emergency number and was directed to the Glenfield Police station. There he made a complaint of assault against Mr Aholelei. He gave the Police a written statement which was taken at 11.20pm that evening. The Police took photographs of Mr Carreras' injuries.

[9] The following day on Thursday 7 May 2009, Mr Carreras phoned his citizens advice bureau and was advised to call the Department of Labour for assistance. Mr Carreras was told about mediation and he was advised that he should seek his employer's agreement to attend mediation. Mr Carreras phoned Mr Aholelei and asked if Mr Aholelei agreed to attend mediation. Mr Aholelei agreed. He asked Mr Carreras to give him a contract name at the Department of Labour.

[10] Mr Carreras phoned Mr Aholelei again. He says that as he was telling Mr Aholelei he would not be coming back to work he was interrupted before he could add "that day" and because he was too sore. He said Mr Aholelei interrupted him and said "We decided we do not want you to come back". Mr Aholelei tells the Authority Mr Carreras said "but I don't think I want to come back" and to that Mr Aholelei replied "I don't know if we want you back".

[11] On the morning of Friday 8 May 2009 Mr Aholelei phoned Mr Carreras in relation to a consignment of ducks that had apparently gone missing that day. Mr Aholelei asked Mr Carreras if he had been at the restaurant that afternoon. Mr Carreras said he had not. Mr Aholelei asked if Mr Carreras still had restaurant keys and when Mr Carreras said he did, Mr Aholelei asked him to post them back.

[12] The parties had no further contact.

The merits

[13] Mr Carreras says he was unjustifiably dismissed and he claims resolution in the form of formal orders from the Authority for reimbursement, compensation and penalties. Claret says that Mr Carreras resigned.

[14] Ms Hartdegen does not argue constructive dismissal. Counsel says there was an actual dismissal which is unjustifiable. The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[15] Mr Carreras tells the Authority he actually enjoyed his employment at the restaurant. The events of 6 May 2009 at the Claret restaurant over two fish meals led to a very unpleasant incident which caused the end of the employment relationship. That ending was entirely unnecessary and completely avoidable. But there is never any justification for violence.

[16] By letter dated 29 June 2009, the New Zealand Police advised Mr Aholelei he was to be formally warned for assaulting Mr Carreras and that the Police would not, at that time, be taking any further action. That Police investigation is no substitute for

this Authority's investigation and the Authority makes its own findings. At the investigation meeting I explained to Mr Aholelei that I did not require him to incriminate himself in answering any of the questions put to him. Mr Aholelei was assisted by Claret's counsel and he did not refuse to answer any question on that basis.

[17] Mr Carreras' first language is French. I told him he had learned some very bad English. I also told him the language he used to Mrs Aholelei was not acceptable. He agreed. He also apologised.

[18] I have seen and heard both Mr Carreras and Mr Aholelei. Mr Aholelei impressed me as a placid and patient man and I did not apprehend him in any way to be particularly irascible. That being so, I am inclined to accept that there was something about Mr Carreras' language and demeanour after service on 6 May 2009 which caused Mr Aholelei to lose his self-control. I find that Mr Aholelei was the aggressor and he assaulted Mr Carreras and caused him to suffer physical injuries.

[19] That situation would ordinarily entitle an employee to regard such conduct as repudiatory. But Mr Carreras did not do so. I find that he was prepared to return to the employment and he very candidly said that he considered he was obliged to continue to honour the contract and return to work although he did not really want to. Consistent in that respect is his contact with the mediation service and his evidence that he sought to be excused from work because he was too sore.

[20] I reject Claret's defence of the claim that Mr Carreras resigned. I refer to Mr Aholelei's candid admission that he assumed that Mr Carreras would turn up for work the following day to open the restaurant for business. Additionally, Mr Aholelei said that he assumed Mr Carreras was calling from the restaurant when he called to discuss mediation. I accept that as evidence of Mr Aholelei's actual apprehension and understanding. In light of that accepted evidence, I find that Mr Aholelei did not and could not reasonably have regarded Mr Carreras statement "f ... find a new chef" if that was actually said and which is denied by Mr Carreras, as Mr Carreras' resignation.

[21] As concerns the telephone discussion on 7 May 2009, Mr Carreras says that Mr Aholelei told him "We decided we do not want you to come back" while Mr Aholelei says he said to Mr Carreras "I don't know if we want you back". I regarded Mr Aholelei's evidence as not determinative of the situation and when I asked him what was the resolution he said Mr Carreras' lawyer phoned him "the next day" raising a personal grievance. I accept however that that evidence is incorrect and the lawyer did not make contact with him until weeks later. I am unable to accept Mr Aholelei's evidence on the point because it is unreliable. I also note that Mr Aholelei did not take any steps corroborating what he says. He did not confirm Mr Carreras' advice to him, he did not raise any issue about notice and he failed to pay Mr Carreras his final wages.

[22] I prefer Mr Carreras' version of what Mr Aholelei said to him. But while I would accept that Mr Carreras would be entitled to regard the statement he says Mr Aholelei made to him as unequivocal and determinative of the situation, he does not rely on it in that way. I am led to conclude that the situation was also unresolved on Mr Carreras' evidence too because he had an election to make as to whether he would affirm or reject Mr Aholelei's repudiatory statement but he did not make that election instantly.

[23] I find that before he could make his election, Mr Aholelei phoned him on Friday 8 May 2009 and asked him to return his keys. I find that statement was conclusive and did determine matters. I find that that request amounted to a "sending away" which constituted a dismissal.

