

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 232
5520013

BETWEEN	JED CATAPANG Applicant
AND	ROBERT AYLWIN First Respondent
AND	BONZ CATERING LIMITED Second Respondent

Member of Authority: Robin Arthur

Representatives: Rowland Ingram, advocate for the Applicant
Robert Aylwin in person as First Respondent and as
director of Second Respondent

Determination: 5 August 2015

DETERMINATION OF THE AUTHORITY

- A. The circumstances in which Jed Catapang’s employment at the Bonz Cajun Kitchen restaurant came to an end amounted to an unjustified dismissal.**
- B. In settlement of Mr Catapang’s grievance for unjustified dismissal Robert Aylwin must pay him the following sums within 28 days of the date of this determination:**
- (i) \$4000 as reimbursement of lost wages under s 123(1)(c)(i) of the Employment Relations Act 2000; and**
 - (ii) \$5000 as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Mr Aylwin must also pay Mr Catapang \$1500 as a contribution to his costs of representation in bringing his grievance claim and a further \$71.56 in reimbursement of the fee paid to lodge his application in the Authority.**

Employment Relationship Problem

[1] Jed Catapang is a 28-year-old hospitality worker from Mindanao in the Philippines. He first came to New Zealand in July 2012 accompanying his mother to visit his sister on a limited visa that required him to leave after six months. He returned to New Zealand in 5 March 2014 under the terms of a year-long Working Holiday Scheme (WHS) visa. The WHS visa conditions allowed him to work provided he did not work for the same employer for more than three months.

[2] His application to the Authority alleged he was unjustifiably dismissed from a job as duty manager of an Auckland restaurant called Bonz Cajun Kitchen one week after starting work there on 26 August 2014. He had worked on four days.

[3] The owner and chef of Bonz Cajun Kitchen, Robert Aylwin, is a Bostonian who moved to New Zealand in 2009. In his statement in reply to the dismissal claim Mr Aylwin wrote that the employment ended because Mr Catapang “*refused to sign the contract provided to him*”. In his witness statement Mr Aylwin described Mr Catapang as having “*quit*” after being told the manager’s position did not suit him.

[4] In investigating Mr Catapang’s application I considered written and oral evidence, given under oath or affirmation, from Mr Catapang, Mr Aylwin and the restaurant’s assistant manager Whitney Choat, along with relevant background documents. Those documents included Mr Catapang’s file from Immigration New Zealand (that he provided) and letters from nine former employees (that Mr Aylwin provided). The parties had the opportunity to provide oral submissions on the issues for resolution by this determination.

[5] As permitted by s174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received but has made findings of fact and law, expressed conclusions on matters requiring determination and specified orders made.

[6] The issues requiring determination as they emerged from the evidence and submissions were:

- (i) What was the nature of Mr Catapang's employment – casual or ongoing, and with or without a valid trial period?
- (ii) Was he employed by Mr Alwyn in his personal capacity or by Bonz Catering Limited?
- (iii) If Mr Catapang was employed, was he dismissed from his employment and, if so, was that dismissal justified?
- (iv) If he was unjustifiably dismissed, what remedies should be awarded considering:
 - (a) lost wages; and
 - (b) compensation for humiliation, loss of dignity and injury to his feelings?
- (v) Should any remedies awarded be reduced due to actions by Mr Catapang that contributed to the situation giving rise to his grievance?
- (vi) Was there a failure to provide Mr Catapang with a written employment agreement, and, if so, should a penalty be awarded for that failure?
- (vii) Should either party contribute to costs of representation incurred by the other party?

The onus of proof and credibility

[7] In addressing those issues I had to weigh evidence from Mr Catapang and Mr Aylwin about what happened, which was largely about what they each had said in conversations with one another. There was little to corroborate either man's version. However I found that even if I preferred Mr Aylwin's account on certain important points – such as whether he had given Mr Catapang a written employment agreement to review (on 26 August 2014) and that he had not told Mr Catapang (on 2 September 2014) that he had not performed the way a manager should – what happened to end Mr Catapang's employment amounted to an unjustified dismissal. The statutory standard required Mr Aylwin to have acted as a fair and reasonable employer could have done in all the circumstances at the time.¹ The onus for establishing that he had done so rested with Mr Aylwin. On several important points his evidence suggested that he had not met various statutory standards during the formation of the employment relationship (or was not able to show that he had). And if his own account of the end of the employment was correct, what he did was not (for reasons

¹ Section 103A(2) of the Employment Relations Act 2000 (the Act)

explained in this determination) what a fair and reasonable employer could have done at the time. Accordingly I did not need to decide whether the account of one man was more credible than the other. Generally I have relied on both men's accounts where they agreed on certain facts and, otherwise, have determined the matter on the balance of probabilities, that is what is more likely than not to have been the case (to the extent it can be discerned from the available evidence).

The nature of the employment?

[8] Mr Catapang and Mr Aylwin agreed Mr Catapang had responded to an advertisement for a duty manager. He was interviewed on 25 July 2015 and spent two hours at a trial at the restaurant on 29 July.

[9] Mr Aylwin contacted Mr Catapang on 24 August after the original appointee to the advertised position quit after three weeks' work. The two men met at the restaurant on 25 August to talk about arrangements for the job and Mr Catapang started work on 26 August.

[10] Mr Aylwin said he gave Mr Catapang a written employment agreement soon after he arrived at work on 26 August. It was a template agreement with some blank spaces into which he handwrote the position – as manager – and an hourly rate of \$17. He said he did not write Mr Catapang's name on the document or keep a copy of that intended agreement. As a result Mr Aylwin had not complied with the statutory obligation of an employer to keep a copy of an intended employment agreement and to include the name of the employee in a written agreement.² While such provisions are commonly seen as protections for workers (or prospective workers), this case has shown those statutory requirements are also protections for employers who are then able to show – if called upon to do so – that they have provided an agreement and what terms were in the form of intended agreement actually provided. In this case the failure to meet those obligations damaged Mr Aylwin's ability as the employer (or the employer's representative) to rebut Mr Catapang's allegation of not having received an agreement at all.

[11] Ms Choat gave evidence that she knew Mr Aylwin was going to talk to Mr Catapang about an employment agreement on 26 August and she later saw Mr Aylwin

² Sections 64(2) and s65(2)(a)(i) of the Act.

sitting with him in the public area outside the restaurant with papers she understood to be the agreement. She usually sat in on discussions Mr Aylwin had when making employment arrangements with new staff but he had told her not to do so on this occasion because Mr Catapang would be her supervisor. Her account corroborated some of Mr Alwyn's version of events on 26 August, albeit from a similarly partisan perspective.

[12] However, if Mr Catapang was given that agreement that day, it nevertheless included written terms that were at odds with the reality of what Mr Aylwin told him about the basis of the employment. The form included a term describing the employment as being on a casual "*as required*" basis. Mr Aylwin said he used a template agreement given to him by the Restaurant Association when he set up the business three years earlier. But his evidence about the nature of the job he offered Mr Catapang showed it was not intended to be casual as that word is properly applied in employment law. Mr Catapang was employed to work on a full-time basis for four or five days a week with his hours set in a fortnightly roster posted in the kitchen.

[13] The misnomer in the use of the word 'casual' was confirmed by Ms Choat's evidence about her own employment from February 2014, under what she said was "*an identical contract*". She had then worked full-time for the remainder of the year on a set roster for 40 hours a week, for five days a week. In 2015 she had changed her work arrangement to a part-time basis on a set roster of 20 to 25 hours over four days in a week. Consistent and predictable patterns of work – with an expectation that workers will work on the days set in posted rosters – is accepted in case law as indicating a permanent, rather than casual, employment relationship.³ The evidence of Mr Aylwin and Ms Choat established that the real nature of the employment relationships with staff at the restaurant generally, and with Mr Catapang in particular, was on-going rather than truly casual. This reality was not changed by the fact that staff could have shifts adjusted for special occasions or needs (such as exams if they were students or to travel for urgent family matters) and that hours were reduced (or fewer staff employed) during the quieter business months.

[14] Neither was Mr Catapang employed on an enforceable 90-day trial period under 67A of the Act. The employment agreement he was said to have been given included a term providing such trial periods. However Mr Aylwin's evidence was

³ See *Baker v St John Central Regional Trust Board* [2013] NZEmpC 34 at [20] and [30].

that Mr Catapang was not given the intended agreement until he started work on 26 August and was then given the opportunity to take it home and review it before it signing. Mr Aylwin said he had run out of his stock of agreements when he talked to Mr Catapang on 25 August so was not able to give him an agreement until he started work on 26 August. Consequently the agreement – if it was provided as Mr Aylwin said it was – was not signed before the employment started and the statutory requirements for an effective trial period were not in place.⁴

[15] At issue also was whether Mr Catapang had accurately disclosed the basis on which he could work lawfully in New Zealand. He insisted that he had told Mr Aylwin in conversations on 25 July and 25 August that his one year WHS visa limited him to working for three months for the same employer. Mr Aylwin insisted Mr Catapang referred only to having a year-long working visa. Mr Aylwin said it would not have made sense for him to offer Mr Catapang the manager's position if he had known Mr Catapang was likely to be limited to three months' work, particularly as it would take two or so months to get the License Controller Qualification and manager's licence that was needed in the role (in order to be in sole charge where liquor was being served to customers).

[16] However Mr Aylwin said his main source of employees were "*travellers and immigrants*" and he was familiar with the various types of visas on which they could seek work. New Zealand has WHS visa schemes for around 40 countries but the conditions vary including how long the visa holder may work for one employer. For British citizens the period is one year, for citizens of China the period is six months, and for Filipinos the permitted period is three months.⁵

[17] Mr Aylwin said he did not check the visas of prospective employees before offering them work as that was something that would be picked up by the pay roll company he used once the employee got their IRD number and he took job applicants at their word if they said they had a valid visa. Employers have an obligation to take reasonable precautions and exercise due diligence in ascertaining whether a person is entitled to do the work offered.⁶ Mr Aylwin's failure to look at Mr Catapang's visa before offering him the job created a risk for his business and meant he missed the opportunity to find out what he said he only found out later, that Mr Catapang's

⁴ *Blackmore v Honick Properties Limited* [2011] NZEmpC 152 at [65].

⁵ See www.immigration.govt.nz/whs.

⁶ Section 350 of the Immigration Act 2009.

employment at Bonz Cajun Kitchen could (at that time) lawfully be no longer than three months.

[18] On Mr Aylwin's account the situation changed on 30 August when – during what was Mr Catapang's third day of work – Mr Catapang asked if Mr Aylwin would give him a permanent employment agreement and a letter of employment so he could get his WHS visa turned into a working visa (which was possible if he had an employer to sponsor him). Mr Aylwin said he asked for time to think about that idea. On 31 August Mr Catapang sent him this text "Rob, can I ask for the contract? I have already with me my IRD Bank details passport. Thanks!" Mr Aylwin responded by asking him to meet at 11am on Tuesday, 2 September.

[19] The employment relationship, as it stood at that stage, was that Mr Catapang had been employed from 26 August on an ongoing basis to work as a manager on a full-time basis. It was not casual employment and it was not subject to a trial period.

Who was the employer – Mr Aylwin or Bonz Catering Limited?

[20] The identity of the employer – or least Mr Catapang's knowledge of who had employed him – was at issue because of the dispute over whether or not he was given a written employment agreement. By an early direction in this matter I had joined Bonz Catering Limited as second respondent so the issue could be investigated.

[21] The template employment agreement provided by Mr Aylwin for the Authority investigation was headed "*Bonz Catering Limited*" and defined the employer as "*Bonz Catering*".

[22] Mr Aylwin accepted, in answer to questions at the Authority investigation meeting, that Mr Catapang was not likely to have seen the name of that registered limited liability company elsewhere during his work. While Mr Aylwin said the company operated the business and employed and paid the staff, signage for the restaurant used its trading name of Bonz Cajun Kitchen and the fortnightly staff roster posted in the kitchen was headed "*Bonz roster*". Mr Catapang had not worked there long enough to get a pay slip so if the company name was referred to on it, he would not have seen it.

[23] In those circumstances I have not accepted that either Mr Aylwin or Bonz Catering Limited met their burden of proof to show Mr Catapang was aware, or should reasonably have been aware, that the company was his employer and not Mr Aylwin. I reached that conclusion because of the doubt caused by Mr Aylwin not being able to provide a copy of what he said was the intended employment agreement given to Mr Catapang on 26 August. Given he had that positive statutory obligation to keep one and had not, the benefit of the doubt has gone to Mr Catapang regarding the identity of the employer. It was most likely Mr Catapang understood Mr Aylwin owned the business and was the employer, partly because of how Mr Aylwin described the situation. In his witness statement Mr Aylwin referred to himself as the “*owner and chef of Bonz Cajun Kitchen*” without any reference to his role as director and 99 per cent shareholder of the company (that is the second respondent) that he asserted at the Authority investigation was the actual employer. While he described himself as a working chef without much knowledge of such legal technicalities, his evidence confirmed that at the time that Mr Catapang was employed it was unlikely the company was put forward (absent firmer evidence about having provided the written agreement) as the employing entity rather than himself.

[24] The consequence of that conclusion was that remedies awarded would be enforceable against Mr Aylwin in his personal capacity rather than the limited liability company.

How the employment ended

[25] Mr Catapang said Mr Aylwin terminated his employment on 2 September after saying to him “*you are not suited for this position*” and “*you haven’t performed the way a manager should do*”. Mr Aylwin paid him \$500 cash for the hours he had worked.

[26] Mr Aylwin gave this written account of that conversation:

I informed him that the manager position was offered to him with the understanding that he was in possession of a work visa for 1 year and that we would go forward with the contract provided but this is not the case and with a working holiday visa I can only offer him a food runner/kitchen hand position at Bonz. I told him that the manager’s position just didn’t suit him at that time, that if it was a manager position he wanted he would be better off going to a hotel or

large restaurant where there is a lot more customer interaction as he obviously has the people skills and the enthusiasm to work a dining room, unfortunately we are a kitchen. Jed just looked at me with a disappointed look. He knew I was right and even though I needed someone I knew he would not be happy working here. I asked him what he wanted to do, he asked me if I could pay him for the time he has worked as he was short on cash ... so I paid him \$500 ... I was under the belief that he was leaving amicably and I wished him luck.” (emphasis added)

[27] Even preferring Mr Aylwin’s account the circumstances disclosed what was clearly a sending away when Mr Catapang did not accept different terms of employment. At law it was a dismissal. From the totality of the evidence I concluded it was an unjustified dismissal as Mr Aylwin’s comments were motivated in part by performance concerns and in part by a difference of understanding about Mr Catapang’s visa status that resulted (again in part) from Mr Aylwin’s oversight in not having properly checked it earlier. His decision to change the basis of the employment on those grounds was, in the circumstances, not what a fair and reasonable employer could have done.

[28] Mr Aylwin sought to distance himself from the notion that how Mr Catapang had carried out his duties – that is his performance – during his three-and-a-half days of work were a factor in what Mr Aylwin told Mr Catapang at the 2 September discussion. By the time of the Authority investigation meeting Mr Aylwin was clearly aware that ending the employment on that basis, without clearly advising Mr Catapang of any shortcomings and giving him the opportunity to improve, would not have met the standard of fair treatment.⁷ However his witness statement, lodged earlier, referred to Mr Catapang as having struggled on his second and third days of work. Ms Choat’s witness statement, lodged in support of Mr Aylwin, referred to Mr Catapang as not effectively performing the variety of jobs needed to ensure efficient service. She gave two examples of her view of Mr Catapang’s shortcomings: one that he stood away from the sink when washing dishes so as not to wet or dirty his clothes and another that he had caused confusion by not adopting the kitchen’s system of responding with a loud and clear ‘yes’ when a chef asked for something. She said Mr Catapang was told “*numerous times*” about the system of responding. She told Mr Aylwin about those concerns before he met Mr Catapang on 2 September.

⁷ *Trotter v Telecom* [1993] 2 ERNZ 659, 681.

[29] As a matter of likelihood Mr Aylwin's concerns about Mr Catapang's performance were clearly a factor in what he said to him on 2 September, as reflected (on his own account) in having said that the manager's position did not suit him. Mr Catapang was then effectively only offered a choice of either continuing his employment as a lower-level food runner or leaving the job. The reality was that his employment as a manager was terminated.

[30] Even allowing for the possibility (and some probability) that Mr Catapang might have been less than frank in what he told Mr Aylwin about the details of his year-long WHS visa (and particularly the three month limit for Filipinos on working for one employer), the responsibility for Mr Aylwin realising that situation was less than ideal rested with him as well as Mr Catapang. Mr Aylwin was under no obligation to accept Mr Catapang's subsequent proposal that he support his application for a working visa (with Mr Aylwin's business named as the employer) but he could not have fairly just ended the employment there and then.

[31] Mr Aylwin's account of Mr Catapang's response – of looking disappointed and then asking to be paid – showed he yielded to Mr Aylwin's decision to end his employment as a manager, not that he accepted it was justified.

Remedies

Lost wages

[32] Mr Catapang sought reimbursement of lost wages for the period from 2 September until he got a new job, in Queenstown, from 5 December 2014. Based on the \$500 cash payment he got for his work at Bonz Cajun Kitchen, he sought a total of \$6000 for a 12-week period as lost wages. The weekly amount of \$500 used for that calculation was less than he would have received as a weekly wage (based on Mr Aylwin's evidence about the hours and days of work agreed verbally on 25 August) or the \$40,000 to \$49,000 salary referred to in the advertisement for the position.

[33] Mr Catapang provided adequate evidence of his attempts to mitigate his loss of wages during the period. While he received no earnings and relied financially on support from his sister during those weeks, he applied for more than 30 jobs at a range

of hospitality businesses and was eventually successful in gaining the Queenstown job.

[34] In assessing the period of loss I had to allow for contingencies that might otherwise have affected what Mr Catapang could have earned from working at Bonz Cajun Kitchen. One such factor was that he could not, on his WHS visa, have worked longer than three months at Bonz Cajun Kitchen. As Mr Aylwin would have been under no obligation to support an application for a longer visa, the maximum period of loss was three months. Mr Catapang's claim for lost wages for 12 weeks was within that period.

[35] Another factor was the prospect that he could have worked as a food runner. However Mr Catapang denied Mr Aylwin had made that offer and said he would have accepted it if it had been offered. As the 'he said:he said' conflict of evidence on that point could not be resolved, the assessed period of loss has not been reduced for that contingency.

[36] A further contingency was the possibility that Mr Catapang could have found another, better job in that period and left anyway. Ms Choat gave evidence that more than 30 new staff were hired in a year so – presuming they were replacing (more or less) departing staff – it was quite probable Mr Catapang could have become part of such turnover. His subsequent employment history supported that likelihood. He worked for only two months in Queenstown before getting a new job at Mount Cook (with an employer prepared to support what was a successful application to get a year-long working visa). His experience in previous roles (in the Philippines, Dubai and the United States) before coming to New Zealand was in front-of-house roles so he was likely to seek and prefer such opportunities to the combined kitchen and service duties required at Bonz Cajun Kitchen.

[37] Allowing for the contingency that he may have left anyway, I assessed the period for which lost wages should be awarded was eight weeks. On the modest level of wages claimed, the award totalled \$4000.

Compensation under s123(1)(c)(i)

[38] Mr Catapang sought an award of \$8000 as compensation for humiliation, loss of dignity and injury to his feelings resulting from his unjustified dismissal. He gave evidence that he felt too humiliated to tell some people close to him about what had happened and that how his employment ended at Bonz Cajun Kitchen damaged his confidence in seeking other work. In setting the compensation award I was mindful of the need not to keep compensatory payments artificially low balanced with the need for moderation.⁸ From his evidence at the Authority investigation Mr Catapang appeared to be a relatively resilient person who suffered no severe or ongoing effects from his unjustified dismissal. In the circumstances of his case I concluded \$5000 was the appropriate level of compensation under s123(1)(c)(i) of the Act.

Any reduction for contribution?

[39] No reduction of remedies awarded was required for actions of Mr Catapang contributing towards the situation giving rise to his grievance. If there were valid concerns over how he performed his duties in his first three-and-a-half days of work they had yet to be properly addressed with an opportunity to improve before his dismissal. There were not sufficiently strong evidential grounds to conclude he had contributed to the situation by what he did (or did not) say about the terms of his visa.

Penalty for not providing a written agreement?

[40] Mr Catapang sought the imposition of a penalty on Mr Aylwin for failing to provide him with an intended agreement. I have reached conclusions on the grievance application without having to make firm findings on whether an intended agreement was provided but it was also clear that, whoever's account was correct, that by seven days after Mr Catapang started work (from 26 August to 2 September) there was no completed and signed agreement in place, contrary to the requirements of the Act and as well as no copy having been kept of what was said to have been the intended agreement provided.⁹

⁸ *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

⁹ Sections 64(2) and s65(1) of the Act.

[41] In some circumstances that might be sufficient to ground a penalty, perhaps of some thousands of dollars. However in the present case, with some factual doubts unresolved and having considered the relevant factors in setting penalties, I was not persuaded that any further deterrent and educative purpose would be served by exercising the discretion to impose such a penalty on Mr Aylwin.¹⁰ And if I had, I would not in this case have agreed to Mr Catapang's request that the penalty should be paid to him rather than the Crown. Penalties are to be imposed for the purpose of punishment, not as an alternative route for increasing compensation.¹¹

Costs

[42] Mr Catapang sought costs and, through his representative in closing submissions, accepted they could be set on the basis of the Authority's usual daily tariff.¹²

[43] Mr Aylwin in his closing submissions said he had persisted in defending Mr Catapang's case "*on principle*" and contrary to advice from his own legal advisor and the mediators at two mediations the parties attended prior to the Authority investigation being notified. As a result of that stance Mr Catapang incurred costs of representation in pursuing his claim in the Authority. Having been successful in that claim, Mr Catapang was entitled to a contribution towards reasonably incurred costs. For the straightforward investigation meeting in this case that took just under two-and-a-half hours, the appropriate award of costs on a tariff-basis was \$1500 (along with reimbursement of the \$71.56 fee charged for lodging the claim in the Authority).

Robin Arthur
Member of the Employment Relations Authority

¹⁰ *Xu v McIntosh* [2004] 2 ERNZ 448 at [47]-[48] and *Tan v Yang* [2014] NZEmpC 65 at [32] and s 135(4) of the Act.

¹¹ *Tan*, above, at [31].

¹² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.