

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 138
3007651

BETWEEN KENNETH ARTHUR
 HEAGREN
 Applicant

AND HARD LEFT LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Kenneth Heagren in person
 Debby Deaker, Advocate for Respondent

Investigation Meeting: 27 July 2017 at Christchurch

Submissions: 2 August 2017 from Applicant
 6 August 2017 from Respondent

Determination: 11 August 2017

DETERMINATION OF THE AUTHORITY

- A Hard Left Limited is not required to reimburse Kenneth Heagren for his off-site accommodation costs.**
- B Kenneth Heagren is owed additional payment for working on public holidays. The Authority has set out three different scenarios and different amounts owed in each pending confirmation as to what anniversary holiday was observed at the Bealey Hotel. The Authority has set out a timeframe for that information to be provided and, once confirmed, payment for work on a public holiday should be made within five days by Hard Left Limited.**

C Kenneth Heagren was unjustifiably dismissed from his employment and the following orders have been made for payments as below:

- (i) \$5,288.46 gross for lost wages under s 123(1)(b) of the Employment Relations Act 2000. This takes into account three weeks in lieu of notice paid to Mr Heagren.**
- (ii) \$7000 without deduction for compensation under s123 (1)(c)(i) of the Employment Relations Act 2000.**

D The Authority is not satisfied that Kenneth Heagren has been paid his holiday pay correctly. Kenneth Heagren is to provide Inland Revenue Department records of his earnings from Hard Left Limited within 10 working days from the date of this determination. Hard Left Limited within the same time frame is to provide records of any amount paid in advance for annual holidays to Mr Heagren. The Authority will then calculate the holiday pay.

E Hard Left Limited is to pay to Kenneth Heagren the sum of \$71.56 being reimbursement of the filing fee.

Employment Relationship Problem

[1] Kenneth Heagren commenced employment with Hard Left Limited on 30 August 2016 at the Bealey Hotel near Arthurs Pass as a Head Chef. Before he commenced that role he had been working in the North Island. Hard Left Limited (Hard Left) is a duly incorporated company which owns and operates the Bealey Hotel. The company has two directors, Marshall Deaker and Debby Deaker. Mrs Deaker attended the investigation meeting on behalf of the respondent.

[2] Mr Heagren's last day of work at the Bealey Hotel was 4 December 2016. Mr Heagren says that he was unjustifiably dismissed. Mrs Deaker says that the relationship ended by way of resignation or mutual agreement to terminate.

[3] Mr Heagren seeks the following remedies in his statement of problem:

- (a) Four weeks' pay in lieu of notice;
- (b) One additional week's pay for failure to give notice;
- (c) One week's pay for hours worked;
- (d) One week's holiday pay;
- (e) Three days' pay for working two public holidays without penal rates being applied;
- (f) Repayment of accommodation costs;
- (g) Compensation in the sum of \$25,000; and
- (h) Reimbursement for lost wages for 13 weeks at \$1,057.70 per week gross.

[4] Mr Heagren seeks a reference however that is not a remedy the Authority is able to award under s 123 of the Employment Relations Act 2000 (the Act). Mr Heagren also wanted a final payslip. A final payslip was not provided before or at the investigation meeting which makes calculation about what was actually paid to him difficult. I will have to work out from the limited records provided by Hard Left and Mr Heagren's bank statements the amounts paid to Mr Heagren following the end of the relationship and what they were for.

[5] Hard Left do not accept that Mr Heagren is entitled to any remedies for his claim of unjustified dismissal or notice. It concedes that Mr Heagren was not paid correctly for statutory holidays but says that it paid his holiday pay.

[6] The parties did not attend mediation. Mr Heagren was very keen to do so but for whatever reason mediation did not occur although there were dates on which mediation was to have been held. It would in my assessment have been very helpful in this case.

Issues

[7] The issues for the Authority to resolve in this matter are:

- (a) Was there agreement that Mr Heagren's accommodation costs off-site would be reimbursed by Hard Left?
- (b) Is money owed for work on public holidays/alternative days?

- (c) How did the relationship between the parties end?
- (d) If Mr Heagren was not dismissed then was notice paid in accordance with the employment agreement?
- (e) If Mr Heagren was dismissed then was the dismissal justified?
- (f) If the dismissal was unjustified then what remedies are available and are there issue of contribution and mitigation?
- (g) Was Mr Heagren paid correctly for his holiday pay?

Was there agreement that Mr Heagren's accommodation costs off-site would be reimbursed by Hard Left?

The individual employment agreement

[8] Mr Heagren was provided with the Hospitality New Zealand Limited individual employment agreement on or before he commenced his employment in August 2016. He did not sign the agreement until in or about September 2016 although the date of signature in the agreement itself is typed as 30 August 2016.

[9] The trial period provision in clause 7 of the employment agreement for the first 90 days of employment was deleted. There is no reference in the employment agreement to accommodation. The salary and the hours of work are contained in schedule A to the employment agreement. Schedule A reflects the salary as \$55,000 gross plus bonuses as mutually agreed. The hours are expressed as flexible but generally 10am to 2pm and 5pm until finish.

Agreement about provision of on-site accommodation

[10] At the time of the interview and when Mr Heagren arrived back from the North Island to commence his employment with Hard Left he was able to stay in a self-contained motel unit on-site at the Bealey Hotel. During the summer months, the high season, Mr Heagren was told his accommodation would be in a room in Moa Lodge on-site. There was no dispute that Mr Heagren was provided accommodation free of charge on-site as a term and condition of his employment.

Dispute about reimbursement for rent paid for off-site accommodation

[11] The issue for resolution by the Authority is whether there was agreement that Mr Heagren's rental would be paid when he rented off-site from in or about mid-September 2016. Mr Heagren has a teenage daughter who stays with him during school holidays. He did not think the on-site accommodation at the Bealey Hotel was suitable for his daughter and wanted to see if he could rent some other accommodation. Mrs Deaker assisted him by discussing options and driving him to a Department of Conservation (DOC) flat in Arthurs Pass village which he ended up renting. Mr Heagren's driving licence was suspended at the time.

[12] Mr Heagren entered into the tenancy agreement for the DOC accommodation from in or about September 2016 and paid the rent himself. This arrangement continued after the school holidays ended until the end of the employment relationship. I put to Mr Heagren why he did not after the school holidays simply move back to the on-site accommodation. He said that he did not think DOC would have been happy with such a short term rental.

[13] Mr Heagren said that he assumed from an initial discussion with Mrs Deaker about a house to rent across the road from the Bealey Hotel that Hard Left would reimburse him for rent. This appears to be because Mrs Deaker told him that they used to rent the house across the road for staff accommodation.

[14] Mrs Deaker denies that there was any agreement Hard Left would pay rent for accommodation for Mr Heagren when he rented off-site or any discussion that could support that. Mr Heagren said that on 9 October in a discussion with Mr Deaker he was advised that Hard Left did not pay for off-site accommodation and that Mr Heagren would have to bear the cost himself.

Conclusion about accommodation

[15] I am not satisfied from the evidence that Hard Left agreed to pay rent for Mr Heagren's off-site accommodation. The claim for reimbursement of accommodation costs is not made out.

Public holidays and payment

[16] The first public holiday Mr Heagren says he worked was Monday 26 September 2016. The second public holiday was Monday 24 October 2016. Mr Heagren says that he was not paid time and a half for working on those days and was not paid for an alternative day.

[17] Mrs Deaker did not dispute that there was no payment at time and a half or for alternative days but seemed less clear about what public holiday fell on 26 September 2016. I will turn to that shortly but I want to set out what the obligations are when an employee works on a public holiday.

Section 50 of the Holidays Act 2003 – payment of time and a half

[18] The payment required to be made if an employee works on a public holiday is found in s 50 of the Holidays Act 2003. When an employee works in accordance with their employment agreement on a public holiday they must be paid at least time and a half. Clause 9.3.5 of the employment agreement between Mr Heagren and Hard Left confirms this.

