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## Ghilardi v Osteria Limited [2011] NZERA 68; [2011] NZERA Auckland 48 (8 February 2011)

Last Updated: 28 March 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 48 5304924

BETWEEN EDUARDO GABRIEL

GHILARDI Applicant

AND OSTERIA LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

K J Anderson

5. Kopu, Counsel for Applicant R Pool, Counsel for Respondent

27 August 2010 at Auckland

6. September and 20 September 2010 for the Applicant 12 September 2010 for the Respondent

Determination:

8 February 2011

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] The applicant, Mr Ghilardi, claims that he was unjustifiably disadvantaged in his employment pertaining to being suspended from his employment on 10th March 2010. He also claims that he was unjustifiably dismissed as he was unable to return to work following the suspension. Mr Ghilardi asks the Authority to find that he has a personal grievance (or grievances) and award him various remedies, including reimbursement of wages and compensation, and a penalty for a breach of his employment agreement. The respondent, Osteria Limited ("Osteria"), refutes the claims and says that Mr Ghilardi was fairly suspended from his employment and then resigned.

#### Background facts and evidence

[2] In 2007, Mr Ghilardi came to New Zealand from Brazil. Sometime in 2008 he commenced work at an Auckland restaurant as a chef. This is where he met Mr Potito (Tito) Cucciniello, who was also a chef at the same restaurant. The two men became friends. Mr Cucciniello left his employment to set up his own Italian restaurant, Pane e Vino ("the restaurant"). The restaurant is owned by Osteria Limited ("Osteria") and Mr Cucciniello is a director of the company. The evidence of Mr Cucciniello is that upon setting up the restaurant, he invited Mr Ghilardi to be the Head Chef. The offer was accepted and Mr Ghilardi signed an employment agreement on 16th June 2009. He also became a 10% shareholder in Osteria and a director of the company.

[3] The restaurant opened for business on 22nd June 2009. The evidence of Mr Cucciniello is that they were busy and he was concerned when Mr Ghilardi informed that he had to go to Brazil for two weeks. Mr Cucciniello says that because Mr Ghilardi was away for more than two weeks without contacting him to inform what he was doing, he placed a formal warning on Mr Ghilardi's personal file on 28th July 2009, for being absent without authorisation. But according to Mr Ghilardi's travel bookings and passport, he left New Zealand on 19th July and returned on 31st July 2009 and resumed work within a day or two, hence it appears that he was away the two weeks that he requested.

[4] In February 2010, Mr Ghilardi returned to Brazil again. He told Mr Cucciniello it was to visit his sick father. Another written warning (22nd February 2010) was placed on his personal file for being absent without authorisation, because Mr Cucciniello says that Mr Ghilardi was away longer than the two weeks permitted. But the travel documents show that Mr Ghilardi left New Zealand on 5th February and arrived back in the country on 21st February 2010. And Mr Ghilardi says that he never received the warnings until preparing for the investigation meeting. Neither party have put any particular weight on the existence of the warnings and their validity or otherwise. Rather, it is the unfolding of the subsequent events connected with Mr Ghilardi's travel to Brazil, and the possible reason for such that assumes more relevance.

[5] The evidence of Mr Cucciniello is that after Mr Ghilardi returned from Brazil the second time, he seemed stressed, he took time off work and made many personal phone calls. Mr Cucciniello says that he had employed a part-time chef, Mr Marcelo Bianchessi, but from 7th March 2010, Mr Bianchessi, without explanation, did not return to work.<sup>[1]</sup> The evidence of Mr Bianchessi is that he was renting a house from Mr Ghilardi. The rented house was "across the road" from where Mr Ghilardi lived. Mr Bianchessi says that Mr Ghilardi asked him to "hold" a courier package for him as it would be delivered to Mr Bianchessi's house. Mr Bianchessi agreed to do so and duly took receipt of and signed for the package when it arrived. However, when Mr Bianchessi arrived home from work the Police were waiting for him and he was taken to the Police Station. Mr Bianchessi was subsequently told by the Police not to work with Mr Ghilardi again. As a consequence, Mr Bianchessi never returned to the restaurant.

[6] It was subsequently revealed that the package that Mr Bianchessi took receipt of contained a Class A drug (cocaine) and on 4th March 2010, Mr Ghilardi was charged under [section 6](#) of the [Misuse of Drugs Act 1975](#). He was released on bail with certain conditions applying, including the surrender of his passport.<sup>[2]</sup>

[7] On 10th March 2010, Mr Cucciniello visited Mr Bianchessi at his new place of work and was informed by Mr Bianchessi of the reason for his departure from his employment at Pane e Vino. The evidence of Mr Cucciniello is that with this knowledge, he spoke to Mr Ghilardi. Mr Cucciniello says that Mr Ghilardi effectively denied that he had anything to do with the drugs. Mr Cucciniello was particularly concerned about the impact the alleged involvement by Mr Ghilardi with drugs would have on the reputation of the restaurant.

