

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 414/10
5285689

BETWEEN CALUM CHARLES
MacDONALD
Applicant

AND BELGRADE HOLDING
COMPANY LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Luke MacDonald for Applicant
Vera Zjajic for Respondent

Investigation Meeting: 9 August 2010

Determination: 16 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Calum MacDonald, claims that he was employed by the Respondent, Belgrade Holdings Company (“BHCL”), from August 2008 to April 2009 at the Forest Hill store, and subsequently at the Browns Bay store until May 2009, when he was unjustifiably dismissed by BHCL.

[2] BHCL says that Mr MacDonald’s employment at the Forest Hill store was justifiably terminated by reason of redundancy in April 2009 and that Mr MacDonald was subsequently employed as an independent contractor at the Browns Bay store. The contract with Mr MacDonald relating to the Browns Bay store was terminated, but as Mr MacDonald was not an employee at this time, there was no unjustifiable dismissal.

Issues

[3] The issues for determination are:

- i. Whether Calum MacDonald was a casual employee, or a permanent part-time employee, when working at the Forest Hill store;
- ii. If a permanent part-time employee, whether Calum MacDonald was terminated from his employment at the Forest Hill store on the basis of redundancy;
- iii. If Calum MacDonald was dismissed on the basis of redundancy, was this a justifiable dismissal;
- iv. Whether Calum MacDonald was an employee or an independent contractor when working at the Browns Bay store;
- v. If Calum MacDonald was an employee at the Browns Bay store, was he dismissed for poor performance and if so, was this a justifiable dismissal.

Background

[4] BHCL operated two stores as franchisees of the Domino's Pizza business. The stores were located in Forest Hill and Browns Bay. BHCL had operated the Browns Bay store for several years and opened the Forest Hill store on or about August 2008.

[5] Mr MacDonald commenced employment at the Forest Hill store during August 2008. Mrs Zjajic, Director of BCHL, says that Mr MacDonald was issued with an Individual Employment Agreement ("the Employment Agreement") signed by Mrs Zjajic on behalf of BHCL. Mr MacDonald denied that he was ever given the Employment Agreement. On the basis that other employees at the Forest Hill store were issued with, and signed, identical employment agreements; I am satisfied that the terms and conditions set out in the Employment Agreement applied to Mr MacDonald during the period of his employment at the Forest Hill store.

[6] Mr MacDonald's duties at the Forest Hill store initially involved the taking of customer orders and customer service, but following training included pizza making.

Once Mr MacDonald obtained his driving licence, he also carried out pizza deliveries from time to time.

[7] BHCL state that the business in the Forest Hill store was not as successful as they had anticipated, and due to financial reasons, they decided during the early part of 2009, to sell the business.

[8] Employees at the Forest Hill store were advised of both the impending sale and the termination of their employment with BHCL on or about two weeks prior to 6 April 2009 when the sale completed.

[9] Following the completion of the sale of the Forest Hill store and the termination of their employment, some of the employees at the Forest Hill store were offered employment at the Browns Bay store, whilst others were either employed by the new owners at the Forest Hill store, or pursued alternative employment.

[10] Mr MacDonald was employed at the Browns Bay store during April and May 2009.

Determination

Was Mr MacDonald a casual or a permanent part-time employee when working at the Forest Hill store?

Intention of the parties

[11] In deciding whether a person is employed under a contract of service the Authority must consider all relevant matters which include the intention of the parties.¹

[12] The Employment Agreement which BHCL states it issued to Mr MacDonald, describes Mr MacDonald's position as 'Casual Instore' in Schedule 1 to the agreement. Mr MacDonald says he did not receive the agreement and it has not been signed by him. However an employee who begins employment without a finalised

¹ S6 Employment Relations Act 2000

employment agreement still enters into a formal employment relationship with the employers, and I am satisfied that the terms of the Employment Agreement applied to Mr MacDonald.

[13] The description of the employment agreement as “casual” is an indicator of the intention of the parties in entering into the employment relationship but is not determinative² of the real nature of the relationship between the parties. His Honour Judge Couch in *Jinkinson v Oceana Gold (NZ)*³ said:

All relevant matters must be taken into account in making that decision and the parties’ description of their relationship is not to be treated as determinative.

[14] The Employment Agreement states that rosters will be available 7 days in advance and an example of these rosters indicates that Mr MacDonald worked weekends and one evening during the week. Additionally payment records for each week from 14 December 2008 to 5 April 2009 offer confirmation of a regular pattern of working.

[15] The Employment Agreement states at clause 18.1 that casual employees can “*end your employment at any time by giving one week’s written notice*”. When Mr MacDonald’s employment was terminated BHCL say, and Mr MacDonald agreed, that he was provided with two weeks notice of termination of employment by BCHL. These requirements are inconsistent with the nature of casual employment.

[16] BHCL at no stage of the proceedings before the Authority, described Mr MacDonald as a casual employee but refer to his position at the Forest Hill store as a ‘part-timer’.

[17] I find that the description of the employment relationship as ‘casual’ as stated on the Employment Agreement is not consistent either with the provisions contained within it or with the pattern of dealing between the parties. The Employment

² S 6 (3) Employment Relations Act 2000

³ CC/09, 13 August 2009 at para [37]

Agreement therefore is not determinative of the real nature of the relationship between the parties.

Analysis of the distinction between casual and on-going employment

[18] The Employment Court judgment of *Jinkinson v Oceana Gold (NZ)*⁴ contains a helpful examination and analysis of the distinction between casual employment and ongoing employment.

[19] The judgment highlights that a major determinant of the distinction between casual and ongoing employment is the extent to which there exist between the parties “*mutual employment related obligations between periods of work*”⁵ The essence of casual work lies in a series of engagements which are complete in themselves, whilst ongoing employment contemplates a continuing pattern of regular and continuous work.

[20] I find that during the time Mr MacDonald worked at the Forest Hill store there were factors which aligned with the list of factors outlined by the Employment Court judgment of *Jinkinson v Oceana Gold (NZ)*, as being indicative of ongoing employment. The most significant of these was a mutual expectation of continuity of employment, but also included were a continuing pattern of regular and continuous work, work being allocated in advance by a roster, and Mr MacDonald being required to advise of his availability one week in advance.

[21] I find that Mr MacDonald was a permanent part-time employee at the Forest Hill store.

Was Mr MacDonald terminated from his employment at the Forest Hill store on the basis of redundancy?

[22] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*⁶ clarified that:

⁵ Ibid at para [40]

⁶ [1991] 1 NZLR 151

“An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.”

[23] Mrs Zjajic explained to the Authority that business at the Forest Hill store had not reached the expected levels. This had resulted in poor financial results and BHCL made the decision to sell the store.

[24] Mrs Zjajic further explained that as a result of the sale, the employment of all the BHCL employees at the Forest Hill store was terminated on the basis of redundancy.

[25] This was confirmed by the Sale and Purchase Agreement signed by the vendors and purchasers on 12 January 2009, which states at clause 19: *“The Vendor warrants that on or before possession date the Vendor will terminate employment of and pay to all staff all sums to which they are entitled in respect of current pay, holiday pay, back pay, long service leave, redundancy, sick leave and all other allowances and entitlements and no liability for such shall be incurred by the Purchaser.”*

[26] The Settlement Date was 6 April 2009 and the employment of all the BHCL employees working at the Forest Hill store was terminated on 5 April 2009.

[27] I am satisfied that the sale of the Forest Hill store was for genuine commercial reasons as a result of financial parameters in terms of profitability not being met. This falls firmly within the scope of the employer’s right to abandon unprofitable activities.

[28] I find that Mr MacDonald’s employment at the Forest Hill store was terminated on 5 April 2009 on the basis of a genuine redundancy.

Was this dismissal on the basis of redundancy a justifiable dismissal?

[29] Section 103A of the Employment Relations Act 2000 (“the Act”) sets out the test of justification:

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering 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.

[30] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[31] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*⁷ noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”⁸

⁷ [2006] ERNZ 825,842

⁸ Ibid at para [40]

[32] BHCL say that employees at the Forest Hill store were informed about the impending sale, and consequent termination of their employment, by reason of redundancy, approximately two weeks prior to the closure. I note that BHCL signed the sale and purchase agreement on 12 January 2009 and completion was set for 6 April 2009. Notification was via a notice on the staff board and a note on their payslips. Additionally Mr Freeman, Operational Manager for BCHL, says he had held a meeting to inform the employees about the sale and termination of their employment two weeks prior to the closure of the store.

[33] I note that communication by means of the employee payslips was a frequently used means of communication between the employees and BHCL and accept that notification of redundancy occurred in this manner. Mr MacDonald agreed that he had been made aware of the sale on an informal basis. However I find that this method of communication does not comply with the requirements of s4 (1A) of the Act.

[34] In *Cammish v Parliamentary Service*⁹ His Honour Judge Goddard observed:

“Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond.”

There is no evidence that any consultation process was undertaken with Mr MacDonald in accordance with the provisions in s4 (1A).

[35] A dismissal for redundancy will be justified only if it was carried out in accordance with any contractual arrangement. Having determined that Mr MacDonald was a permanent employee, clause 20 of the Employment Agreement applies. This clause specifies that permanent employees are entitled to one month’s written notice if the employment is terminated because of redundancy.

[36] In giving Mr MacDonald only 2 weeks notice of termination, the employer was in breach of the contractual terms. Additionally, even in the case of a genuine

⁹ [1996] 1ERNZ 404

redundancy, which this was, a just employer, subject to the mutual obligations of trust and confidence and fair dealing, will implement the decision in a fair and reasonable manner. BCHL did not comply with the requirements of s4 (1A).

[37] A fair and reasonable employer would have consulted with Mr MacDonald about the redundancy, and would have acted in accordance with the contractual arrangements. I find that the dismissal of Mr MacDonald was an unjustifiable dismissal.

Was Mr MacDonald an employee or an independent contractor when working at the Browns Bay store?

[38] Mr MacDonald claims that his employment finished at the Forest Hill store at the end of a rostered shift on 5 April and that he started work at the Browns Bay store on what would have been his next rostered shift i.e. that there was no break in his employment.

[39] BHCL states that Mr MacDonald was not offered a position at the Browns Bay store following the sale of the Forest Hill store, but that Mr MacDonald called at the Browns Bay store a couple of weeks after the sale of the Forest Hill store which completed on 6 April 2009, and asked for a job. BHCL states that Mr MacDonald was employed at the Browns Bay store with effect from 25 April 2009.

[40] BHCL has produced pay records which confirm that Mr MacDonald was employed during each of the three weeks ending 26 April, 3 May and 10 May 2009. Mr MacDonald was unable to provide any evidential basis to confirm employment with effect from the week commencing 6 April 2009. I accept the evidence provided by BCHL as being the more credible.

[41] On or about week ending 10 May 2009, BHCL state that Mr MacDonald's employment with the Browns Bay store was terminated. The parties agree that the termination was effected by means of an informal off-site discussion between Mr MacDonald and Mr Freeman. Following this discussion Mr MacDonald left the store and his employment with BCHL ended.

[42] In deciding whether Mr MacDonald was employed at the Browns Bay store as an employee, I apply s6 of the Act which provides in part “s6 *Meaning of employee:*

a.

1. *In deciding ... whether a person is employed by another person under a contract of service, the ... Authority-... must determine the real nature of the relationship between them.*

(3) *For the purposes of subsection (2)... or the Authority-*

(a) must consider all relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[43] In *Bryson v Three Foot Six Limited (No2)*¹⁰ the Supreme Court stated the following:

“All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the

¹⁰ [2005] 1 ERNZ 372

way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.

Contractual basis

[44] BHCL submitted a contract for drivers, which it claimed was given to Mr MacDonald. This contract states that the legal relationship between the driver and the BHCL is that of principal and independent contractor. The contract also stipulates that :

- a. Payment will be on a per delivery basis plus an agreed hourly rate.
- b. BHCL would pay the agreed hourly rate even if there were no deliveries.
- c. The driver would be responsible for all costs and expenses of the business including the costs and expenses of operating and maintaining all delivery vehicles.
- d. The driver would provide at his/her own expense ACC employer contributions for any employees, and Third Party property damage liability insurance.
- e. The driver was expected to bring a \$20 float for each delivery period
- f. The contract was terminable by verbal notice by the other party at the conclusion of any delivery.

[45] The contract has not been signed by Mr MacDonald who claims it was not presented to him. BHCL has provided pay records which confirm the dates of employment at the Browns Bay store as covering a period of 3 weeks in total and showing that in the week ending 26.04.09 Mr MacDonald worked 1.79 hours, in the following week 15.64 hours, and in the third week 7.75 hours. Although the pay records record the Tax Code as NIL and no tax is shown as having been deducted from the pay in the form of PAYE, which is an indicator of employment status as an independent contractor, the payment is on the basis of an hourly rate only and there is no separate delivery payment as referred to in the contract.

[46] I find that the contract and the pay records are not conclusive as to the real nature of the employment relationship.

[47] Turning to the way the relationship operated in practice, the evidence of Mr MacDonald is that he was employed to perform exactly the same duties at the Browns Bay store as he had at the Forest Hill store, which had included driving in addition to counter service. All the male employees at Forest Hill store were expected to deliver the pizzas and this happened on an ad hoc basis depending on who was available at a given time.

[48] The evidence of Mr Freeman and Mr and Mrs Zjajic is that Mr MacDonald had received verbal warnings about his inappropriate behaviour at the Forest Hill store and that as a result he was not one of the employees to be offered employment as an employee at the Browns Bay store. A few weeks later Mr MacDonald had asked for employment at the Browns Bay store and been offered a driving position on an independent contractor basis, which he had accepted.

[49] Mr Zjajic, Director of BCHL, said that Mr MacDonald had turned up for work without petrol on two occasions and had been given money out of the till, which he (Mr MacDonald) subsequently replaced, to purchase the petrol and carry out the deliveries. Mr Freeman stated that Mr MacDonald had worked as counter staff.

[50] The independent driver contract entitled drivers to a commission payment in addition to an agreed hourly rate. However there is no evidence that Mr MacDonald received any commission payments, rather the payroll records indicate payment on the basis of an hourly rate only.

[51] I accept that the independent driving position was intended by BCHL but in practice I find it more credible on the evidence of Mr Freeman that in the short time Mr MacDonald was employed at the Browns Bay store, he carried out similar duties to those he had performed at the Forest Hill store, these being counter duties and some pizza delivery driving.

Control and Integration test

[52] The evidence of Mr Freeman was that Mr MacDonald worked on the same basis in the Browns Bay store as in the Forest Hill store, carrying out the same duties.

[53] I find that Mr MacDonald was subject to the control of BHCL in respect of those duties and that he was integrated into the business of the Browns Bay store.

The fundamental test

[54] Examining the question of whether Mr MacDonald was in business on his own account, the fundamental test, I find it a relevant circumstance that at the time Mr MacDonald was 16 years of age and had only just left school. I do not believe that he considered himself as being in business on his own account but rather believed that he was employed under a contract of service in a similar capacity to that at the Forest Hill store. The circumstance of applying to BCHL for monies to purchase petrol in order to make the deliveries when required to do so supports this conclusion.

[55] In consideration of the above observations, I find that Mr MacDonald was a part-time permanent employee rather than an independent contractor at the Browns Bay store.

As an employee was Calum MacDonald dismissed for poor performance and if so, was this a justifiable dismissal?

[56] Mr Freeman stated that Mr MacDonald behaved in an unacceptable manner at the Browns Bay store and as a result he took Mr MacDonald outside to the car park and told him there was no longer a job for him.

[57] Mr Freeman told Mr MacDonald there was a possibility that he might obtain employment at another store in Albany and offered to telephone the store manager to speak to him on Mr MacDonald's behalf. Mr MacDonald left the Browns Bay store, having been summarily dismissed by BHCL. Mr Freeman says he did not make the promised telephone call to the Albany store.

[58] The test of justification in s103A Employment Relations Act 2000 applies. A fair and reasonable employer would have followed a fair and reasonable procedure.

[59] I find that in dismissing Mr MacDonald, BCHL did not adhere to the basic requirements of procedural fairness, specifically:

- a. Mr MacDonald was not provided with a specific allegation of misconduct or told what the likely consequences would be if the allegations were established;
- b. Mr MacDonald was not provided with a real opportunity to provide an explanation to refute the allegations; and
- c. There was no unbiased consideration of the explanation since no opportunity was given to Mr MacDonald to provide one.

[60] I find that BHCL departed so far from these basic requirements as to render the dismissal of Mr MacDonald an unjustifiable dismissal.

Remedies

Employment at the Forest Hill store

Reimbursement of lost wages

[61] Mr MacDonald's employment at the Forest Hill store was terminated on the basis of redundancy. I have found Mr MacDonald was dismissed on the grounds of a genuine redundancy. Consequently no remedy can be awarded for the loss of a job¹¹.

[62] I have determined that Mr MacDonald was a permanent part-time employee. The employment agreement at clause 19.1 provides that permanent employees, whose employment is terminated on the basis of redundancy, will be provided with one month's notice. Mr MacDonald was only provided with 2 weeks notice.

[63] From the example roster provided, I have calculated that Mr MacDonald worked 12.60 hours per week. On the basis that the minimum wage of \$12.50 applies, I have calculated the amount owed to Mr MacDonald in respect of the portion of the notice period not paid, as being 12.60 hours per week for 2 weeks at the rate of \$12.50 per hour.

¹¹ *Arokaki Corporation Limited v McGavin* [1998] 1 ERNZ 601

[64] I make the following award: a payment of \$315.00 gross in respect of the portion of notice period not paid.

Compensation

[65] Mr MacDonald has not raised a personal grievance in connection with the termination of his employment at the Forest Hill store. Had he done so, having found that the lack of consultation or of adherence to contractual arrangements rendered the dismissal unjustifiable, I would probably have made an award for compensation.

[66] However Mr MacDonald has not raised a personal grievance in respect of this period of his employment with BHCL, makes no claim for compensation, and offers no evidence that the termination of his employment had an adverse impact on him. I conclude that this is as a result of his belief that his employment had been transferred to the Browns Bay store.

[67] Accordingly I make no award for compensation.

Employment at the Browns Bay store

Reimbursement of lost wages

[68] I have found Mr MacDonald's employment to have been unjustifiably terminated from the Browns Bay store with effect from the week ending 10 May 2009. Mr MacDonald says that he tried to mitigate the effects of the loss of his employment at BHCL, for example, by making weekly visits to industrial areas canvassing companies for available positions and by visiting websites such as Seek. I am satisfied that Mr MacDonald made an effort to mitigate his loss. Mr MacDonald obtained employment in February of this year, albeit on a commission only basis.

[69] In the circumstances, I believe an award of 3 months salary in respect of lost wages is appropriate. On the evidence provided, Mr MacDonald worked a total 3 weeks at the Browns Bay store, working an average of 11 hours per week. I have calculated the amount owed to Mr MacDonald in respect of lost wages as being 11 hours per week for 12 weeks at the rate of \$12.50 per hour.

[70] I make the following award: a payment of \$1,650.00 gross in respect of lost wages.

Compensation

[71] Mr MacDonald was unjustifiably dismissed from his employment and says that he suffered hurt and humiliation as a result of losing his employment. In particular he says that he had to enrol for an unemployment benefit due to financial pressure.

[72] I have taken into account in determining the amount of compensation to be awarded: the summary nature of the termination, the fact that the decision to terminate his employment was delivered to Mr MacDonald by Mr Freeman in the car park of the Browns Bay store, and the impact that this decision had upon a young person.

[73] I make the following award: a payment under s. 123(1)(c)(i) of the Employment Relations Act 2000 for hurt, humiliation and injury to feelings in the sum of \$2,500.00.

Contribution

[74] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[75] Mrs Zjajic gave evidence to the effect that she had, approximately one month after the Forest Hill store closed and after Mr MacDonald commenced working at the Browns Bay store, become aware of a photograph showing Mr MacDonald and 3 other ex-employees displaying the letters of the franchisor brand 'Domino's' on their bare buttocks.

[76] Mrs Zjajic says, and I accept, that had this photograph been brought to the attention of the franchisor, there would have been serious implications for BCHL's position as the franchisee of the Browns Bay store. I further accept that this photograph influenced the decision of BHCL to terminate Mr MacDonald's employment.

[77] I find contributory fault on the part of Mr MacDonald and reduce the figures awarded in respect of the Browns Bay period of employment by 40%.

Costs

[78] As neither party had representation, the question of costs does not arise.

Eleanor Robinson
Member of the Employment Relations Authority