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## Cook v Bradiana Enterprises Limited CA182/10 (Christchurch) [2010] NZERA 748 (16 September 2010)

Last Updated: 11 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 182/10 5287015

BETWEEN DEMI COOK

Applicant

A N D BRADIANA ENTERPRISES

LTD

Respondent

Member of Authority: James Crichton

Representatives: Jonny Sanders, Advocate for Applicant

Sue Grey, Counsel for Respondent

Investigation Meeting: 21 May 2010 at Christchurch

Determination: 16 September 2010

### DETERMINATION OF THE AUTHORITY

#### Employment relationship problem

[1] The applicant (Ms Cook) alleges that she was unjustifiably dismissed by the respondent ("Bradiana") and also that she suffered disadvantage by unjustified actions of Bradiana. Those claims are resisted by Bradiana.

[2] When Ms Cook filed her statement of problem in the Authority on 7 December 2009, she cited Mr Hunter Ritchie as first respondent and Bradiana as second respondent. Ms Cook took this step because she was uncertain about who her employer actually was. There was then an argument between the parties about whether correspondence served on Mr Ritchie properly gave notice to Bradiana of the matters in contention. Mr Ritchie is a director of Bradiana and it is not unreasonable to conclude that as a director of Bradiana, notice to him of proceedings and/or correspondence affecting Bradiana constituted defacto communication with the company.

[3] The practical reality is that while the legal position is that Mr Ritchie and Bradiana are separate legal entities, Mr Ritchie is the governing director of Bradiana in the sense that he is the *hands on* operator of Bradiana's business. Correspondence and proceedings directed to Mr Ritchie as *employer* may not strictly speaking be appropriately addressed if Mr Ritchie is not in fact the employer, but it goes too far for Bradiana to claim that information supplied to Mr Ritchie does not reach Bradiana simply because Mr Ritchie is labelled as *employer* when he is not.

[4] Ms Cook alleges that she was employed by Mr Ritchie. Her dealings were with Mr Ritchie and her wages were direct credited to her bank account against Mr Ritchie's name. Her evidence was that she never heard the name Bradiana until after the end of her employment.

[5] Conversely, Bradiana maintains that there can only be one employer of Ms Cook, that it is the employer of Ms Cook and

therefore that ought to dispose of the matter.

[6] Submissions for Ms Cook proceed on the footing that the doctrine of the undisclosed principle applies. In effect, it is suggested that because it appears that Ms Cook did not hear of Bradiana until after the employment ended, it somehow follows that Mr Ritchie must be the employer. But that cannot be right. I am satisfied the evidence does disclose that Ms Cook may not have heard the name Bradiana during the employment, but that of itself does not mean that Bradiana is not the employer and that another entity is.

[7] Bradiana readily acknowledged throughout that they were the employer and arguably, as soon as they first took responsibility for the matter, it ought to have been clear to Ms Cook's advisors that she was mistaken in her provisional conclusion that Mr Hunter Ritchie was her employer. After all, it matters not at all who the employer is provided an employer can be identified for liability to rest on, should culpability be established. In this case, the only hard evidence that Mr Ritchie was the employer was the fact that Ms Cook's wages were paid against his name rather than against the name of Bradiana. Mr Ritchie's evidence before the Authority readily acknowledged that was the position, but indicated it was inadvertent. The evidence of Mr Ritchie and his fellow director Moka Ritchie clearly establish that the business in which Ms Cook was employed was owned by Bradiana and that in consequence, Bradiana was Ms Cook's employer.

[8] That being the position, I am satisfied that the proper course of action is to remove Mr Hunter Ritchie from the intituling to this matter as I am satisfied that he is not a party in this proceeding. The matter can properly proceed with Bradiana clearly identified as the respondent employer.

[9] Ms Cook was employed at Bradiana's Wendys Super Sundaes business in a Christchurch Mall. She commenced her employment in August 2007. There was no written employment agreement. The nature of the engagement is in dispute. Bradiana say that Ms Cook was a casual employee while Ms Cook maintains that her hours and work, although rostered, were regular and consistent.

