

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 104/08
5124537

BETWEEN	JOSHUA HARRIS Applicant
AND	MEDIA ART GLOBAL LIMITED First Respondent
AND	KUBIKWELL LIMITED Second Respondent

Member of Authority: James Crichton

Representatives: Bradley McDonald, Counsel for Applicant
Dmitri Koubantsev, Advocate for Respondents

Investigation Meeting: 16 July 2008 at Christchurch

Determination: 23 July 2008

DETERMINATION OF THE AUTHORITY

The second respondent

[1] In the statement of problem filed in the Authority on 16 May 2008, the applicant (Mr Harris) argues that the second respondent (Kubikwell) ought to be joined to the proceedings on the basis that that firm on occasion paid his wages. Mr Harris also alleged in his evidence that on occasion he performed work for Kubikwell.

[2] Mr Koubantsev for the first and second respondents, sought to have Kubikwell severed from the proceedings on the footing that Mr Harris was employed by the first respondent (Level One), never performed duties for Kubikwell, and while it was accepted that Mr Harris had been paid by Kubikwell on occasion, that was in the nature of an inter-company loan from Kubikwell to Level One and was always the

subject of repayment arrangements as between Level One and Kubikwell. Payment of wages in that way to Mr Harris was a function of necessity because of cashflow problems for Level One.

[3] I am satisfied on the balance of probabilities that Kubikwell never employed Mr Harris, that in consequence there was no employment relationship between those two parties, and therefore that Kubikwell ought not to be joined in this proceeding. I therefore direct that Kubikwell is to be severed from the present proceeding.

[4] I reach this conclusion because I am not satisfied that there is any evidence at all that Mr Harris performed any duties for Kubikwell; it is true that Mr Harris performed duties similar to duties that he might have performed were he working for Kubikwell (that is cleaning duties), but in my opinion those cleaning duties are part of his job description in respect of his employment by Level One and the fact that Mr Harris was occasionally paid by Kubikwell is not determinative of an employment relationship. Indeed, the explanation provided on Kubikwell's behalf that cashflow difficulties of Level One precluded it meeting its obligations to Mr Harris is a perfectly reasonable explanation for why there were occasional wage payments from Kubikwell to Mr Harris.

[5] In consequence of this decision, Kubikwell is no longer a part of this present proceeding.

Employment relationship problem

[6] Mr Harris claims that he was unjustifiably constructively dismissed by Level One, suffered disadvantage by unjustified actions of Level One and that Level One breached its statutory obligation to act with good faith towards him.

[7] Level One denies the unjustified dismissal, deny unjustified actions causing disadvantage and deny acting in bad faith toward Mr Harris. There is, however, an acknowledgment that the early part of the process adopted by Level One in investigating complaints against Mr Harris may not have been as appropriate as it ought to have been.

[8] Mr Harris was employed initially as a barman at Level One and from 5 March 2008 Mr Harris was promoted to the role of night time bar manager with a new employment agreement and a wider span of duties.

[9] On 5 April 2008, Mr Harris was presented with what is described as a second written warning by Level One alleging that he had failed to fulfil some of his duties as the night time bar manager. It is accepted that this warning was in fact Mr Harris' first warning and Level One confirmed at the investigation meeting that the warning was in fact inappropriate; indeed, Mr Koubantsev gave evidence that he had told Mr Harris at the time that the warning was inappropriate, that it was not to stand, and that Mr Harris was to ignore it. I am satisfied then that the warning is of no further relevance to the employment relationship problem between these two parties.

[10] Mr Harris took a period of pre-arranged annual leave in April 2008 and returned to Christchurch on 21 April when he sent a text message to his immediate manager seeking to have confirmation of the hours that he was to work for the ensuing week. She told him that he had no hours allocated for the ensuing week.

[11] It took Mr Harris some little time to establish the position and eventually Mr Harris was able to establish by various telephone calls made by himself and by his mother that there was a serious complaint about him. Mr Harris was advised that the complaint was a verbal complaint brought by co-workers who alleged harassment and bullying.

[12] Eventually, a meeting was arranged at the premises of Level One at which Mr Harris attended with his mother and Level One was represented by the managing director of the employer and another director, Mr Koubantsev. It seems common ground that that initial meeting was simply a discussion about, in Mrs Harris' words, *what had gone wrong*. There was still no written material which Mr Harris could respond to but it became clear that Mr Harris was suspended without pay pending the resolution of the outstanding issues. Level One relies on the provision in the applicable employment agreement which provides that *no permanent and fixed hours are to be guaranteed* as justification for the suspension without pay.

