

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 115  
5371845

BETWEEN RYAN LA ROCHE  
Applicant  
AND VICTORY ENTERPRISES  
LIMITED  
Respondent

Member of Authority: Alastair Dumbleton  
Representatives: Hamish Burdon, advocate for Applicant  
Alice Gower, counsel for Respondent  
Investigation Meeting: 20 November 2012  
Submissions Received: 23 and 28 November 2012  
Date of Determination: 4 April 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. When the parties were in an employment relationship Victory Enterprises Ltd acted without justification and to the disadvantage of Ryan La Roche. He has a personal grievance for that reason.**
- B. To remedy the grievance Victory Enterprises Ltd must pay \$2,311.20 to Mr La Roche in reimbursement of lost remuneration, including holiday pay, and \$1,000 as compensation for humiliation and hurt feelings suffered by him. Victory Enterprises Ltd may withhold \$300 as repayment of money lent to Mr La Roche.**
- C. Victory Enterprises Ltd must pay \$3,000 to Mr La Roche as a contribution to costs and expenses incurred in obtaining**

**representation. The company is also to reimburse Mr La Roche the fee of \$71.56 he paid to make his application to the Authority.**

### **Employment relationship problem**

[1] The problems brought by the applicant, Mr Ryan La Roche, to the Authority for investigation and determination arose from a relationship of employment. When he lodged his application in the Authority, Mr La Roche considered his employer had been Mr Allan Webb but at the investigation meeting he accepted that the contract had been with Victory Enterprises Ltd, a company Mr Webb owns and controls.

[2] By consent a change of respondent party was made during the meeting, enabling it to proceed without delay.

[3] Through his company Mr Webb operates a cinema, the Regent Theatre, and has done so since 1974. The cinema, in Te Awamutu, can screen five movies at the same time and to assist in that work has up to 10 staff engaged. They are mostly part-time employees.

[4] Mr La Roche started work at the cinema in June 2009 when he was 17 years old.

[5] One of the issues for determination by the Authority is whether his employment was on a casual or permanent part-time basis. When he started Mr La Roche was not given a written employment agreement, as by law he should have been. The form he filled in when applying for the job described the position as “casual cinema attendant” and stated “The position is casual: we do not guarantee you work beyond the current roster.” But the form also stated prominently:

***You must be AVAILABLE for ALL weekends AND school holidays in case you are needed.***

***If you cannot commit yourself to this then DO NOT fill in this form.***

[6] A record of hours worked kept by Victory Enterprises Ltd for the period 1 April 2011 to 31 March 2012 shows that over 44 weeks Mr La Roche was rostered to

work on average 18 hours each week. Consistent with the requirement stated in the job application form, more hours are shown to have been worked during the periods of the school holidays and weekends.

[7] The report does not cover all 52 weeks of the year because the continuity of the employment was disrupted by the problems which developed from about February 2012. Mr La Roche's hours were reduced substantially from that time until the end of the financial year in March, and on 31 May 2012 he was advised he had been suspended. The employment ended at or near the end of June when he resigned after finding another job. No grievance has been raised in relation to the termination, which Mr La Roche accepts was at his initiative by resignation he gave freely.

[8] The claims for determination by the Authority are that from February until the end of May 2012 when Mr La Roche was suspended, his employer acted without justification and caused him disadvantage. To resolve his personal grievance he seeks from Victory Enterprises Ltd the remedies of reimbursement of lost remuneration and compensation for humiliation and hurt feelings. Mediation and other means of resolving the problems were tried unsuccessfully by the parties before the Authority concluded its investigation.