[8] In his statement of evidence, Mr Ghilardi says that on 10th March 2010, he approached Mr Cucciniello and told him about the drugs charges as he felt that it was important that Mr Cucciniello heard about this from him rather than from someone else. Mr Ghilardi attests that Mr Cucciniello told him that he would be seeking legal advice and that later in the evening of 10th March; Mr Ghilardi received a suspension letter from Mr Cucciniello. However, at the investigation meeting, Mr Ghilardi told the Authority that on 10th March, Mr Cucciniello phoned him and requested that he come to the restaurant and upon Mr Ghilardi's arrival, Mr Cucciniello spoke to him about the drugs charges. Nonetheless, what is consistent in regard to the evidence, is that following seeking legal advice, Mr Cucciniello issued Mr Ghilardi with the

following letter dated 10th March 2010:

We understand you are being investigated for a serious drugs charge. This may impact on your employment at Pane e Vino. With regret we must take action to avoid

loss to the Company.

Accordingly we are suspending your employment contract effective immediately pending completion of the investigation as this will affect Panne [sic] e Vino and its business and because you may be unable in any event to complete your work properly. The business is unable to pay a salary to you pending completion of the investigation.

[9] At the request of Mr Cucciniello, the two men met again on 11th March 2010. Mr Ghilardi was given a letter (and attachments) from the accountants for Osteria; the apparent purpose of which was to transfer Mr Ghilardi's shareholding in the company and also to record the resignation of Mr Ghilardi as a director. It is unclear whether these actions occurred; but in any event, that is a commercial matter between Mr Ghilardi and Osteria and not within the jurisdiction of Authority as these matters were not a component of Mr Ghilardi's employment terms and conditions. While Mr Ghilardi was suspended from his employment, Mr Cucciniello asked him if he would work that evening but then not return again. It appears that Mr Ghilardi agreed to the request.

[10] After 11th March 2010, it seems that Mr Ghilardi came to the restaurant on a daily basis. Mr Ghilardi says that he attempted to talk to Mr Cucciniello about his suspension and he wanted to return to work. The evidence of Mr Cucciniello is that on 16th March 2010, Mr Ghilardi came to the restaurant and there was some discussion about Mr Ghilardi's

circumstances; with Mr Cucciniello expressing his unhappiness that Mr Ghilardi had "lied" to him. Mr Cucciniello says that Mr Ghilardi said that he had made a "mistake" and that he was sorry for Mr Bianchessi but that "they don't have proof." Mr Cucciniello says that he told Mr Ghilardi that his actions could have major impact on the business<sup>[3]</sup> and that staff had told him that they would not work with Mr Ghilardi. Mr Cucciniello says that he told Mr Ghilardi "for me it's over." [11] The further evidence of Mr Cucciniello is that Mr Ghilardi responded by saying: "I don't want to fight with you. I'm leaving." Mr Cucciniello says that there was also some discussion about Mr Ghilardi's shareholding and directorship of the company; with Mr Ghilardi indicating that he would get some advice. Mr Cucciniello attests that Mr Ghilardi was "calm" throughout the discussion; but then the next morning (17th March), Mr Ghilardi appeared on the front lawn of Mr Cucciniello's home saying that he wanted his job back. Mr Cucciniello says that Mr Ghilardi seemed "quite threatening" and Mr Cucciniello was concerned about his family.

[12] It appears that the visit by Mr Ghilardi to Mr Cucciniello's home was the last contact between the two men. Via a letter dated 14th April 2010, Mr Ghilardi's lawyers informed that his suspension was a breach of his employment agreement but Mr Ghilardi was not resigning and he was seeking immediate reinstatement to his employment. The parties have been unable to reach a settlement of the issues and the Authority is now required to determine matters.

### **Analysis and Conclusions**

[13] [Section 103A](#) of the [Employment Relations Act 2000](#) (the Act) provides the test to be applied to a dismissal; and in circumstances where an unjustified disadvantage in employment claim arises. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, 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.

[14] There are a number of issues that require determination. Firstly:

#### **Was there a breach of Mr Ghilardi's employment agreement in regard to his suspension from employment?**

[15] At clause 13.2 of the employment agreement is: **Suspension**

In the event that the Employer wishes to investigate any alleged misconduct, it may, after discussing the proposal of suspension with the Employee, and considering the Employee's views, suspend the Employee on pay whilst the investigation is being carried out.

[16] I find that there was "alleged misconduct" in that it was alleged that the actions of Mr Ghilardi had:

- (i) affected another employee (Mr Bianchessi) to the extent that he left his employment at the restaurant;
- (ii) attracted the Police to the restaurant to speak to Mr Ghilardi; and

(iii) left Mr Ghilardi facing serious charges under the [Misuse of Drugs Act 1975](#).

That then activates other provisions of the suspension clause whereby Mr Cucciniello was required to discuss with Mr Ghilardi "the proposal of suspension" and consider Mr Ghilardi's "views" before implementing the suspension. And the suspension of Mr Ghilardi had to be "on pay."

[17] Unfortunately, Mr Cucciniello failed to observe the reasonably simple obligations set out above on all counts; including the fact that Mr Ghilardi was not paid during the suspension.<sup>[4]</sup> It follows that the suspension was unfair and unreasonable and hence unjustified, as it was carried out in substantial breach of the above terms of the employment agreement. It also follows that Mr Ghilardi was been unjustifiably disadvantaged in his employment and he has a personal grievance.

[18] Before addressing the question of any remedy that may be available to Mr Ghilardi under s 123(1)(c)(i) of the Act, because there are issues as to whether he was dismissed, or he resigned during the period of suspension; or perhaps the suspension subsequently morphed into a dismissal, I believe that it is appropriate to determine those issues and then consider any applicable remedies on a global basis. [It is appropriate that I record here that I find that the breach of the suspension provisions of Mr Ghilardi's employment agreement do not warrant the awarding of a penalty under ss 134 and 135 of the Act. Rather, Mr Ghilardi has a remedy under s 123 of the

Act.]

#### **Was Mr Ghilardi dismissed?**

[19] It is commonly accepted that Mr Ghilardi was suspended from his employment on 10th March 2010 while an investigation into his actions pertaining to the drug charges, including the possible affect on the business of the restaurant, and possibly the departure of Mr Bianchessi, took place. However, it is what happened subsequently that is disputed. It is the argument for Mr Ghilardi that if an investigation took place, then he was never informed of the outcome and he was simply left in an indefinite state of suspension that then became a dismissal because he was never invited or allowed to return to

work.

[20] On the other hand, the argument for Osteria firstly is that Mr Ghilardi resigned on 16th March 2010. This is taken to have occurred when Mr Ghilardi said to Mr Cucciniello: "*I don't want to fight with you. I'm leaving*" But Mr Ghilardi says that he did not mean that he was leaving his employment. Rather, he was just informing that he didn't want to argue with Mr Cucciniello and was leaving the restaurant premises at that time. I conclude that it is more probable than not that this was the situation.

[21] The evidence of Mr Cucciniello, as it pertains to what he said when the two men met on 16th March, leads me to conclude that that it is more probable than not that Mr Ghilardi was dismissed that day. The evidence of Mr Cucciniello is: "*I also said that staff had told me that they would not work with him anymore. I said "for me this is over."* That Mr Ghilardi believed that he had been dismissed appears to be confirmed by his rather peculiar actions the next day, when he appeared at Mr Cucciniello's home and informed that he wanted to have his job back.

### **Was the dismissal unjustified?**

[22] Having found that Mr Ghilardi was, more probably than not, dismissed on 16th March 2010, the investigation moves to whether or not the dismissal was justified. It is well established that not only must there be substantive justification for a dismissal, but also the manner in which the dismissal is effected must be fair. But as the Court of Appeal has stated:

[... it is often convenient to distinguish between procedural and substantive fairness. But there is no sharp dichotomy. In the end the overall question is whether the employee has been treated fairly in all the circumstances.[\[5\]](#)

[23] To recap on the events. Firstly, Mr Ghilardi was suspended from his employment (unfairly) to allow an investigation into his alleged misconduct. It seems that Mr Cucciniello had carried out some investigation prior to the suspension being implemented, as by 10th March 2010, he had discovered:

- (a) That Mr Bianchessi had allegedly left the employment of the restaurant due to becoming entangled in a Class A drug delivery allegedly meant for Mr Ghilardi.
- (b) That another employee, Rodrigo Fierreira, had told him that Mr Ghilardi had told Mr Fierreira to tell Mr Cucciniello that the reason why Mr Bianchessi had left was that he and Mr Ghilardi had had "a fight."
- (c) That Mr Ghilardi had been charged with an offence (or offences) under the [Misuse of Drugs Act 1975](#).
- (d) That upon Mr Cucciniello putting these matters to Mr Ghilardi on 10th March, Mr Ghilardi responded: "I didn't do anything. They don't have proof. The package has another name. I am clean."