Section 56 of the Holidays Act 2003 – alternative days

[19] Under s 56 of the Holidays Act 2003 an employee is entitled to another day's holiday known as an alternative day if the public holiday falls on a day that would otherwise be a working day for an employee and the employee works on any part of the day. Conversely if an employee works on a public holiday that is not otherwise a working day the employee shall be paid time and a half for the time actually worked but has no entitlement to an alternative holiday. Clause 9.3.7 and clause 9.3.8 of the employment agreement confirm that.

How to determine what is otherwise a working day

[20] The Authority determines what would otherwise be a working day under s 12 of the Holidays Act and takes into account factors listed in s 12(3) including the employment agreement, work patterns, rosters, reasonable expectations and whether, but for the day being a public holiday the employee would have worked on the day concerned.

[21] Mr Heagren said that he often had Monday as one of his rostered days off. There was no written information provided about the days Mr Heagren worked or his rosters. I did note Mr Heagren's evidence that after a meeting that assumes some importance in this matter on Sunday 27 November 2016 Mr Heagren then had Monday 28 and Tuesday 29 November as his rostered days off.

[22] Clause 6.1 of the employment agreement provides that the ordinary hours of work should not normally exceed 40 hours in any one week and may be worked on no more than five days of the week Monday to Sunday. Clause 6.2 provides further that where the employee and employer agree the ordinary hours may be spread over 6 or 7 days and/or

exceed 40 hours per week. In terms of those clauses however the evidence supported Mr Heagren usually had Monday as one of his two days rostered off.

[23] I conclude from the evidence that Mr Heagren worked 26 September and 24 October 2016 on what, had they not been public holidays, would not otherwise have been working days for him.

26 September 2016 or 11 November 2016

[24] I want to now consider the date of 26 September 2016. That was South Canterbury anniversary day. Days that are public holidays include the day of the anniversary of a province or the day locally observed as that day.

[25] I am not sure if the South Canterbury anniversary was observed at the Bealey Hotel. The other likely anniversary would be the Canterbury Anniversary which was observed in 2016 on 11 November. I find if it is the latter date and it was worked then Mr Heagren would be entitled to payment for an alternative day as well as payment at time and a half as there was no evidence that Friday was other than a working day for him. Mr Heagren was still working on 11 November at the Bealey Hotel.

[26] That leaves an exact calculation of what is owed somewhat up in the air which is not desirable. Mrs Deaker is to, within 5 days of the date of this determination, advise the Authority and Mr Heagren of the anniversary day observed at the Bealey Hotel. Mr Heagren has a further 5 days to respond if he so wishes. If the Canterbury anniversary is the anniversary observed Mrs Deaker is to confirm whether Mr Heagren worked that day.

[27] To assist the parties in hopefully being able to conclude this matter on their own I have calculated payments in the following scenarios based on the above reasoning.

First scenario if 26 September 2016 was the observed anniversary day

[28] If the public holidays worked are 26 September and 24 October 2016 then Mr Heagren should have been paid at time and a half for each day worked. I have calculated what should be paid in that scenario for both days as \$211.54 gross. I have done this on the basis of salary only because there is no evidence of other payments which is \$55,000 divided by 52 weeks and I arrive at a weekly figure of \$1057.70. That weekly sum then divided over five days provides a daily rate of \$211.54. I have multiplied that daily rate by 0.5 to arrive at \$105.77. That figure then multiplied by two days is \$211.54 gross.

Second scenario if 11 November 2016 was the observed anniversary day and it was worked

[29] If the anniversary public holiday observed at the Bealey Hotel is Canterbury anniversary day and it was worked by Mr Heagren then the payment owing is \$211.54 gross as above for time and a half for that day and Labour Day and then a further sum of \$211.54 gross for one alternative day. That is an amount in total of \$423.08 gross.

Third scenario if 11 November 2016 was the observed anniversary day and it was not worked

[30] If the anniversary public holiday observed at the Bealey Hotel is Canterbury anniversary day and it was not worked by Mr Heagren then he is entitled to payment at time and a half for working on Labour Day. That is the sum of \$105.77 gross.

[31] Once the anniversary date is confirmed then Mrs Deaker should attend to payment of the amount owing in accordance with the correct scenario above within five days.

How did the relationship between the parties end?

[32] Bealey Hotel is managed alternatively by Mrs Deaker, her husband Marshall, their daughter Siobhan, and Siobhan's partner Thomas. The relationship between Mr Heagren and Thomas when he was managing the Hotel had become somewhat difficult. Mr Heagren described Thomas as being obstructive to changes that he wanted to make to the menu and uncooperative. Mrs Deaker in her evidence said that Thomas in turn became annoyed with Mr Heagren's refusal to take feedback and direction.

[33] These difficulties were known by Mr and Mrs Deaker and in all likelihood, I find, raised from time to time by Mr Heagren as an issue. Matters came to a head on or about 23 November 2016. Mr Heagren explained that Thomas had intervened in the cooking of a steak that he had undertaken in a particular way for a client and there had been a flare up.

[34] Mr Heagren felt that it had become impossible to do his job and spoke to Mr Deaker about a meeting to discuss the matter saying that he would prefer Thomas not work in the kitchen until matters were resolved. Mr Heagren said that he thought there might be a staff meeting involving Thomas to decide a way forward. Mr Deaker said that he wanted to wait until his wife returned from Karamea before they had a meeting. Mr Heagren said, and I accept this, that no date was given at that time for a meeting.

Meeting takes place 27 November 2016

[35] After work on Sunday 27 November 2016 at or about 10pm Mr Heagren was asked to join Mr and Mrs Deaker at a table in the restaurant near the bar. There are two quite different accounts of what was said.

Mr Heagren's account of the meeting

[36] Mr Heagren's account of the meeting is that he was immediately informed that Mr and Mrs Deaker had decided to replace him with another chef as things were not working out and that he should look for another job. He said that he was told about performance and staff relationship concerns. Mr Heagren said that he was concerned at the lack of a fair process about those matters and that he thought the situation was still retrievable if they would work constructively with him. Mr Heagren said that the Deaker's felt matters had gone too far and they wanted a fresh start with a new chef. Mr Heagren said that Mrs Deaker asked him what he wanted to do and that he replied if they could not work things out rationally and their minds were made up then he did not have any options left. He said that he was not prepared to continue the discussion and his written evidence provided that he would see them in the morning. Mr Heagren denies any discussion about a notice period.

[37] Mr Heagren said that the next two days were rostered days off and he asked for 30 November off to attend a job interview. Mr Heagren told me that the job he interviewed for was not suitable for him as it was part-time and not the work he wanted.

[38] On 1 December 2016 Mr Deaker asked Mr Heagren about how he was progressing with finding another job and mentioned the time taken off to go for an interview. Mr Heagren advised that the job was not suitable. Mr Heagren said that Mr Deaker advised that Mrs Deaker was returning from Christchurch with a replacement chef so Sunday [4 December 2016] would be Mr Heagren's last working day. Mr Heagren said that he thought this was unfair and that he was entitled to notice and Mr Deaker said something to the effect that he would pay Mr Heagren more than he was entitled to.

[39] The replacement chef arrived at the Bealey Hotel over the weekend 3 and 4 December 2016 and on Sunday 4 December Mr Heagren was advised that he could finish at lunch time and was not required to come back for the evening shift but could return for a drink and a meal. Mr Heagren said it was at that point that there was some discussion about notice. Following that there were some issues around returning a vacuum cleaner belonging to the

hotel. There was some money paid to Mr Heagren although he was unable to ascertain what the payments were for.

Mrs Deaker's account of the meeting

[40] Mrs Deaker said that she was asked by Mr Deaker to attend a meeting requested by Mr Heagren and she drove down from Karamea on 27 November 2016 which was a Sunday afternoon in order to attend.

[41] Mrs Deaker said that after the dinner service the meeting took place at a table by the fire. Mrs Deaker said that Mr Heagren raised two issues as ultimatums. The first that he would no longer work with Thomas in the kitchen and the second was that he required a new oven.

[42] Mrs Deaker said that the purchase of a new oven was only a timing issue about selecting the most suitable oven. The issue she said they were firm on was that Thomas would definitely be staying in the kitchen and be involved with quality control.

[43] Mrs Deaker said that there was therefore an impasse and she asked Mr Heagren what he wanted to do. Mr Heagren then put that question back to Mr and Mrs Deaker. There was then an awkward silence. After a period of awkwardness and silence Mrs Deaker said that Mr Heagren said "well I guess I'll leave then". She said that he added "because they would not give him what he reasonably requested and that they did not think he could do the job or they would not have Thomas checking up on him he would start looking for something else."

[44] Mrs Deaker said that the conversation then "turned to compensation". She said that Mr Heagren explained it had cost him \$2000 to come down from the North Island and she responded that the recruitment agency had cost \$2000. Mrs Deaker said that Mr Deaker then said that "we will look after you Ken we will pay you four weeks' pay even if we get someone else before the notice is up". Mrs Deaker said Mr Heagren replied "we will do four weeks but if you get someone earlier then you need to give me five weeks". She said that Mr Heagren went over to where the employment agreement was and turned to the relevant notice clause about termination in the employment agreement. Mrs Deaker said that she did not agree that was right and said she would check with the Hotel Association.

Credibility

[45] Before setting out my conclusion about the meeting on 27 November 2016 I want to make some initial comments about assessing credibility. Mrs Deaker in her evidence raised issues about Mr Heagren to demonstrate that his evidence was not credible. Mr Heagren felt that the evidence was quite unfair.

[46] It is very unusual to make what is known as a blanket finding of credibility. That is a finding where you accept or reject all of the evidence of a witness. To make such a blanket finding of credibility can be unfair because it does not allow for the fact that people have different views about what they heard at the same meeting. There can also be a subconscious reconstruction of facts by a party to suit the case subsequently presented or defended. Those matters do not necessarily mean there is deliberate untruthfulness. The main area in dispute in this matter is how the relationship ended. In order to determine that, the focus falls on the exchange that took place on 27 November 2016 and what account is, on the balance of probabilities, more likely.

Conclusion on how the relationship ended

[47] I prefer Mrs Deaker's account as more likely that Mr Heagren raised two matters that were of concern to him toward the start of the meeting on 27 November 2016. I do not conclude that Mr Heagren was told at the outset that he was being replaced because I accept Mrs Deaker's evidence the meeting was to listen to what Mr Heagren had to say. It is also, I find, much less likely on Mr Heagren's account that if that indeed was what had been said at the outset he would have been asked what he wanted to do. Mr Heagren said something to the effect that he might as well leave and look for another job following confirmation Thomas would remain in the kitchen, discussion about performance, silence, and a question about his intentions.

[48] Whether there was any discussion about notice at that meeting is another area of dispute. I am not satisfied that Mr Heagren made a statement that notice ran from the date of the meeting or that Hard Left could terminate his employment if they found a replacement chef. I find that the date notice would commence and in turn the date the relationship would end was unclear as at 27 November 2016

[49] In later submissions Mrs Deaker says that Mr Heagren made it clear to other employees' he was giving four weeks' notice. The account of the exchange, I find, in Mrs Deaker's written statement of evidence does not go that far and I cannot be satisfied of that. If there was discussion about notice then I find it was in all likelihood about what notice

would be required. I find it more likely that any discussion about forfeiture or payment of a week's notice did not take place until a later date when it was clear a replacement chef had been employed.

[50] I do not find, even on Mrs Deaker's evidence, the words spoken by Mr Heagren along the lines "well I'll guess I'll leave then" and "I'll look for something else" could safely be relied on as his resignation without further discussion and clarification. I find the discussion about the amount of money Mr Heagren had paid to come to work at the Bealey Hotel supported the need to clearly identify what Mr Heagren's future intentions were.

[51] Mr Heagren's words, I find, were seized upon as his resignation and an immediate search was commenced by Hard Left to find a replacement chef. Mr Heagren in his evidence suggested that steps had already been taken to replace him with the new chef. Information provided by Mrs Deaker after the investigation meeting supports that it was not until after 27 November 2016 that Mrs Deaker received an email with the new chef's curriculum vitae. Mr Heagren was then advised a new chef had been employed and told that his last day would be the following Sunday 4 December 2016. It was noted by Mrs Deaker that Mr Heagren was "a bit grumpy and not happy" when advised about the replacement chef.

[52] I accept that there were concerns for Mrs Deaker in finding another chef for the summer season. What a fair and reasonable employer could have been expected to have done is to have talked to Mr Heagren after 27 November 2016 to confirm that he intended to resign and when that resignation would take effect before taking steps to employ someone else. I asked Mrs Deaker why she did not delay the commencement date of the new chef until it had been confirmed with Mr Heagren that he would resign and when that would occur. Mrs Deaker said in response that she was concerned about the quality of the food Mr Heagren was producing.

[53] Mr and Mrs Deaker did not have legal or human resource advice at the meeting on 27 November but talking to Mr Heagren to confirm his intentions about what he was to do and when is not a matter of expense but rather communication in accordance with good faith. They relied on an equivocal exchange to end the employment relationship. Mrs Deaker said that she regretted not asking for a written resignation and I agree that would have

been a sensible step in the circumstances of this case. Case law supports that an apparent resignation can also amount to a dismissal depending on the facts of the case.¹

[54] I find, based on the above, that Mr Heagren was actually dismissed from his employment on 4 December 2016 after he was advised a new chef would be starting work and that would be Mr Heagren's last day. I do not find that Mr Heagren resigned on 27 November or that there was a mutual intention to end the employment. The exchange that was had on 27 November 2016 was not clear enough to be regarded as an unequivocal resignation. Notwithstanding that Mr Heagren's words were seized upon and relied on to replace him with a new chef the following week without further clarification and discussion.

Was the dismissal unjustified?

[55] The Authority has determined that there was a dismissal. Section 103A of the Employment Relations Act 2000 (the Act) contains the test of justification to be applied when determining if a dismissal was justifiable. The Authority must objectively determine whether the actions of Hard Left and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[56] The Authority must, in applying the test, consider the four procedural factors set out in s 103A 3(a) to (d) of the Act and any other factors it thinks appropriate. It must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[57] A fair and reasonable employer will also comply with the statutory obligations of good faith.

[58] I have firstly considered why Mr Heagren's words at 27 November 2016 were seized upon and considered to amount to a resignation without further discussion. Mrs Deaker in her evidence said that she considered Mr Heagren presented her and Mr Deaker with an ultimatum about Thomas on 27 November 2016 and the only way forward would have been for him to have rescinded his ultimatum. Mr Heagren then said that he would start looking elsewhere which was taken as a resignation.

[59] Mr Heagren did not accept that he presented an ultimatum that if not accepted would result in the end of employment. He said he wanted to work out a way of operating

¹ *Boobyer v Good Health Wanganui Limited* EC Wellington 24 February 1994 WEC 3/94

satisfactorily with Thomas. When I consider the evidence objectively I find that some performance concerns were part of the decision to seize on Mr Heagren's words. As I pointed out to Mr Heagren and Mrs Deaker there had been no formal performance process in accordance with the employment agreement. Mr Heagren had not been advised of the concerns and the corrective actions required and that a failure to improve may result in termination. Mrs Deaker, I accept, raised matters from time to time in passing to Mr Heagren but not in the formal way envisaged in the employment agreement. I do not find that Mr Heagren could have been dismissed justifiably without such a process for performance concerns.

[60] Instead of using a fair process Mr Heagren's words that he "guessed he would leave and start looking for something else" were seized upon and steps were taken almost immediately to replace him. He was then advised he had been replaced and his last day would be 4 December 2016.