[13] Eventually, on 1 May 2008, Mr Harris received via email copies of two statements from co-workers which form the basis of the allegations against him. He produced a detailed written response to those allegations and there was a further meeting between the parties on 8 May 2008 at the offices of Mr Harris' solicitor where the matters in contention were traversed again. The upshot of the meeting at the lawyer's office was a commitment from Level One that the disciplinary action

undertaken against Mr Harris was at an end, that there were to be no disciplinary sanctions and Mr Harris was free to return to duty.

[14] There is dispute about whether Mr Koubantsev said at the 8 May meeting that if Mr Harris returned to duty the women complainants would all leave, or not. Mr Harris and his mother both recall Mr Koubantsev making that observation at the 8 May meeting while Mr Koubantsev agrees that he said it, but he says that he said it at the earlier meeting at Level One's own premises.

[15] In any event, the 8 May meeting then proceeded to try to settle the employment relationship problem between the parties with each of them making an offer to the other which was not accepted. In the context of trying to settle the matter, Mr Koubantsev made the observation that his business was in financial difficulty and that there may well be some problem in Level One paying any more than it had in fact offered on this occasion. Mr Harris took these observations as a threat; Mr Koubantsev said that he was simply trying to be honest and straightforward.

[16] Mr Harris then determined to conclude his employment relationship with Level One on the basis that he felt he could no longer continue. In his oral evidence before the Authority, Mr Harris relied particularly in explaining that decision on the remarks that both he and his mother allege Mr Koubantsev made that if Mr Harris returned to the workplace, the women complainants would leave.

Issues

[17] The first issue for determination by the Authority is whether the investigation undertaken by Level One was a fair and reasonable one in all the circumstances.

[18] Next, the Authority needs to consider whether the evidence supports the view that Mr Harris has been unjustifiably constructively dismissed from his employment.

The investigation

[19] There can be no doubt that the investigation process adopted by Level One was an unsatisfactory one and did not, in any sense, comply with the law. Mr Koubantsev seemed to accept that the process was unsatisfactory when he was giving his evidence before the Authority. He immediately conceded that the people who were working for him had not done a good job in conducting the employment

investigation against Mr Harris and his evidence really was on the footing that after he personally took charge, the process got back on track. I accept those observations at face value. I think it is the case that Level One's senior staff did not perform creditably in the early part of this investigation, but once Mr Koubantsev was personally involved, he did his best to try to put matters right.

[20] It clearly cannot be a fair process to have an employee chasing around trying to establish what his work situation is, not being clear whether he is working or not and not being confronted with the nature and extent of any allegations against him until the eleventh hour.

[21] It became clear at the investigation meeting that Mr Harris had been suspended without pay in order for Level One to conduct inquiries about the complaints made against Mr Harris. However, it was some time before Mr Harris was able to establish by his own diligence and that of his mother that that suspension was in fact the explanation for why he had not been allocated any hours on his return from holiday.

[22] Further, the fact that the other principal complainant was herself also suspended without pay, was not clear to Mr Harris until the investigation meeting revealed that intelligence. Plainly, Level One ought to have told Mr Harris clearly and unequivocally as soon as he returned from his holiday that there was a complaint, that he was suspended without pay until that complaint had been properly investigated, and as soon as the complaint was reduced to writing, it should have been provided forthwith to Mr Harris in order that he could respond to it.

[23] In fact, none of that happened and the business of establishing just why he did not receive any hours in the week that he returned from leave was the subject of speculation by Mr Harris for some many days and it is clear that he did not receive the written complaints until 1 May, clearly some considerable time after they first became available to the employer. That is a completely unfair process and does not in any way accord with the requirements of the law. As soon as the complaint was made, Mr Harris ought to have that complaint put to him in clear terms so that he has an opportunity to reply to it. As I have indicated, that did not happen promptly at all, and in fact may never have happened if Mr Harris and his mother had not diligently tried to establish just what was going on.

[24] By the time of the second meeting on 8 May, Mr Koubantsev had had an opportunity to personally engage with the issues and between the first meeting and the second on 8 May, Mr Koubantsev had talked to all the protagonists and satisfied himself that there was no culpability on Mr Harris' part. Mr Koubantsev said he formed the view after talking to the young women who complained that they had been disgruntled when Mr Harris had been appointed to the role of night time bar manager and in Mr Koubantsev's words *the girls had decided to make your life hard*.

[25] Having reached the conclusion that there was no case to answer, Mr Koubantsev told Mr Harris at the 8 May meeting that the disciplinary process was at an end and that Mr Harris could return to work. Mr Koubantsev clearly thought that in making that announcement he had dealt with the problem, but of course he overlooked the reality that by then Mr Harris had taken legal advice and had suffered financial loss and emotional distress as a consequence of what had happened. Attempts to resolve those issues at the 8 May meeting were unsuccessful and Mr Harris then resigned his position.

[26] I am satisfied that the investigation process was unsatisfactory for precisely the reasons that Mr Koubantsev himself acknowledged. There was an unreasonable delay at the beginning of the process when Mr Harris was not told that he was suspended without pay and there was a further unreasonable delay when Mr Harris was not told the nature of the allegations against him until far too late. It was clear that the employer knew what the allegations were long before Mr Harris did, and that is simply not fair.

[27] I have no hesitation then in reaching the conclusion that there have been unjustified actions by Level One which have caused Mr Harris disadvantage by this unsatisfactory investigatory process.

[28] In the same general connection is the reliance on the *no fixed hours* provision in the employment agreement as a basis for suspending without pay. I do not accept that it is available to Level One to suspend without pay in reliance on that provision.

The constructive dismissal claim

[29] Mr Harris says that he was left with no alternative but to terminate his employment agreement once the parties had unsuccessfully tried to resolve the losses he had sustained in the unsatisfactory employment investigation. I do not believe that

Mr Harris had no choice and so my finding on this issue is that there is in fact no constructive dismissal at all but simply a voluntary resignation freely made in a situation where Mr Harris genuinely had an option.

[30] There is dispute about whether Mr Koubantsev made the remark about the female complainants leaving if Mr Harris came back. Mr Koubantsev acknowledges making the observation but he denies making it in the 8 May meeting. Mr Harris says that that observation was a material factor in encouraging him not to return to the workplace.

[31] Even if Mr Harris and his mother are correct in their recollection that Mr Koubantsev made the statement at the 8 May meeting, I am not sure that that helps Mr Harris' argument. Had he returned to the workplace and the female complainants had chosen to leave, that, one would have thought, would have made his return to work more straightforward than the converse. Either way, I do not think that Mr Harris was in any sense forced to leave work. His conduct had been vindicated and the claim against him dismissed so he was effectively exonerated from any wrongdoing.

Determination

[32] Mr Harris has satisfied me that he has suffered disadvantage as a consequence of the unjustifiable actions of Level One in the inappropriate way in which the disciplinary process was originally handled. Mr Harris is entitled to remedies.

[33] In respect of Mr Harris' allegation that he was unjustifiably constructively dismissed, as I have just noted, I have not found that allegation proven and accordingly I dismissed it.

[34] Before determining the level of remedies that are appropriate for Mr Harris, I note that there was significant evidence given at the investigation meeting about the financial position of Level One. The principal asset of the business has been sold and the proceeds of sale have been disbursed to defray creditors. It appears there is significant money still owed to creditors and the ability to sustain and satisfy any award made by the Authority must be in doubt.

[35] However, Mr Harris was advised of the risk before proceeding with the investigation meeting and he will understand that the determination of the Authority will need to be enforced by him in the usual way.

[36] Section 124 of the Employment Relations Act 2000 requires me to consider whether Mr Harris' behaviour contributed in any way to the circumstances giving rise to his personal grievance. I am satisfied that Mr Harris made no contribution at all to the circumstances giving rise to his personal grievance. Indeed, were it not for his (and his mother's) diligent pursuit of Level One to establish just what was going on, the matter might never have been brought to a head at all.

[37] There is no question that Mr Harris suffered hurt, humiliation and injury to his feelings as a consequence of the unsatisfactory nature of the investigation process. He was put under unreasonable strain by the long drawn out nature of the process and its uncertainty. I direct that Level One is to pay to Mr Harris the sum of \$1,000 under s.123(1)(c)(i) of the Employment Relations Act 2000.

[38] Mr Harris has also lost wages as a consequence of his personal grievance but because of my finding that he resigned of his own accord, his wages loss is more modest than would otherwise have been the case. I direct that Level One is to pay Mr Harris the sum of \$3,240 gross being one month's wages.

[39] I must deal with the allegation of bad faith. I do not find evidence of bad faith. I was impressed by the straightforward evidence of Mr Koubantsev and while finding against Level One do not consider Level One acted in bad faith.

Costs

[40] Mr Harris has incurred legal costs in progressing his personal grievance. His claim has been partially successful. Given the financial predicament of Level One and the need to restrain legal costs as far as is possible, I do not propose, on this occasion, to require the parties to negotiate costs or indeed to provide me with submissions as to costs.

[41] I direct that Level One is to pay to Mr Harris the sum of \$750 as a contribution to his costs.

Concluding observation

[42] The Authority expresses the hope that Mr Harris will now feel able to put this matter behind him, whatever his success in obtaining satisfaction of the Authority's award from his employer, Level One. Mr Harris is encouraged to reflect on the fact that Mr Koubantsev, on behalf of Level One, has already exonerated him from wrongdoing at the meeting of 8 May 2008 and this decision of the Authority may also assist him in concluding this chapter of his life.

James Crichton
Member of the Employment Relations Authority