

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 141/09
5145788

BETWEEN KENNETH EDWARD DEAN
DODGE
Applicant

AND VILLAGE INN LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Phil James, Counsel for Applicant
Tony Shaw, Counsel for Respondent

Investigation Meeting: 22 May 2009 at Christchurch

Determination: 31 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ken Dodge worked for Village Inn Limited as a chef from about April 2007 until his employment terminated in October 2008. Mr Dodge says that he was dismissed by the company's managing director Robert Mason. He also says that he suffered a disadvantage because of the company's unjustified actions relating to a term in his employment agreement, unlawful deductions from his wages, the way he was spoken to by Mr Mason and breaches of good faith.

[2] The Village Inn denies dismissing Mr Dodge or unjustifiably disadvantaging him.

[3] There are a number of factual disputes that must be resolved in order to determine this matter. It is convenient first to deal with the terms of the employment and I will resolve part of the disadvantage grievance claim at the same time before explaining what led to the termination of Mr Dodge's employment. If it is established

that he was dismissed I will assess any justification and then determine the remainder of the disadvantage claim.

Terms of employment

[4] Mr Dodge and Mr Mason have known one another for some years, Mr Dodge having worked in various hospitality businesses owned by interests associated with Mr Mason. In about March 2007 Village Inn Limited purchased a hospitality business in Hanmer. Mr Dodge was offered a 10% shareholding in the company and the position of chef which he accepted. There is a signed employment agreement dated 21 April 2007.

[5] Clause 5.2.4 of the agreement says *Deductions may be made from the employee's wages ...from final pay for any unreturned protective clothing, equipment, or any other property, or any debt believed by the employer to be owing to the employer, whatsoever it may be.*

[6] The allegation is that the inclusion of this clause in the employment agreement is unreasonable and oppressive, as is the clause itself. That is an attempt to challenge the validity of the agreed terms of the employment. The difficulty for Mr Dodge is that ss.68, 69 and 161(2) of the Employment Relations Act 2000 must be read as a code setting out the circumstances in which the Authority may give remedies for unfair bargaining. None of the conditions set out in s.68 apply. The further difficulty is that the full definition of an unjustified disadvantage excludes an action deriving solely from the interpretation, application or operation of the employment agreement, or the disputed interpretation, application or operation of the employment agreement: see s.103(3). Accordingly I find that no grievance or other legal claim arises as a result of clause 5.2.4 of the employment agreement.

[7] Having said that, the operation of a term such as this is always subject to the Wages Protection Act 1983, a point to which I will return.

Termination of the employment

[8] Gemma O'Sullivan works for Village Inn, now as a duty manager. At relevant times she lived in Hanmer with her partner. Ms O'Sullivan and Mr Dodge became friendly. Her evidence is that she and Mr Dodge began to flirt with one another by way of text messages. That too is Mr Dodge's evidence.

[9] Arthur Blake is the manager of Village Inn and Kerry Mason is a manager. Ms O'Sullivan complained to Mr Blake about the text messages and there was then a discussion between Mr Dodge, Mr Blake, Robert Mason and Kerry Mason to the effect that Mr Dodge should desist. There are significant disputes about when this occurred, what was said and the bona fides of notes purporting to record the exchange as a disciplinary meeting in August 2008. What is not disputed now is that there was such a discussion and the texting stopped for a time. Mr Dodge says, in connection with this discussion which he says occurred in January 2008, that Robert Mason said to him *give me one reason why you shouldn't fuck off?* On the assumption that Mr Mason said this in either January or August 2008, it is irrelevant to the termination of Mr Dodge's employment which occurred in October 2008.

[10] At some point the texting between Mr Dodge and Ms O'Sullivan resumed. Ms O'Sullivan's partner came to learn of it.