[10] On 11 October 2009, Ms Cook kicked another employee at work. The other employee *got a fright* and stumbled as a consequence of the kick and the ice cream holder was knocked off the counter. Fortunately the customer was able to catch both the ice cream and the ice cream holder.

[11] On 17 October 2009, Ms Cook was asked to attend a meeting with her mother as a support person in which three allegations (including the allegation that she had kicked a co-worker) were put to her. Bradiana said they would investigate the allegations and in particular talk to the co-worker who had been kicked. In the meantime Ms Cook was taken off the duty roster.

[12] Bradiana were to contact Mrs Cook once they had spoken to the co-worker. There was no immediate action from Bradiana and Mrs Cook visited Mr Ritchie at Bradiana's work premises on Wednesday 21 October and according to Mr Ritchie, Mrs Cook told him that her daughter was finished with work and that Bradiana hadn't heard the last of the situation. No further steps were taken by Bradiana because Mr Ritchie became seriously ill on 22 October and was admitted to hospital. Before Bradiana had an opportunity to complete its investigation, it received a letter dated 29 October 2009 from Ms Cook's advocate alleging that Ms Cook had been unjustifiably dismissed.

## Issues

[13] The most fundamental question in the present matter is whether there was a dismissal at all. Subsidiary issues are whether there was an improper suspension which constituted unjustified disadvantage, and whether the employment was casual or not, and finally there are questions about whether there are wages or other monies owed to Ms Cook.

### Was there a dismissal?

[14] I am satisfied on the evidence before the Authority that there was no dismissal. Ms Cook worked normally on the roster set for her up to and including 17 October 2009 the date of the meeting between the parties to discuss the complaints Bradiana had about Ms Cook's behaviour. At that meeting, Ms Cook was told that she would not be required for the next shift she was rostered on for, to enable the employer to inquire into the circumstances of the kicking of a co-worker. Ms Cook says that the cancellation of that shift and the subsequent cancellation of later shifts constitutes an improper suspension and in effect brought the employment relationship to an end. I note for the sake of completeness that the question of whether the suspension was in the nature of a disadvantage, by way of the unjustified actions of Bradiana, is an issue that I will take up at the next section of this determination. For present purposes, I desire to concentrate only on the submission that the succession of cancellations of shifts amounted to a dismissal.

[15] I do not accept that submission because I am persuaded that the factual position is otherwise. It is true that there was a suspension of work which the employer says was to enable it to inquire into the circumstances surrounding the allegation. However, before the employer was able to conduct that inquiry, Mrs Cook had attended at the work place on 21 October 2009 (barely four days after the meeting) and I am satisfied that what she said to Mr Ritchie was sufficient to convince him that Ms Cook had ended the employment relationship.

[16] There are two versions of this brief encounter. Mrs Cook says that she went to Bradiana's premises and asked why her daughter was not rostered on to work. She recalls Mr Ritchie saying first that the reason for that was that Bradiana had yet to speak to the other co-worker. As the conversation continued, Mrs Cook remembers Mr Ritchie offering the view that as Ms Cook was a casual worker, there was no obligation on him to give her any particular shifts.

[17] I am satisfied that Mrs Cook may well have had the exchange that she remembers with Mr Ritchie; the matters I have just referred to in the preceding paragraph are not inconsistent with Mr Ritchie's recollection of the discussion, but the important question is whether Mr Ritchie was left with the impression that Ms Cook was finishing her employment with Bradiana. I am satisfied that is the impression which Mrs Cook left with Mr Ritchie at the end of that conversation. I am also satisfied that Mrs Cook left Mr Ritchie with the understanding that she would be taking the matter to her lawyer, which of course she was perfectly entitled to do.