[61] I do not find that the requirements for a fair process in s 103A (3) (a) to (d) of the Act was met by Hard Left. Allegations or concerns were not put to Mr Heagren before he was dismissed. He had no opportunity to respond to them and his explanations could not be considered as to whether the employment relationship could continue. These were not minor defects and Mr Heagren was treated unfairly as a result.

[62] I find that the dismissal was unjustified. I do not find that the actions of Hard Left in dismissing Mr Heagren were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Mr Heagren has a personal grievance that his dismissal was unjustified.

Remedies

Lost Wages

[63] After his dismissal Mr Heagren shifted to Reefton on the West Coast. He had previously arranged to do the catering for a friend's daughter's wedding in early January and he said that for the remainder of December/January 2016/17 he did not "do a lot of looking for a job". Further he said that as it was the high season most chefs were already in work. Mr Heagren was in receipt over this time of the disability benefit for a condition he had whilst working at the Bealey Hotel and his bank statements support that there was no income for the

thirteen weeks and indeed beyond aside from the disability benefit. Mr Heagren said that after January 2017 he applied for roles through Trade Me although no records were provided.

[64] Mr Heagren wants to be reimbursed for thirteen weeks lost wages. As I advised Mr Heagren if I got to this point, issues about adequacy of notice paid are absorbed in the assessment of lost wages and do not require separate determination. It is necessary though to work out what payments were made to Mr Heagren for payment in lieu of notice and whether he was paid correctly for holiday pay.

What was Mr Heagren paid in lieu of notice?

[65] According to Hard Left's Ace payroll record Mr Heagren was paid a total gross payment for salary when he worked at Hard Left of \$14,807.66. Holiday pay in the sum of \$1,184.60 gross is showing as paid. Mr Heagren's bank statements show that he usually received \$828.19 per week net. On 5 December the company records show that Mr Heagren was paid \$1605.42 net and on 13 December \$2,484.57 net.

[66] I accept that the payment made on 13 December in all likelihood reflects three payments of \$828.19 net which would support payment of three weeks' notice. Part of the payment on 5 December is, I find, in all likelihood payment of wages for hours worked in the final week up to that date. I will deal with the balance of the payment when I turn to consider whether Mr Heagren was paid correctly for holiday pay.

Assessment of reimbursement of lost wages

[67] Section 128 of the Act provides that where the Authority finds an employee has a personal grievance and the employee has lost remuneration as a result, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or up to 3 months ordinary time remuneration.

[68] Mr Heagren received three weeks payment in lieu of notice. There was limited evidence of any attempts to mitigate loss although after January Mr Heagren said he did apply for jobs. There was some suggestion that Mrs Deaker had spoken poorly of Mr Heagren to another chef and that this had impacted on his ability to obtain work. There was no other evidence to support that that impacted on Mr Heagren finding work. I need to consider how long the employment relationship at Bealey Hotel would have continued.

[69] Mr Heagren had indicated that he would look elsewhere for work and Hard Left had issues that needed discussion and resolution if the relationship continued. If there had been proper discussion and confirmation of Mr Heagren's intentions then I cannot be satisfied that the relationship would have continued for the full thirteen weeks. It is likely Mr Heagren would have found another role or there may have been some mutual agreement to end the relationship on terms agreeable to all. I find in the circumstances of this matter it would be fair and reasonable to assess lost wages on the basis of an eight week period less three weeks wages paid in lieu of notice.

[70] Subject to contribution Mr Heagren is entitled to payment for reimbursement of lost wages for a period of eight weeks less three weeks already paid in lieu of notice in the sum of \$5288.46 gross (5 x \$1057.70).

Compensation

[71] Mr Heagren claims the sum of \$25,000 under this head.