[11] Mr Dodge was at work on Sunday 12 October 2008 with Matthew Vlietstra in the kitchen. Ms O'Sullivan was due to work but she did not arrive. Ms O'Sullivan's evidence is that her partner became *very angry* when he found out about the continued texting so she decided to leave Hanmer as quickly as possible, knowing of his history of violence. Mr Dodge came to learn of these circumstances from Ms O'Sullivan by text message. Mr Vlietstra's evidence is that he noticed from about 5.30pm onwards that Mr Dodge was becoming very nervous. He expanded a little on that when questioned by counsel for Mr Dodge by saying that *Ken was very shakey* and that he was 100% sure that it related to the news about Ms O'Sullivan's partner because he and Mr Dodge discussed it during the evening. For his part, Mr Dodge denies that he was scared for his own safety or a nervous wreck as a result of hearing from Ms O'Sullivan on 12 October. I prefer Mr Vlietstra's evidence on these points. I find that Mr Dodge became scared for his own safety. It is common ground between Mr Dodge and Mr Vlietstra that the former called the latter some time a bit later in the evening during which Mr Dodge described Ms O'Sullivan's partner as a *nutter*. That supports a conclusion that Mr Dodge was fearful for his safety and wanted to leave Hanmer meantime. Mr Dodge's evidence which I accept is that he rang Mr Vlietstra because there was still a kitchen to run. That evidence supports a conclusion that Mr Dodge did not at the time think he had been dismissed.

[12] It is now common ground that Mr Dodge rang Robert Mason at about 9.00pm but there remains a dispute about what was said. Mr Dodge says that he told Mr Mason about Ms O'Sullivan's partner reading the texts and reacting and Ms O'Sullivan leaving Hanmer. Mr Mason responded by referring to his keeping his distance from Mr Dodge for some months saying *I've been watching you for months – like Tony fucking Soprano and this is what you get when you wreck families.* Mr Dodge says he asked what Mr Mason wanted from him to which Mr Mason responded *I cannot believe you are still there and Gemma's partner will kill you when he gets his hands on you and it will be with my blessing and I shouldn't say this but fuck off and Yep, fuck off. Call me in two weeks.* Mr Mason says that he said *it may be an idea to fuck off for a couple of weeks, have a holiday, you've got plenty of holiday pay owed and give me a ring to make sure the coast is clear.*

[13] Mr Vlietstra did not overhear the call but his evidence is that Mr Dodge said to him after the call *Bob has advised me to leave for two weeks.* He also says in his written evidence that Mr Dodge specifically said that he had not been sacked but he retreated from that evidence when questioned by Mr Dodge's counsel. Mr Dodge says that he told Mr Vlietstra *Bob said to call him in two weeks.*

[14] I have formed the view that more caution is needed with Mr Dodge's evidence than with Mr Mason's. I do not accept Mr Dodge's assertion that he and Mr Mason were talking about the end of the employment relationship between Mr Dodge and Village Inn. Rather, they were talking about Mr Dodge fleeing Hanmer temporarily to avoid coming into contact with Ms O'Sullivan's very angry partner. I do not accept Mr Dodge's evidence that he did not know why he needed to call Mr Mason in two weeks. He knew very well that the purpose was to see if things had calmed down and if it was safe for him to return to work in Hanmer. In these circumstances I do not accept that Mr Dodge understood the discussion with Robert Mason amounted to the termination of his employment; nor did Robert Mason intend to or actually dismiss Mr Dodge. I find that Mr Dodge was not dismissed as a result of anything said during the phone discussion.

[15] Mr Dodge promptly left Hanmer. Before doing this he apparently went to see a friend Ged O'Grady. They both say that Mr Dodge told Mr O'Grady that Mr Mason had told him to *fuck off* and he was going to *get buried.* I do not accept Mr O'Grady's

evidence – it adds nothing reliable to Mr Dodge’s account of his discussion with Mr Mason and his resulting understanding about his employment.

[16] Arthur Blake gave detailed evidence about how Ms O’Sullivan’s partner discovered Mr Dodge’s text messages and her concern for her safety. Although hearsay evidence, there is no reason to doubt its accuracy. Mr Blake relayed these events to Robert Mason so he knew what had happened before he received Mr Dodge’s call at about 9.00pm. Mr Blake also says, and I accept, that Mr Dodge left instructions with Mr Vlietstra for Mr Blake to do the kitchen orders. That supports the conclusion that Mr Dodge did not regard himself as having been dismissed.