[24] Then following the suspension of Mr Ghilardi, Mr Cucciniello was told by two employees, Mr Fierreira and Mr Roger Moraes, that they would not continue to work with Mr Ghilardi. Mr Cucciniello says that he also discovered another employee, Tiago Brito, had left the restaurant because of his "discomfort" with the "suspicious activities" of Mr Ghilardi. The further evidence of Mr Cucciniello is that a number of people in the Brazilian community told him that they knew about Mr Ghilardi's "involvement" with drugs.

[25] Then on 16th March 2010, Mr Cucciniello and Mr Ghilardi had a discussion. Mr Cucciniello says that they "discussed the situation." The evidence of Mr Cucciniello is that: "*I said I was unhappy that he had lied to me. He admitted that he had made a "mistake" and he said he was sorry for Marcelo but that "they don't have proof." He also said "This is my life, one day with the stars and one day with the devil."* The oral evidence of Mr Ghilardi is that: "We talked about the job, the problem."

[26] Pursuant to s 103A of the Act, the Authority must consider whether the dismissal of Mr Ghilardi was what a fair and reasonable employer would have done "in all the circumstances at the time" the dismissal occurred. It has been submitted for Mr Ghilardi that Mr Cucciniello "deliberately failed" to undertake an investigation but as set out above, I do not find this to be so. However, where Mr Cucciniello can be seen to be at fault is that prior to 16th March 2010, the date that I have concluded Mr Ghilardi was dismissed, Mr Cucciniello failed to set out in detail for Mr Ghilardi the findings of the investigation and the allegations that Mr Ghilardi was required to answer to (and when), and the possible outcome i.e. dismissal, if Mr Ghilardi was unable to provide an acceptable explanation to the allegations. Furthermore, Mr Ghilardi should have been informed of the possible serious consequences in regard to his ongoing employment and that he was entitled to have a support person or representative at a meeting to be take place in due course.

[27] A consideration of all the circumstances at the time must also take into account the nature of the relationship that existed between Mr Cucciniello and Mr Ghilardi. It appears that their relationship was not of the usual employer/employee type that usually comes before the Authority. Firstly, the two men had been friends. And, while Mr Ghilardi became an employee of Osteria, he had other responsibilities as he was also a shareholder and director of the company, having put funds into the business, and by his own evidence, he had put some energy into setting up the restaurant. Furthermore, as evidenced by the advertisement for the restaurant in the Ponsonby News (March 2010), the names of both men were associated with the restaurant and Mr Cucciniello was particularly conscious of and concerned about, the reputation of the restaurant and how any possibility of it being connected with drugs might be perceived. A further circumstance is that Mr Cucciniello had not been in business for very long and appears to have little knowledge of the essentials of employment law, although it appears that he did obtain some legal advice which appears to have been questionable, or perhaps Mr Cucciniello

simply misinterpreted various matters. I also take into account that it appears that there was some fairly frank discussion between the two men and I have no doubt that Mr Ghilardi was fully aware of how his alleged actions were perceived, the effect on other employees, particularly Mr Bianchessi, who was forced to leave his employment at the restaurant (apparently on the advice of the Police). And there is reasonable evidence to suggest that Mr Bianchessi was potentially legally compromised by Mr Ghilardi in regard to Mr Bianchessi taking receipt of the couriered parcel that contained the Class A drugs, which Mr Ghilardi is now facing criminal charges about.

[28] Therefore taking all of the circumstances into account, including Mr Ghilardi's acknowledgement to Mr Cucciniello that he "made a mistake" and that he was "sorry for Marcelo," [6] I find that procedurally, Mr Ghilardi was unjustifiably dismissed and he has a personal grievance on that count. But in regard to the substance of the dismissal, I find that faced with all of the circumstances that Mr Cucciniello had before him, there was substantive justification for the dismissal of Mr Ghilardi.

## **Remedies**

[29] Having found that Mr Ghilardi has personal grievances due to his unjustified suspension and also lack of proper procedure relating to his dismissal, pursuant to section 123 of the Act, the Authority: ["... may, in settling the grievance," provide for various remedies.

### **(a) The unjustified disadvantage**

[30] For the reasons set out above, I have found that the suspension of Mr Ghilardi was an unjustified disadvantage to him in his employment because it was carried out in substantive breach of the terms of his employment agreement, including the established fact that he was not paid. Therefore, pursuant to s 123(1)(b) of the Act, Mr Ghilardi is entitled to be paid his wages for the period 12th March to 16th March 2010 inclusive. [7] It appears from the wage and time record for Mr Ghilardi that at the time of his dismissal he was paid the gross sum of \$1,000 per week for 40 hours of work, or \$200 per day hence the entitlement for the loss of wages is the gross sum of \$1,000. An order follows.

[31] In regard to compensation under s 123(1)(c)(i) of the Act, Mr Ghilardi seeks the sum of \$20,000, apparently as a global sum for the unjustified disadvantage and the dismissal. In regard to the effect upon Mr Ghilardi of the unjustified disadvantage, the evidence largely relates to the period after the dismissal. However, Mr Ghilardi says that he was humiliated by the "whole process" in that he was unable to talk to his colleagues and he was affected by his sudden departure from the restaurant. However, it seems that Mr Ghilardi's colleagues had formed their own views of his alleged behaviour and did not wish to work with him again. Nonetheless, I accept that the forced suddenness of his departure, without pay, in breach of the terms of his employment agreement, had an affect that entitles him to compensation pursuant to section 123(1)(c)(i) of the Act, in the sum of \$3,000.

[32] Under the provisions of s 124 of the Act, the Authority is required to:

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

I have given some thought to reducing the compensation payable to Mr Ghilardi but conclude that because it was the substantive breach of the suspension provisions of his employment agreement that led to the finding of unjustified disadvantage, Mr Ghilardi cannot be held to have contributed to the breach, hence the remedy should not be reduced.

### **(b) The unjustified dismissal**

[33] I have found that Mr Ghilardi was unjustifiably dismissed on a procedural basis, but the dismissal was substantively justified. Exercising the discretion available under s 123(1) whereby the Authority "may" in settling the grievance, provide various remedies; and the further discretion available under s 124 of the Act, I conclude that given the substantial extent to which Mr Ghilardi contributed towards the situation that gave rise to the personal grievance, including that I have found that the dismissal was substantively justified; I decline to award any remedies to him.

[34] In case there remains any doubt as to why I have concluded that Mr Ghilardi is not entitled to any remedies, the reasons (or causal connection) have been substantially advanced in the submissions for the respondent, which I largely accept, and are summarised as below, in that the actions of Mr Ghilardi:

- (a) Had the potential to bring the restaurant into disrepute through his alleged actions importing and possessing cocaine as evidenced by the visit by the Police.
- (b) Involved Mr Bianchessi (as a work colleague and a more junior employee) in an illegal action by asking him to take receipt of a parcel of Class A drugs which also had the potential to legally compromise him; and which resulted in the loss of Mr Bianchessi's employment at the restaurant.
- (c) Brought about criminal charges for which Mr Ghilardi faces a public trial which also has the potential to bring the name of the restaurant into the public arena.

(d) In addition to the above, by his actions, abused the trust and confidence that had been placed in him as Head Chef by:

- (i) Concealing from Mr Cucciniello what had happened in regard to the drugs charges but informing other employees.
- (ii) Instructing Mr Fierreira to mislead Mr Cucciniello regarding to the sudden reason for the departure of Mr Bianchessi.

(iii) Created a situation whereby other employees were not prepared to

work with him.

### **Determination**

[35] For the reasons set out above, I find that:

(1) Pursuant to section 103(1)(b) of the Act, Mr Ghilardi was unjustifiably disadvantaged in his employment. Under the provisions of section 123(1)(b) of the Act, Osteria Limited is ordered to pay to Mr Ghilardi the gross sum of \$1,000 for loss of wages; and under section 123(1)(c)(i) of the Act, the sum of \$3,000 as compensation.

(2) Mr Ghilardi was procedurally unjustifiably dismissed but the dismissal was substantively justified. There are no remedies awarded for the unjustified dismissal.

**Costs:** Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the outcome and that the investigation meeting was completed well within one day. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

**K J Anderson**

**Member of the Employment Relations Authority**

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[1] The evidence of Mr Bianchessi is that he stopped working at the restaurant on 2nd March 2010.

[2] The Authority is informed that the matter is before the District Court on 16th February 2011.

[3] When being questioned by Mr Pool, Mr Ghilardi informed that the police came to the restaurant to speak to him.

[4] Mr Cucciniello said that he acted on legal advice but he didn't have a copy of the employment agreement available at the time.

[5] *Nelson Air Ltd v NZALPA* [1994] 2 ERNZ 665.

[6] Mr Bianchessi.

[7] The Authority understands that Mr Ghilardi worked on the 10th and 11th March 2010.

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