

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 223
5326693

BETWEEN AFANO FA'AMOE
Applicant

A N D ANGELA NIELSEN
t/a TOBY'S RESTAURANT
Respondent

Member of Authority: K J Anderson

Representatives: Afano Fa'amoe, In Person
No appearance by the Respondent

Investigation: 20 June 2012 at Auckland

Date of Determination: 2 July 2012

DETERMINATION OF THE AUTHORITY

The absence of the respondent

[1] There have been some difficulties in having this matter heard before the Authority. It was originally scheduled for an investigation meeting on 5 October 2011 but due to a witness for the respondent being unavailable, this date was vacated. The matter was rescheduled for an investigation meeting to be held on 30 November 2011. Due to various difficulties that Ms Nielsen was apparently facing, her representative sought an adjournment on 31 October 2011 and this was accommodated by the Authority. On 9 November 2011, the Authority was informed by the Hospitality Association of New Zealand that it could no longer represent Ms Nielsen, as she was no longer a member of the Association. The Authority has not been able to make personal contact with Ms Nielsen but in order to progress this matter a *Notice of Meeting* for the hearing on 20 June 2012 was couriered to her and receipted with the signature of *A N NIELSEN*. I am satisfied that the respondent has full knowledge of the claims of the applicant and the investigation meeting, but has chosen not to participate in the proceedings of the Authority. Therefore, pursuant to Clause 12 of

Schedule 2 to the Employment Relations Act 2000, the Authority has acted fully in this matter as if the respondent has duly attended.

The claims of Ms Fa'amoe

[2] Ms Fa'amoe says that she was unjustifiably dismissed on 24 October 2010. She asks that the Authority find that she has a personal grievance and award her the remedies of reimbursement of wages for three months and appropriate compensation for hurt and humiliation. Via the *Statement in Reply*, Ms Nielsen says that she understood that it was mutually agreed that Ms Fa'amoe was not suited for the position she had been employed for and hence Ms Fa'amoe was not dismissed. Rather, Ms Nielsen says, there was a mutual parting of the ways and that Ms Fa'amoe had a position elsewhere.

Background

[3] The evidence of Ms Fa'amoe is that on 9 October 2010, she was interviewed by Ms Nielsen for the position of Restaurant/Bar Manager at Toby's Restaurant, Titirangi. Ms Nielsen and her husband operated the restaurant for some six years but the Authority understands it was sold in October 2011. Ms Fa'amoe commenced her employment on 12 October 2010. It seems that it was agreed that there would be an initial trial period for Ms Fa'amoe, albeit the legal status of the arrangement was probably questionable.

[4] Ms Fa'amoe is very experienced in the hospitality industry, having been involved in a variety of roles over many years. Ms Fa'amoe has a pleasant and professional demeanour. Her evidence is that she prides herself on her professional approach and likes to share her knowledge and experience with others. Unfortunately, according to the evidence of Ms Fa'amoe, the manner in which the restaurant and bar operated left much to be desired, at least from her professional view.

[5] Ms Fa'amoe worked for a trial period of three days and then on Monday, 18 October 2010, she met with Ms Nielsen and her husband to discuss the ongoing terms of employment. The evidence of Ms Fa'amoe is that after some discussion about Ms Fa'amoe having other employment options available, namely employment at Eden Park, Ms Fa'amoe indicated that she preferred to work at the restaurant as it was close to her home. Ms Fa'amoe says that Ms Nielsen told her that she would pay "top

dollar” and it was agreed that Ms Fa’amoe would be paid \$52,000 per annum. The first day of employment for Ms Fa’amoe as a salaried employee was 19 October 2010.

[6] Ms Fa’amoe presented graphic evidence of her day-to-day experiences at the restaurant including what appears to be a general lack of a positive or constructive relationship with Ms Nielsen, whom seems to have been absent more often than not. It also appears that Ms Fa’amoe did not receive the necessary support from Ms Nielsen to effectively carry out her role as the Restaurant/Bar Manager and there did not appear to be any defined lines as to who the other staff were accountable to. But of particular concern to Ms Fa’amoe was the manner in which she was spoken to by the Head Chef. Ms Fa’amoe gave examples of being sworn at by him and of being treated in a generally rude and dismissive manner. It is also clear from the information that has been provided by Ms Nielsen that she was aware that the Head Chef could be “a difficult man” and she cautioned Ms Fa’amoe accordingly when she was interviewed. While Ms Fa’amoe related some other concerns that she had in regard to the conduct of some other staff and customers, in regard to their drinking habits in the bar and the possible threat to the bar’s licence, it is clear that it was the relationship with the Head Chef that caused the most concern, not only for Ms Fa’amoe but also, apparently, for Ms Nielsen.

The dismissal

[7] On Sunday 24 October 2010, Ms Fa’amoe returned from a family outing and discovered on her cell phone a text from Ms Nielsen:

Hi I have been trying to ring u. There is urgency and I wld rather talk in person but viv [the Head Chef] is having a fit. The conflict between the 2 of u is getting worse. I am piggy in the middle. It is not going to wrk. I am sorry u have done a great job. It is urgent 4 me to tell u as u can still take the eden park offer. Pls ring me when you want to at anytime. Thanku. Pl text ur bank acct details so I can pay u. I thought it would get better with time.

Ms Fa’amoe says that she tried to contact Ms Nielsen several times that day and left messages but did not receive a response.

[8] Early on Monday, 25 October 2010, Ms Fa’amoe sent a text to Ms Nielsen asking if a resolution could be reached. Ms Nielsen replied promptly. The substance of the text being that the Head Chef and other staff were upset and that the last week had been “a battle zone.” Ms Fa’amoe replied that she would do what ever was

required to “put it right.” After informing that she would “mull it over” Ms Nielsen sent a final text at 8:48am that day:

U need to take the eden park offer now before it is too late. Viv is not happy. The business needs him to produce the food. End of story. At the end of the day it is about the business. Will do payment transfer Wednesday. Good luck. I mean it. Thanku.

Was Ms Fa’amoe dismissed?

[9] When one is presented with the evidence from only one party to a dispute, that evidence must be treated with some caution as to its veracity. Upon meeting Ms Fa’amoe and observing her closely at the investigation meeting, while she related her experiences for the short time she worked at the restaurant, I am satisfied that the substance of her evidence is credible and I conclude that she was dismissed via a text message on Sunday, 24 October 2010; and that the dismissal was confirmed, again via a text, the following day. While Ms Nielsen has attempted to portray that Ms Fa’amoe accepted that she was not suitable to continue working at the restaurant and had another employment option available to her, I do not find this to be so. Rather I conclude that Ms Fa’amoe desperately wanted to retain her employment at the restaurant and was prepared to do what ever was reasonably required to ensure that her relationship with the Head Chef and other staff (if necessary) was reconciled. It may be that the professionalism of Ms Fa’amoe was more than the owners of restaurant required and/or the culture that existed within the business was such that there was an undisguised resistance to any attempts by Ms Fa’amoe to improve the operation of the business. In any event it is clear that Ms Nielsen was not prepared to make any effort to conciliate the differences that had arisen or give any support at all to Ms Fa’amoe as the newly employed Restaurant/Bar Manager. Rather, it seems that Ms Nielsen concluded it was an easier option to simply dismiss Ms Fa’amoe.

Was the dismissal unjustifiable?

[10] Given the circumstances as set out above, it goes without saying that the dismissal of Ms Fa’amoe must be found to be procedurally and substantively unjustifiable. The manner in which she was treated was not what a fair and reasonable employer would have done in the circumstances.¹ Ms Fa’amoe has a personal grievance and is entitled to remedies.

¹ Section 103A Employment Relations Act 2000 (as it was then).

Remedies

[11] Having found that Ms Fa'amoe has a personal grievance, pursuant to section 123(1) of the Employment Relations Act 2000 (the Act):

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the following remedies:

Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then, at s.128(2) of the Act, if the Authority determines that an employee has a personal grievance, and there has been lost remuneration because of the grievance, the Authority:

[... must, whether or not it provides for any of the other remedies provided for in s.123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

(a) *Reimbursement of lost wages*

[12] Ms Fa'amoe seeks the statutory award of three month's lost wages. Her evidence is that she attempted to obtain other employment but when it came down to an interview, she did not go through with it as she had lost her confidence. Ms Fa'amoe's evidence about this and the affect of the sudden loss of her employment was plain to see. In fact, Ms Fa'amoe does not appear to have had an option available to work at Eden Park at that time, albeit she did work there during the Rugby World Cup in 2011. I conclude that Ms Fa'amoe is entitled to be paid three month's reimbursement of wages being the gross sum of \$13,000 (\$52,000 x 3 months). An order follows.

(b) *Compensation*

[13] Section 123(1)(c)(i) of the Act provides for the payment to the employee of compensation by the employee's employer, including compensation for humiliation, loss of dignity and injury to the feelings of the employee. Ms Fa'amoe gave evidence, corroborated by her husband, of the upsetting affects of the sudden loss of her employment which she saw as her "dream job." Given the circumstances, including the affect of the sudden and callous manner in which Ms Fa'amoe was dismissed (by

text); I accept that Ms Fa'amoe was affected to a degree that warrants compensation in the sum of \$3,000.

(c) *Contribution*

[14] Pursuant to section 124 of the Act, I have considered the extent to which the actions of Ms Fa'amoe may have contributed towards the situation that gave rise to the grievance. There is some reference contained in a letter dated 3 November 2010, where Ms Nielsen responded to Ms Fa'amoe raising a grievance; and a similar reference in the *Statement of Reply*: to Ms Fa'amoe acting inappropriately towards other employees in her first week of employment. But the evidence about this is inconclusive as unfortunately Ms Nielsen did not see fit to be actively involved in the processes of the Authority; hence the remedies are not reduced.

Determination

[15] For the reasons set out above I find that Ms Fa'amoe was unjustifiably dismissed. Ms Angela Nielsen is ordered to pay to Ms Fa'amoe the gross sum of \$13,000.00 as reimbursement of lost wages and \$3,000.00 as compensation pursuant to section 123(1)(c)(i) of the Act. Ms Fa'amoe is also entitled to be paid the sum of \$71.56 being the application fee paid to the Authority.

[16] I also direct that pursuant to Reg 26 of the Employment Relations Authority Regulations 2000, Ms Fa'amoe be provided with a certificate of determination, sealed with the seal of the Authority, recording that Ms Angela Nielsen is ordered to pay to Ms Fa'amoe the gross sum of \$16,000.00; plus costs of \$71.56.

K J Anderson
Member of the Employment Relations Authority