



# New Zealand Employment Relations Authority Decisions

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## Lewis v Gateway Motel Limited AA360/10 (Auckland) [2010] NZERA 668 (16 August 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 360/10 5305514

BETWEEN JASON LEWIS

Applicant

AND GATEWAY MOTEL LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Robin Arthur

Louise Darroch for Applicant

Rakesh Sharma and Ajay Kochhar for Respondent

16 August 2010

16 August 2010

### DETERMINATION OF THE AUTHORITY

[4] Mr Ryan was granted leave to withdraw as GML's representative on 29 July 2010 after he advised that he had no instructions.

[5] GML says Mr Lewis does not have a personal grievance. It says he was made redundant on sale of the motel and not employed by GML on the recommendation of "*previous management*" who considered Mr Lewis "*personal conduct and attendance was poor*".

[6] I have taken GML's reply as an application for reopening of an investigation: Clause 4, Schedule 2 of the Act. This is sometimes referred to as seeking a "rehearing".

### Should a re-opening of the investigation be ordered?

[7] Mr Lewis lodged his personal grievance in January 2007. At the time he was represented by the Unite union which represented a number of workers affected by the sale of the motel premises in November 2006 in a dispute over what transfer arrangements had been made for their employment to continue with the new owners.

[8] GML witnesses - its director, Rakesh Sharma and manager at that time, Sachin Ghadiyar - did not attend an Authority investigation meeting held on 24 January 2008. That meeting had been notified to GML through its counsel at the address for service given in its statement in reply.

[9] The Authority's determination was delayed to await a decision of the Employment Court in another case which concerned the application of the Act's continuity of employment provisions.<sup>1</sup> Following that decision the Authority considered legal submissions from counsel acting for both parties at the time before issuing its determination of 22 December 2009 (AA468/09). Ms Darroch had lodged submissions on 9 October 2009. Mr Ryan had lodged submissions on 6 November

2009.

*1 Olsen v Carter Holt Harvey Limited* (AC 45/08, 24 November 2008).

[10] The Authority found Mr Lewis was not entitled to the statutory protection provided to specified categories of employees under Part 6A of the Act. However the

Authority then considered whether Mr Lewis' circumstances were covered by the Act's provisions applying to other employees. These provided for transfer of employment where an arrangement and consensus has been made between the existing employer and the new employer. The Authority found, on the facts and evidence available to it, that such an arrangement and consensus was reached with the new employer in this case. GML's failure to abide by that agreement meant it had unjustifiably dismissed Mr Lewis.

[11] That conclusion could be revisited by reopening the Authority's investigation should it be established that there was a real possibility or significant risk of a miscarriage of justice. In making that assessment the Authority must balance the risk of injustice against the importance of certainty.<sup>[1]</sup>

[12] Having heard today from Mr Sharma on why GML considers the investigation should be reopened, I find no such risk in this matter for the following reasons:

- (i) GML did not attend the notified investigation meeting in January 2008 despite the Authority advising Mr Sharma and Mr Ghadiyar were required to attend (Minute of 30 November 2007); and
- (ii) GML had an additional opportunity to make written submissions in November 2009 and those submissions were considered before the Authority determined this matter; and
- (iii) GML does not have any new or different evidence that could not have been provided to the earlier investigation; and
- (iv) GML did not use its opportunity to challenge the determination of 22 December 2009 within the 28 day period provided in the Act; and
- (v) GML did not seek a re-opening of the investigation until Mr Lewis applied for a compliance order in May 2010.

[13] I accept Ms Darroch's submission that a bare allegation of being poorly represented is not grounds in itself for a re-opening of an investigation.

[14] Authority's records show Mr Ryan (then acting for GML) was provided with a copy of the determination on 22 December 2009. Although Mr Sharma today confirmed in his evidence that he spoke with Mr Ryan about that determination, nothing was done about filing a challenge in the Employment Court because Mr Sharma had been overseas for various extended periods this year. That is not sufficient grounds for a reopening. Mr Sharma could have made arrangements for a challenge to be filed.