[18] I am satisfied then that the employment relationship did not come to an end as a consequence of a dismissal (as Ms Cook contends) but rather as a consequence of Mrs Cook telling Mr Ritchie that the employment was at an end. In those circumstances, I am satisfied Mr Ritchie genuinely believed that Ms Cook was not coming back and in a provisional sense, that was an end of the matter.

[19] I say a provisional sense because what happened next was that Mr Ritchie became seriously ill, in fact was admitted to hospital the day after he had the discussion I have just referred to with Mrs Cook. Mr Ritchie remained in hospital from 22 October 2009 down to 27 October 2009. Obviously Mr and Mrs Ritchie were most concerned about Mr Ritchie's health and not in the least engaged with the question of what, if anything, they should do about the kicking incident. If they thought about it all, and that seems unlikely, they probably thought about it in the context of having received notification from Mrs Cook that the employment relationship, in any event, was over.

[20] However, the short point is that before Bradiana could decide what, if anything, they needed to do in respect to Ms Cook's employment, they received Ms Cook's advocate's letter, which is dated 29 October, alleging unjustified dismissal. That letter of course is dated just two days after Mr Ritchie was discharged from hospital. Even after his discharge from hospital he was still receiving intravenous antibiotics for a further two weeks and so was hardly in the best of health. Bradiana took Ms Cook's advocate's letter of 29 October 2009 as further confirmation that however it had happened, the employment relationship was at an end. There was no further attempt by Bradiana to complete the investigation into the kicking incident.

[21] I am satisfied then that so far as the allegation of unjustified dismissal is concerned, the claim is not made out because on the view of the evidence which the Authority prefers, the employment relationship came to an end not via the agency of the employer, but as a consequence of the action of the employee through her mother Mrs Cook.

### **Was there an unlawful suspension?**

[22] The allegation that Ms Cook was unlawfully suspended is, as I noted above, because of her removal from the roster. Ms Cook argues that there is no employment agreement in place (and that is conceded) and that therefore there is no provision in such an employment agreement to give the employer the right to suspend.

[23] I do not agree that that is the law. I am satisfied the law provides that there are circumstances in which a suspension is permissible even although there is no provision in an employment agreement to contemplate such a course of action. Generally, the common law position is that a right to suspend at large is only available where the particular circumstances of the case justify the conviction that the employee remaining in the employment would materially prejudice the investigation. This was just such a case. Here, the employer wanted to inquire of the victim of Ms Cook's assault (because that was what it was) and they felt, on reasonable grounds, that Ms Cook's continued presence in the work place would prejudice that inquiry. I think that is a reasonable conclusion in all the circumstances and therefore I am satisfied that the suspension was not unjustified at all.

[24] I am particularly drawn to that conclusion because of the evidence given at the Authority's investigation meeting by the victim of Ms Cook's kick, Ms Sarah Jamieson who gave compelling evidence about the effect of the kick on her. She says in her evidence:

*I know Demi (Ms Cook) has said in her evidence it was a joke. But it wasn't a joke and she kicked me hard enough to hurt and to give me a fright. Also we were not fooling around and not mucking about. I was serving a customer and she just kicked me for no reason. I don't see how Demi says it "was a joke", it wasn't funny and she should know better than to kick people.*

[25] What is even more significant from Ms Jamieson's evidence is her view about the general behaviour of Ms Cook in the work place. As her evidence continued, it became evident that Ms Jamieson considered that Ms Cook was inclined to make things up to get others into trouble and amongst other things had told Ms Jamieson that Mr Ritchie believed that Ms Jamieson was stealing money from the shop and was watching her.

[26] Ms Cook denies saying that Mr Ritchie was watching Ms Jamieson because he thought Ms Jamieson was stealing from him, but Ms Jamieson was adamant that that was what Ms Cook said, and I believe her. I thought Ms Jamieson's evidence was

compelling and truthful and in general, I preferred her recollection of events, where there was conflict, to Ms Cook's.

[27] I believe it is reasonable to assume that Ms Jamieson's views of Ms Cook's behaviour were not just her own views but were likely to have been shared or at least known about by the employer. Accordingly, I think it reasonable for the employer to be anxious about Ms Cook being in the work place while any inquiry was proceeding. I am not satisfied then that the suspension was improper or that it constituted disadvantage by an unjustified action of Bradiana.

### **Was the employment casual?**

[28] The question of whether Ms Cook was a casual employee of Bradiana or not arises. Ms Cook maintained that she was not casual while Bradiana said she was. I am satisfied that a proper construction of Bradiana's action in removing Ms Cook from the roster was to enable them to conduct their inquiries without any potential impact from Ms Cook and was not because of their conviction that Ms Cook was a casual worker. Although not germane to the decision that the Authority has made, I am satisfied on the facts that Ms Cook was not a casual worker; *Jinkinson v. Oceana Gold (NZ) Ltd* (CC 9/09) applied. A central principle to be derived from that case is that where there is an expectation of continuing work being offered, the employment is permanent rather than casual.

[29] The question whether work is permanent or casual is not just an academic one. In the present case, the question of whether the work performed is casual or not, impacts on monies which may be owed to Ms Cook. Because Bradiana regarded Ms Cook as casual, (a view I have already disagreed with), they considered they were entitled to pay her holiday pay on top of her hourly rate in accordance with the relevant provisions of the Holidays Act.

[30] However, the relevant provision of the Holidays Act is particular in its application and I am satisfied that the four conditions which are required to be met by section 28 have not all been met in this case. This section generally provides for circumstances where the payment of holiday pay may be paid with the ordinary pay.

That arrangement is only possible where there is either a fixed term agreement for less than 12 months (not relevant in this case), or where work is so intermittent or irregular "that it is impractical for the employer to do otherwise" (again not relevant in the present case). There is simply no reason why the employer could not have provided 4 weeks annual holidays in accordance with the law.

[31] But even if that reasoning is not accepted, the section goes on to require that, in addition to the work being "intermittent or irregular", the employee must also agree to the arrangement in her employment agreement (by consent, there was no employment agreement provided) AND the holiday pay is separately identified AND the rate paid is not less than 8% of gross earnings. The final two conditions are met by Bradiana's process but the first two are not. The condition relating to the employees acceptance in the employment agreement can not be met because there was no written employment agreement to agree to. Nor is there any extraneous evidence before the Authority of Ms Cook's agreement to the arrangement. As the Authority has remarked in previous cases, "two out of four" does not meet the statutory test in section 28.

[32] I am satisfied then that Ms Cook was entitled to be paid holiday pay in the normal way. Furthermore, Section 28(4) of the Holidays Act also applies to preclude Bradiana setting off payments already made by it as holiday pay.

[33] Ms Cook also claims sick pay for 2 days. I am satisfied that [Section 63](#) of the [Holidays Act 2003](#) applies which provides generally for sick leave. It is apparently not contested that Ms Cook was sick and was not paid for the time she had off.

### **Is Ms Cook owed money?**

[34] Although I am satisfied that Ms Cook does not have a personal grievance for the reasons I have advanced earlier in this determination, I conclude there are sums of money owing to her by way of unpaid sick leave and holiday leave.

[35] While the Authority is happy to fix payments in respect of holiday pay and sick pay, the Authority's preference is for the parties representatives to liaise with a view to resolving matters by agreement based on the principles enunciated in this determination. This course of action is adopted particularly because there is disagreement about the days taken as annual leave.

### **Determination**

[36] Ms Cook has failed to satisfy me that she has a personal grievance either in consequence of having been unjustifiably dismissed or in consequence of having suffered an unjustified disadvantage.

[37] It follows that Ms Cook has no entitlement to remedies in that regard. However, in respect to her claim to have been short paid sick pay and holiday pay, I am satisfied she has entitlements.

[38] The representatives are to liaise with a view to agreeing this issue. If the matter remains unresolved in 14 days, leave is reserved to revert to the Authority for orders.

### **Costs**

[39] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority

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