[17] After Mr Dodge’s departure from Hanmer, Mr Blake was asked by Robert Mason to retrieve Mr Dodge’s work keys. He asked Mr Vlietstra to text Mr Dodge, which he did. Mr Blake also phoned Mr Dodge several times. The two men spoke late morning on 13 October. Mr Dodge agreed to return the keys and did so. I do not accept that the requirement for the keys to be returned failing which the locks would be changed amounted to a dismissal or sending away of Mr Dodge by the employer. Mr Mason asked Mr Blake to retrieve the keys as a prudent measure given the uncertainty about when Mr Dodge would be returning to Hanmer. It was Mr Blake who added the threat about changing the locks but I do not accept that it added materially to what was being communicated to Mr Dodge.

[18] I note counsel’s submission that the tone and content of Mr Mason’s communication to Mr Dodge on 12 October 2008 give rise to an unjustified disadvantage grievance quite apart from the dismissal allegation. I do not accept this submission. Neither Mr Dodge’s conditions of employment nor his employment were affected by what Mr Mason said. Any effects visited on Mr Dodge resulted from his own concern for his safety.

Unlawful deductions

[19] The next contact between Mr Dodge and the Village Inn was when Mr Mason received a letter dated 20 October 2008 from Mr Dodge’s solicitor. In part, the letter reads *He has also instructed us that he has not yet received the holiday pay due to him following the recent termination of his employment. Please ensure that this is paid to him immediately as required.* I note that Mr Dodge was the first one of the parties to

assert that the employment relationship had been terminated. This distinguishes the present case from those cited by counsel for Mr Dodge where an employer seizes upon an employee's ambiguous words or actions to hold them to an unintended resignation.

[20] Mr Mason wrote back on 22 October 2008 saying *We appreciate your letter regarding Kenneth's alleged termination of employment. We would immediately like to clarify that he was neither terminated nor given any ground for constructive dismissal within the workplace. It also says We have included an account of Payments and deductions made to Ken from Holiday pay owing. Please appreciate the time it took to clean his work residence that we own and he lived in.* The letter also refers to the discovery of text messages by Ms O'Sullivan's partner and Mr Dodge's concern about possible ramifications as the reason for his departure from Hanmer. A cheque for final pay but not any account was enclosed.

[21] The solicitor responded by letter dated 3 November 2008. The letter refers to advice received by Mr Dodge on 12 and 13 October making it clear that his employment had been terminated and requiring him to return the work keys. That drew a response from HANZ on behalf of the company denying any dismissal. There was then a further letter from Mr Dodge's solicitor also raising a grievance about the deductions made from Mr Dodge's holiday pay. HANZ again responded.

[22] The account referred to in the 22 October letter was eventually provided to the Authority and Mr Dodge. It shows a total deduction of \$1,251.62 for furniture removal, cleaning, fumigation and disinfecting, rubbish dumping, phone, power and final rent.

[23] An employer is permitted to make deductions from wages due only with for a lawful purpose and with the written consent of the employee: see s.5 Wages Protection Act 1983. The words relied on in the agreement are *any debt believed by the employer to be owing to the employer, whatsoever it may be.* I do not accept that by signing the employment agreement Mr Dodge gave written consent for any of the deductions except the power and final rent. Those two deductions were clearly consented to by Mr Dodge throughout the employment so they fall within the ambit of written consent at the end of the employment as well. The remaining sum must be repaid to Mr Dodge. Leave is reserved in case of any difficulty with calculating the unlawful deduction that must now be repaid to Mr Dodge.

[24] Although Mr Dodge seems to have cast the complaint about the unlawful deductions also as an unjustified disadvantage personal grievance I find that this part of the problem is solely a breach of the Wages Protection Act 1983 and I have dealt with it on that basis. The employer's actions occurred after the employment ended so they could not have affected his employment or any conditions of his employment in the *on the job* sense required for a personal grievance.

Summary

[25] Mr Dodge was not dismissed by Village Inn Limited nor does he have any other personal grievance against his former employer.

[26] Village Inn Limited breached the Wages Protection Act 1983 by making unlawful deductions from Mr Dodge's final pay. As identified above those sums are to be paid to Mr Dodge.

[27] Costs are reserved. If costs cannot be agreed, a memorandum may be lodged and served within 21 days and any reply may be lodged and served within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority