

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Aman Madwhan (Applicant)
AND Box Lounge Ponsonby Limited (Respondent)
REPRESENTATIVES John Coyle, Advocate for Applicant
Maru Nihoniho, Director, for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 8 September 2005
ADDITIONAL INFORMATION SUPPLIED 16 September 2005
DATE OF DETERMINATION 10 October 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a problem about an employment relationship that lasted just one week. The respondent company took over the Box House restaurant on 19 October 2004. Its director, Ms Nihoniho, planned to keep on all the existing staff but in the week leading up to the takeover she learnt that one of the chefs did not wish to stay. She was introduced to Mr Madwhan as a potential replacement. By 20 October at the latest he had started work at an agreed rate of \$15.00 per hour. On 25 October he was dismissed. Mr Madwhan says he was offered full time permanent work with no conditions. Ms Nihoniho disagrees. She says that she never guaranteed him any minimum number of hours per week and that he was employed on a one week trial. She says that she dismissed him at the end of the trial because she was not happy with his performance and because she did not need all the staff she had.

[2] The terms and conditions of employment were not recorded in writing. Section .67 of the Employment Relations Act provides as follows:

“(1) Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation or trial after the commencement of the employment,-

- (a) the fact of the probation or trial period must be specified in writing in the employment agreement; and*
- (b) neither the fact that the probation or trial period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation or trial period.*

[(2) Failure to comply with subsection (1) (a) does not affect the validity of the employment agreement between the parties]

[(3) However, if the employer does not comply with subsection (1) (a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation or trial if the employee elects, at any time, to treat that term as ineffective.]

- [3] The effect of this provision is that the employer cannot rely on any probationary term which is not recorded in writing. I need not determine whether there was an agreement that Mr Madwhan would be on trial since it would be of no effect in any event. The dismissal falls to be justified in the same way as any dismissal from permanent employment.
- [4] Ms Nihoniho says because she believed Mr Madwhan was on trial she also believed she was able to dismiss him at the end of that trial. She does not attempt to say that the dismissal followed a full and fair procedure, and so it follows that the dismissal has not been justified. Mr Madwhan is entitled to remedies. The only remaining issue for determination is what those remedies should be.

Remedies

- [5] Mr Madwhan told me that he was unemployed until 16 March 2005. He did not volunteer any information about what he had done to mitigate his loss in the meantime. At the investigation meeting I asked him how he had lived, and what he had done to find work in the intervening period. He told me that he had gone on a benefit and that he had applied for jobs. Between October 2004 and March 2005 the job market in Auckland was very buoyant and restaurant work in particular was plentiful. As I told Mr Madwhan at the meeting, I am puzzled as to why a chef (as he claims to be) would have had been unable to find work for four and a half months over the busy summer period. I told him that he should provide me with evidence of his job search efforts.
- [6] On 16 September he supplied me with a list of nine restaurants at which he appears to have tried to get work, although one he described as being too far to travel. He does not say when he made contact with these restaurants. Five of the approaches resulted in some sort of interview but he was unsuccessful in gaining any of these positions. Eight or nine approaches in over four months do not satisfy me that Mr Madwhan has made as much effort as he could to find work. I am not convinced therefore that he has properly attempted to mitigate his loss. Because of this I am not prepared to award lost earnings for the entire period in which he was unemployed. Instead I award four weeks wages on the basis that I consider it reasonable that he might well have taken at least this long to find a job.
- [7] Because the terms and conditions of employment were not recorded in writing he must get the benefit of the doubt as to the hours for which he was employed, which I treat as 40 hours per week. **The respondent is therefore ordered to pay to him the sum of \$2,400.00 gross arrears of wages.** As for compensation, I have taken into consideration the fact that Mr Madwhan was employed for only one week and gave little evidence of the effects of the dismissal on him. **The respondent is ordered to pay to the applicant the sum of \$500.00 compensation under s.123 of the Employment Relations Act.**