[15] Mr Sharma also insists the Authority was wrong to determine that GML was aware of a letter sent in September 2006 to employees from the former owner of the motel which promised they could transfer their employment to GML. Documents provided to the earlier investigation showed Mr Lewis had confirmed he wished to take up that option.

[16] Mr Sharma says he was "100 per cent" certain that he had never seen the September 2006 letter advising motel employees of that arrangement. However an email from the manager of the previous owner, dated 19 October 2006 and addressed to Mr Sharma, attached a copy of what is described as "the letter that was given to the staff regarding their termination". Mr Sharma replied to that email on 20 October 2006. I consider that document supports the Authority's finding that GML was sent the September 2006 letter and raised no objection to it at the time. Consequently the Authority was able to conclude consensus had been reached between GML and the vendor on the transfer of employees, including Mr Lewis. In light of the evidence available to the Authority at the time, there is no significant risk that its finding was without foundation or amounted to a miscarriage of justice.

[17] Mr Sharma sought to provide additional evidence which he says confirms GML did not intend employing any of the previous motel staff, except for those who had to transfer under the statutory continuity provisions. He says this intention is evidenced by a copy of a list of staff which he had discussed with the previous motel owner's representative. Mr Sharma says the previous owner had rated each worker as to how good they were, using a system of crosses from one to five, with five being the best. The list showed only one cross beside the name of Mr Lewis and Mr Sharma says he would not have offered to employ someone rated that low by his previous employer. However, even if I accepted Mr Sharma's evidence of his intentions and what the marked list is said to show, it is evidence that GML had adequate opportunity to bring at various times during the previous investigation. It failed to do so and must bear the consequences.

[18] Accordingly, and for the reasons given, I decline to order a reopening of the Authority investigation of this matter.

### **Should a compliance order be issued?**

[19] Mr Lewis is entitled to an order requiring GML pay the amounts ordered in remedies and costs to him.

[20] I accept his evidence that he was paid between \$120 and \$150 each week. The award of wages is to be paid at the rate of \$120 per week.

[21] Under s137 and s138 of the Act GML is ordered to comply with determinations AA468/09 and AA178/10 by paying the following sums to Mr Lewis by no later than 30 August 2010:

- (i) \$480, being four weeks' wages; and
- (ii) \$4000 as compensation under s123(1)(c)(i) of the Act; and
- (iii) \$4000 as a contribution towards his costs to 22 December 2009; and
- (iv) \$74 in reimbursement of disbursements.

### **Interest**

[22] Mr Lewis is also entitled to interest on the amount of \$4480 in lost wages and distress compensation awarded to him on 22 December 2009. I order GML to pay the further sum of \$151.78 to Mr Lewis as interest on that amount for the period from 23 December 2009 to 16 August 2010 and a further \$0.64 a day from 17 August 2010 until the sums due are paid in full.<sup>[2]</sup>

### **Costs**

[23] Mr Lewis has been successful in his compliance order application and is entitled to a further award of costs. These are awarded, on a tariff basis, for an investigation meeting lasting less than half a day in the sum of \$1000. GML is also to pay that amount to Mr Lewis.

### **Further steps**

[24] A certificate of determination is to be issued with this determination.

[25] If GML fails to pay the amount ordered in the time due, Mr Lewis may seek enforcement of this order in the District Court (s141 of the Act) or seek further orders in the Employment Court (s138(6) and s140(6) of the Act). The Employment Court may make orders to fine, imprison or sequester the property of a person in default of a compliance order made under s137 of the Act.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>[1]</sup> *Ports of Auckland v NZ Waterfront Workers Union* [1995] NZCA 390; [1995] 2 ERNZ 85, 88-89 (CA).

<sup>[2]</sup> Interest at 5.24 per cent under clause 11 of Schedule 2 of the Act.