[72] He said that he was humiliated on 27 November 2016 because the meeting was in front of other people at the bar and they heard what was being said and went outside to give him some privacy. Mrs Deaker said that they were going outside to smoke. Mr Heagren said that he had spent money to obtain a limited licence to work at the Bealey hotel at some cost and to relocate from the North Island. He felt that the situation had affected his career prospects and that there were unfounded challenges to his credibility and professionalism. He specifically said that Mrs Deaker had spoken to another chef about his abilities in a critical manner. He was concerned that Mrs Deaker had in preparation for the investigation meeting at the Authority contacted his referees and asked them a question that he felt brought his honesty into question. Mrs Deaker had not contacted the referees before Mr Heagren commenced his employment.

[73] I accept that the dismissal had an impact on Mr Heagren and that there was a measure of embarrassment for him that the meeting on 27 November 2016 was held in the presence of others although I cannot conclude with certainty what those people heard. Although Mr Heagren had indicated that he would look for another job he ultimately lost control over how the relationship would end and when. I accept that he felt a loss of control about contact with his referees and what they may conclude from those discussions. In all the circumstances I find a suitable award for compensation is the sum of \$7000.

[74] Subject to any issues of contribution Mr Heagren is entitled to payment of the sum of \$7000 for compensation under s 123 (1)(c)(i) of the Act.

Contribution

[75] I am required to consider under s 124 of the Act whether Mr Heagren's actions contributed to the situation that gave rise to the personal grievance and if so reduce the remedies that would otherwise be awarded.

[76] The matter that I have turned my mind to is whether Mr Heagren led Mr and Mrs Deaker to conclude that he was resigning and that their subsequent actions that I have found were unjustified were based on that. I have not found that Mr Heagren's statements about leaving were unequivocal but they were seized upon as his resignation. Further clarification and discussion was required. That did not occur. In those circumstances I am not satisfied that there is a causal connection between what Mr Heagren said on 27 November and the action of employing someone to replace Mr Heagren without further discussion and clarification.

[77] I do not find there were actions on the part of Mr Heagren that are blameworthy and should lead to a reduction of remedies.

Was Mr Heagren paid correctly for holiday pay

[78] I remain unclear about whether Mr Heagren received his correct amount for holiday pay. Mr Heagren was paid the sum of \$1605.42 net on 5 December 2016. Of that sum, \$828.19 was payment for hours worked. The amount to be attributed to holiday pay is the balance of \$777.23 net. I am not able to conclude with certainty that is the correct net payment for holiday pay.

[79] Holiday pay is calculated if employment ends within 12 months under s 23 of the Holidays Act 2003. An employee is to be paid 8% of gross earnings since the commencement of employment less any amount paid for annual holidays in advance.

[80] In order for me to undertake such a calculation Mr Heagren is to provide the Authority and Mrs Deaker, within 10 working days, a record of gross earnings from Hard Left held by the Inland Revenue Department. Mrs Deaker is to provide within 10 working days any amount paid in advance for annual holidays to Mr Heagren. I shall then determine what is owed for holiday pay.

[81] I record that the Authority, in its notice of direction dated 6 June 2017, did ask for amongst other matters wage and time records, holiday and leave records and from Mr Heagren his Inland Revenue records for the period of his employment. These were not provided.

Costs

[82] Mr Heagren and Mrs Deaker were unrepresented. Mr Heagren is entitled to be reimbursed for his filing fee in the sum of \$71.56.

Orders made

[83] The following orders are made:

- a. I order Hard Left Limited to pay to Kenneth Heagren the sum of \$5288.46 gross for reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.
- b. I order Hard Left Limited to pay to Kenneth Heagren the sum of \$7000 without deduction for compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000.
- c. I order Hard Left Limited to pay to Kenneth Heagren the sum of \$71.56 being reimbursement of the filing fee.

[84] Mrs Deaker is to within five days from the date of this determination provide information about the anniversary date observed at the Bealey Hotel.

[85] Mr Heagren is to within ten working days of the date of this determination provide his record of earnings from the Inland Revenue Department. Mrs Deaker is to within ten working days of this determination provide details of any amount paid for annual holidays in advance.

Helen Doyle
Member of the Employment Relations Authority