[9] Throughout the country hundreds of young people, and many older ones, are employed to work in cinemas part-time or on a casual basis. While there seems to be nothing about that kind of work to make employment in it complicated or problematic, in the way it was performed the relationship between Victory Enterprises Ltd, through Mr Webb, and Mr La Roche was anything but simple and straightforward, particularly in the last few months of it. Much of the difficulties seem to have arisen from an inability of employee and employer to communicate with and be responsive to each other. Youth and lack of maturity on the part of Mr La Roche, and lack of knowledge of some of an employer's basic obligations, and also perhaps some apprehensiveness about managing young people on the part of Mr Webb, seem to have led to issues escalating out of all proportion to their seriousness, and being mishandled, to ultimately cost both Mr La Roche and Mr Webb's business a grossly disproportionate amount of time and money in trying to resolve them.

[10] A failure to provide a written employment agreement from the outset of the relationship played its part in this matter, as did Mr Webb's decision to use a solicitor

(not counsel Ms Gower) to conduct disciplinary processes and deal with the relatively minor problems more in the manner of an old fashioned authoritarian headmaster than a communicative and responsive employer.

[11] After having attended meetings with Mr Webb and Mr O'Brien his solicitor, Mr La Roche engaged an employment advocate Mr Hamish Burdon. In a letter dated 15 February 2012 referring to those meetings, held on 7 and 10 February, Mr Burdon raised a personal grievance "for the manner in which he has been treated in regards to the process adopted at those meetings and the following actions." They were:

- *Failure to provide a written employment contract from the outset of employment in June 2009*
- *Inadequate notice of the meetings on 7 and 10 February, and failure to advise any details of the allegations or matters to be discussed at those meetings or any potential disciplinary action to be taken.*
- *Unfair procedure at the meetings.*
- *Unreasonable conclusion of the employer that there had been failures on the part of Mr La Roche, and unfair imposition of a warning.*
- *Making of slanderous comments about Mr La Roche to his mother.*

[12] In concluding his letter Mr Burdon advised Mr Webb:

*As an employer you have breached several of your legal obligations under the Employment Relations Act 2000. You cannot demote an employee from the hours he has worked for the past three years, force him to sign an employment agreement that is not close to being legally correct and discipline him for things he has not done, or that other staff still do.*

[13] The evidence before the Authority strongly supports Mr Burdon's expressed views and also the presence of a grievance as raised by Mr La Roche.

[14] The day after Mr Burdon had written to Mr Webb, his solicitor Mr O'Brien wrote to Mr La Roche. He advised that his letter was "a written warning" and that his client Mr Webb expected to see significant improvement in his conduct, failing which the employment could be terminated. According to the advice the warning was to stay in effect for six months and Mr La Roche would be monitored for four weeks. Reference was made to a written employment contract proffered to Mr La Roche and which he was requested to sign.

[15] One defect of the draft contract given to him was that the procedures for settling grievances were expressed to be those under the Employment Contracts Act 1991 which had been repealed in 2000. Another defect was that the time limit for raising a grievance was specified to be only 30 days rather than the period of 90 days allowed under the current statute (as well as the Employment Contracts Act). Despite taking legal advice it is clear that Mr Webb had gaps in his knowledge of employment law and practice. This seems surprising considering that he had up to 10 people working in the cinema and had been an employer in his business for quite a number of years.

[16] Attached to the letter from Mr O'Brien was a list of as many as 29 items of conduct or performance of Mr La Roche that had been discussed with him at the meetings of 7 and 10 February. Individually, the alleged transgressions dating from 22 December 2011 to 9 February 2012 are relatively minor, but cumulatively they seem daunting.

[17] Mr La Roche through his advocate continued to complain about the requirement that he sign a defective employment agreement and that he had had to attend two meetings of a disciplinary nature in relation to which no process had been followed and unjustified decisions had been made.

[18] On 6 March 2012 by letter from Mr O'Brien, Mr La Roche was advised that his request not to work on 17 March, a rostered day on, had been declined by Mr Webb and that he was to work that day or risk placing his employment in jeopardy. That advice given on behalf of the employer is inconsistent with its view that the employment was casual.

[19] Mr La Roche was advised on 30 March 2012 that a review of his performance was to be conducted on 5 April at Mr O'Brien's firm's office. Following the meeting he was advised that unless his conduct significantly improved he would be dismissed. He was advised that a warning to this effect was to stay in force for six months. Included among the items discussed was a requirement to have his employment agreement executed by his signature.

[20] Mr La Roche disputed the justification for the employer's actions in relation to the meeting held on 5 April and advised that he expected the matter to be discussed at a mediation arranged to take place on 26 April.

[21] The grievance was not resolved in mediation. Mr Burdon wrote to Mr O'Brien advising that Mr La Roche wished to return to work. When he did so his performance led to a request for another meeting with Mr Webb's solicitor. Mr O'Brien wrote a letter to Mr Burdon on 31 May 2012 advising that Mr La Roche was suspended pending a meeting to deal with new issues that had arisen. The meeting was scheduled to take place on 21 June and the matters to be discussed were set out by Mr O'Brien in his letter, as follows:

- (i) *You failed to wear the Coke shirt as directed;*
- (ii) *You failed to roll the boxes of ice-cream as directed;*
- (iii) *You declined to engage with Mr Webb and patrons;*
- (iv) *You were to return the key and did not.*

[22] The letter also advised that if an allegation of substandard work performance was established, disciplinary action might be taken and Mr La Roche's employment might be in jeopardy.

[23] Mr La Roche went to Mr O'Brien's offices on 21 June at the time requested for the meeting but Mr O'Brien for some reason did not join him, although he was there and apparently had been made aware that Mr La Roche was present.

[24] Sometime after the meeting date Mr La Roche, who had remained suspended without pay, found other employment and resigned to take this up from 20 August.

[25] The Authority has seen very few cases like this one where relatively minor issues which undoubtedly arose out of the conduct and performance of a young employee, have needed so much time and money and required the involvement of advocates in trying to have them satisfactorily addressed and resolved. The documentation generated by the parties and supplied to the Authority seems out of all proportion to the problems that were essentially about communication and giving simple, straightforward and reasonable instructions, such as could be expected in an employment of this nature.

[26] Unfortunately Mr Webb in his business had difficulties with another employee who worked with Mr La Roche, a Ms Hose. Her claim was resolved by the Authority in a determination dated 11 May 2012 – [2012] NZERA Auckland 162. The Authority, member James Crichton, concluded that Ms Hose had suffered disadvantage because of a series of unjustified actions of Mr Webb. They included giving inadequate notice of a disciplinary meeting and conducting that meeting in an

unfair manner. There are a number of close similarities to Mr La Roche's case. For the reasons given by the Authority, Ms Hose was awarded \$2,000 for hurt feelings and humiliation under s 123 (1)(c)(i) of the Employment Relations Act 2000.

[27] I conclude that although Mr Webb almost certainly had some grounds amongst his many issues he took up with Mr La Roche for conducting a disciplinary meeting and for issuing a warning, he effectively stifled the opportunity to do this fairly and reasonably by the manner in which he approached it. This was principally by calling the initial meetings with almost no notice and by not giving any indication of what they were to be about. At the meetings Mr La Roche was saturated with many diverse issues about his conduct and performance, none of them major, raised by Mr Webb. In this approach it cannot be seen that Mr La Roche had a reasonable opportunity to address so many matters brought up with him in a short period. The involvement and approach taken by the solicitor Mr O'Brien, while it may have been well intended, in my view was intimidating to Mr La Roche even although he had an advisor with him at the meetings.

### **Determination**

[28] I must find that the actions of the employer in conducting these meetings, issuing warnings from them and at the end suspending Mr La Roche were not justified. Under the test at s 103A of the Employment Relations Act 2000, the actions of the employer and the way the employer acted, were I conclude not what a fair and reasonable employer could have done in all the circumstances present at the time the decisions were made about those actions.

[29] Having regard to the factors required to be considered under s 103A(3), I find that there was a substantial failure in process which resulted in the treatment of Mr La Roche becoming unfair to him.

[30] I consider, in assessing appropriate remedies to resolve the unjustified disadvantage grievance, it is likely that Mr La Roche contributed to the situation that gave rise to the grievance. However, to assess the degree of that with any precision has been made difficult by the merits of Mr Webb's concerns being drowned by the poor procedure that accompanied the employer's attempts to resolve the difficulties in this workplace. That procedure, in my view, contributed more to the situation than Mr La Roche by any of his conduct or performance.

### **Casual or permanent employment?**

[31] In assessing the claim for lost remuneration, the Authority has concluded that Mr La Roche was not a casual employee but was a permanent part-timer. The requirement to work at weekends and school holidays seems to me to provide a degree of regularity above that normally associated with a truly casual employment. As the Employment Court held in *Jenkinson v. Oceania Gold (NZ) Ltd*, CC/09, 13 August 2009, the strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which the employee is also bound to accept and undertake. It seems to me the requirement to work at weekends and during school holidays pointed to that obligation being present, and the regularity of work performed by Mr La Roche on a weekly rostered basis also points to on-going employment as the real nature of the relationship he had with Victory Enterprises Ltd.

[32] A work pattern having some degree of consistency and predictability can be seen from the record of hours worked. The issue of to Mr La Roche of a warning to last six months, his suspension and monitoring of him for four weeks, are also steps out of place in a casual employment.

### **Lost wages and compensation awarded**

[33] I accept the claim that Mr La Roche had his hours of work unjustifiably reduced significantly, from February 2012 until he was suspended at the end of May. But I also note there was no guarantee or certainty of having the exact same number of rostered work hours each week. I regard 10 hours per week as fair for the purpose of loss assessment. For 12 weeks - 4 at a rate of \$13 per hour and then 8 at \$13.50 - the arrears for that period is therefore \$1,600, to which must be added a further \$128.00 as proportionate holiday pay due.

[34] In relation to the suspension in the period from 31 May until termination of the employment near the end of June, I consider that the action of the employer was unjustified although Mr La Roche contributed to that situation leading to that. I award lost wages for 10 hours per week, for a period of 4 weeks at \$13.50 per hour, an amount of \$540. To that must be added the payment of \$43.20 as proportionate holiday pay.

[35] Total gross wages and holiday pay to be paid to Mr La Roche is therefore \$2,311.20.

[36] As Mr La Roche agrees that he owes \$300 to Mr Webb, in repayment of the loan that amount may be deducted from the wages to be paid to him by Victory Enterprises Ltd.

[37] I consider that \$1,000 is an appropriate amount for compensation for hurt feelings in all the circumstances of this case, pursuant to s 123(1)(c)(i) of the Employment Relations Act.

### **Costs**

[38] The costs incurred by both parties have made worse a situation which should never have arisen, or at least should not have come to the point where investigation and determination by the Authority became necessary. The level of costs means that neither party, particularly Mr La Roche who has established his claim with some success, can be financially restored to anything like the position they were in before this saga started unfolding. For the advocacy services engaged by him, Mr La Roche has a bill for \$12,519 (excluding GST). Mr Webb's costs are advised to be \$6,972 (excluding GST), which are the total legal fees for Mr O'Brien and Ms Gower who succeeded him. I note that during a break at the investigation meeting the parties made a final without prejudice attempt to settle matters. Mr La Roche was offered \$2,700 but declined to accept that amount.

[39] I find nothing about this case to justify an award of costs to Mr La Roche that would go anywhere near the level he has expended. This case has nothing about it to justify a departure from the usual approach of applying the daily tariff, currently \$3,500, adjusted up or down. In all the circumstances, including meeting time of less than a full day, I consider that Victory Enterprises Ltd should pay as a contribution to costs to Mr La Roche the sum of \$3,000. Also the company is to reimburse him the application fee of \$71.56.