[24] Having found a dismissal, I must now consider justification. I find that there was no justification and no justification is proffered by Claret arguing as it does that Mr Carreras resigned. But I have found Mr Carreras did not resign and that Claret could not reasonably consider that he had. Consequently, I am led to conclude that there was no good reason for dismissing Mr Carreras and there was no process by which Claret could fairly and reasonably conclude that Mr Carreras had committed any conduct which would have justified dismissal.

The determination

[25] On an objective basis, I consider that Claret's actions and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[26] I find the dismissal does not meet the test of justification prescribed at section 103A of the Act. **I find that Mr Carreras has a personal grievance for unjustifiable dismissal. He is entitled to formal orders from the Authority in settlement of that personal grievance.**

The resolution

[27] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Carreras' actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[28] I understand Mr Carreras to particularly wish there be a finding that Mrs Aholelei made a mistake in the order she took and she failed to comply with standard industry practice. I am not persuaded that such a finding is relevant or proper.

[29] I have found that Mr Carreras swore at Mrs Aholelei. But I accept Mr Aholelei's evidence that he was not aware of that fact. But he was aware of Mr Carreras' hostile and disrespectful behaviour to Mrs Aholelei at the end of service on 6 May 2009. He was also aware of Mr Carreras swearing and cursing and his volatile behaviour in the kitchen which was audible to those in the restaurant. These matters known to Mr Aholelei, I find were the catalyst for the violence that took place at the end of service. I find that Mr Carreras' behaviour prior to the violence constitutes blameworthy conduct which contributed to the situation that gave rise to the personal grievance. That being my finding, I am obliged to reduce either or both of the nature and extent of any remedies to be awarded to Mr Carreras. I first set those remedies.

Reimbursement

[30] I am satisfied that Mr Carreras has lost income as a result of the personal grievance. I accept that Mr Carreras has lost six weeks income. I further accept that he took steps to find other work and eventually did find other employment. In accordance with his counsel's calculations I find that Mr Carreras' loss of income is in the gross sum of \$7,181.62.

[31] In principle I have found that Mr Carreras contributed to the situation that led to the personal grievance. Blameworthy conduct by Mr Carreras is not to be rewarded. I assess Mr Carreras' contribution to be equivalent to that of Mr Aholelei. Both men were unable to exercise restraint and self control. I therefore reduce the award of reimbursement to Mr Carreras by half. **I order Basani Limited t/a Claret Restaurant to pay to Jean-Phillipe Carreras the gross sum of \$3,590.81 as reimbursement.**

Compensation

[32] Mr Carreras tells the Authority he has never been assaulted by an employer and the incident on 6 May 2009 has affected his confidence and trust in people he works under. He says he is more wary of them now. He says the incident affected him emotionally and he feels anxious a lot the time and struggles to sleep.

[33] This process is not directed towards compensating Mr Carreras for being assaulted. The compensation to be now awarded is in respect of the established losses which flow directly from the unlawful termination of employment. They are two distinct legal wrongs. I award compensation now only in respect of the latter.

[34] I accept that Mr Carreras has suffered humiliation, loss of dignity and injury to his feelings arising out of the unlawful termination of his employment. By his statement of problem he claims \$20,000.00 compensation. His evidence does not justify an award at that level. I do regard the assault as an aggravating feature of this dismissal. Having regard to the nature of the personal grievance, his evidence and his length of service, I award compensation in the amount of \$5,000.00 but reduced by

half for contribution. **I order Basani Limited t/a Claret Restaurant to pay to Jean-Phillipe Carreras the sum of \$2,500.00 compensation.**

The claim for penalties

[35] Mr Carreras claims penalties for breach of contract and good faith. I regard the claim in breach of contract as barred by section 113 of the Act. In relation to the claim for breach of the duty of good faith I am not persuaded that I should exercise my discretion to impose a penalty where I have already remedied the wrong done to Mr Carreras by the formal orders I have made. I am also not persuaded there is any public utility in imposing a penalty additional to the formal orders made. **There will be no formal orders in relation to the claim for penalties.**

The counter-problem

[36] Claret claims damages from Mr Carreras for lost turnover and says that he took the new Mothers Day menu with him, in breach of contract. While the counter-problem is expressly pleaded, there was no evidence led in support of it in Mr Aholelei's prepared witness statement.

[37] First it is said that Claret suffered loss because of Mr Carreras' resignation without notice. I first note that Claret did not take any steps to compel Mr Carreras' compliance with any contractual notice period. Its failure to do so in my view is a failure by it to mitigate its own losses (as alleged). I would disqualify the claim on that basis. But most significantly and obviously however, I have found that Mr Carreras did not resign. I have found he was dismissed, and unjustifiably so. His unlawful termination and the repudiation of the contract by the employer relieved him of further performance of it. Whether or not there were losses which flowed from his demise, that demise was not his doing. That disposes of the claim. It also disposes of the claim in relation to the new Mothers Day menu in which it is said that Mr Carreras misappropriated recipes. I am not persuaded of the factual basis of that claim in any event.

[38] The counter-problem must fail for these reasons and there will be no orders by the Authority in relation to it.

The costs

[39] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Hartdegen is to lodge and serve a memorandum as to costs within 28 days of the date of this Determination. Ms Rolls is to lodge and serve a memorandum in reply within 14 days of being served with the applicant's memorandum. I will not consider any memorandum lodged outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority