

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 120/09
File Number: 5148083

BETWEEN Jonathan Mawley
Applicant

AND Mark Jorgensen t/a Barista the
Espresso Bar
Respondent

Member of Authority: Denis Asher

Representatives: Alan Millar for Mr Mawley
Phil Drummond for Mr Jorgensen

Investigation Meeting Palmerston North, 27 May & 19 August 2009

Submissions Received On the day of the investigation

Determination: 28 August 2009

PRELIMINARY DETERMINATION OF THE AUTHORITY

The Problem

[1] The preliminary question is who was the employer? Mr Mawley says his employer was Mr Jorgensen t/a Barista the Espresso Bar: Mr Jorgensen says the employer was Jorgensen Holdings Limited (the Company), of which he is the sole director and principal shareholder and which has now ceased trading.

- [2] The parties have attempted mediation with Mr Jorgensen failing to attend on two occasions despite his prior agreement to do so.

Background

- [3] The Company was the owner of Barista the Espresso Bar, a café.
- [4] The Company has recently sold the café to a third party.
- [5] Mr Mawley has brought a personal grievance against Mr Jorgensen t/a Barista the Espresso Bar (statement of problem received on 6 March 2009) alleging unjustified constructive dismissal and claiming, amongst other things, unpaid wages and holiday pay.
- [6] The parties agree that, following a meeting between the applicant and Mr Jorgensen, the former was employed as head chef at the café, some weeks before signing an individual employment agreement on 26 February 2007. The agreement is stated to be between "*Barista the Espresso Bar*" and the applicant (refer to exhibit 1 in the respondent's bundle).
- [7] Because of issues about alleged non-payment of child support deductions from his wages, irregular wage payments resulting in bank penalties for defaults on automatic payments and increasing work hours as staff numbers were reduced, and because of Mr Jorgensen's failure to rectify the situation, Mr Mawley said he had no option but to resign his employment during December 2008.
- [8] An investigation on 27 May was adjourned following my agreement to Mr Jorgensen's application for the same on the grounds he needed legal representation, his counsel's assurance his client had undertaken to adhere to his terms of representation including contacting Mr Drummond, and because it presented an opportunity for the parties to attend mediation. As it happened, and for the second time, Mr Jorgensen did not attend the agreed mediation.
- [9] In advice received by email on 9 June Mr Drummond advised that an issue had arisen as to who was the employer.

- [10] Following another telephone conference, this time with the parties' representatives, I set down the resumed investigation for 19 August 2009 so as to determine the preliminary question of who was Mr Mawley's employer.

Applicant's Position Summarised

- [11] Following a referral by Work & Income, Mr Mawley met with Mark Jorgensen at a cocktail bar in Palmerston North.
- [12] During their conversation Mr Jorgensen advised the applicant he was the owner of the café and that he was urgently seeking a new head chef.
- [13] Terms and conditions of employment were discussed and agreed, including an hourly rate of \$22 and a 6-week probation period and a similar resignation notice period.
- [14] Mr Mawley told the respondent he was very keen on the job; they shook hands. On the following day Mr Mawley telephoned and confirmed his acceptance of the position.
- [15] Mr Mawley believes he started work shortly afterward, and some weeks after that he in turn signed off an employment agreement: the applicant believes Mr Jorgensen also signed off the same contract but cannot find that copy of the agreement.
- [16] Mr Mawley says he was never told of the existence of the Company (but became aware of it during his employment) and never understood he was employed by it: instead he was and is firmly of the view that he was employed by Mr Jorgensen t/a as Barista the Espresso Bar.

Mr Jorgensen's Position Summarised

- [17] Mr Mawley has produced no documentary evidence to support his claim he was employed by Mr Jorgensen.
- [18] The employment agreement does not have Mr Jorgensen's name on it, but the name Barista the Espresso Bar: it has always been Jorgensen Holdings

Limited t/a as Barista the Espresso Bar. Unfortunately the agreement did not make that clear.

- [19] Mr Jorgensen dealt with Mr Mawley only in his capacity as director of the Company.
- [20] Mr Jorgensen admits he does not recall ever discussing with Mr Mawley who his employer was.

Discussion and Findings

- [21] The onus of proving whether an employer is an individual of a company lies with the employee and the standard of proof is the balance of probabilities: *Colosimo v Parker*, (2007) 8 NZELC 98,622.
- [22] In *Colosimo* the Court noted that the question to be asked is whether the individual held themselves out to be the employer.
- [23] Unlike the factual circumstances in *Colosimo*, in this case there was a meeting between Messrs Mawley and Jorgensen specifically for the purpose of the possible employment of the former – Mr Jorgensen says of course he was not participating in a private capacity but as the agent of the Company.
- [24] As observed in *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451 at par 22, who would an independent but knowledgeable observer have said was Mr Mawley's employer?
- [25] Mr Jorgensen accepts he does not recall ever discussing with Mr Mawley who the latter's employer was (par 6.4 of his witness statement).
- [26] Mr Mawley's recollection of their meeting prior to his employment is that Mr Jorgensen informed him he was the owner of Barista the Espresso Bar (final par, first page of applicant's witness statement received on 23 July).
- [27] The employment agreement was signed after Mr Mawley started working as head chef at Barista the Espresso Bar.

- [28] Mr Mawley's bank statements record his wages as being variously paid by, for example, "*Barista Wage Barista* (3 September 2008), "*DC Jorgensen Hol*" (24 October 2008) and "*Deposit*" (7 November 2008) (attachments to statement of problem). Mr Jorgensen cannot account for the various descriptors but says arrangements were put in place for wage payments to be made by the Company, however on occasions other payments were made because of cash flow issues.
- [29] Mr Jorgensen says, and Mr Mawley does not dispute, that the latter's pay slips were all headed "*Jorgensen Holdings Limited*" (respondent's doc 7).
- [30] Approaching the matter with the principles set out in the authorities referred to above (including *Weston v Fraser* unreported, Travis J, 4 Jul 2008, WC 15/08), I am satisfied that Mr Mawley's true employer was Mr Jorgensen, as – in breach of the employer's statutory obligation to reduce an individual employment agreement to writing, including identifying the employer (s. 65(1)(a) of the Act) – he engaged the applicant from the outset without the benefit of a written employment agreement confirming his claim the Company was the employer, and because on his own admission he cannot recall making clear he was not the employer but the Company was.
- [31] In other words, an independent but knowledgeable observer would have concluded from Mr Jorgensen's conduct, particularly at the time of offer and acceptance as well as during the duration of the employment relationship, that he was holding himself out as Mr Mawley's employer.
- [32] The absence of clear documentary evidence as well as the inconsistent record as to the origin of his wages payments (even though the wages slips referred to the Company) would not have caused Mr Mawley to question his initial impression, that he was employed by Mr Jorgensen.
- [33] This is an instance of undisclosed principal: Mr Jorgensen appeared to act on his own behalf, and Mr Mawley relied (and relies) on that. Mr Jorgensen did not discharge the onus he was under to plainly identify his (claimed) agency role and the existence of a third party, namely the Company: Cheshire & Fifoots Law of Contract, 8th New Zealand Edition, pages 498-499.

Determination

[34] Mr Jorgensen was Mr Mawley's employer.

[35] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority