

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 390/07
5080134

BETWEEN ZACHARY MCMILLAN
 Applicant

AND JOY BONG LIMITED
 First Respondent

 JOY BONG 2005 LIMITED
 Second Respondent

Member of Authority: R A Monaghan

Representatives: Anne Shirley, Counsel for Applicant
 Mark Griffen, Advocate for Respondents

Investigation Meeting: 20 September 2007

Submissions received: 28 September 2007 from Applicant
 5 November 2007 from Respondent

Determination: 11 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Zachary McMillan says he was unjustifiably and constructively dismissed.

[2] He also seeks wages and holiday pay, payments in respect of statutory holidays on which Mr McMillan says he worked, a penalty for failure to provide a written employment agreement, and interest.

[3] Joy Bong Limited (“JBL”) denies that it was Mr McMillan’s employer, saying a related company Joy Bong (2005) Limited (“JB 2005”) was the employer.

[4] It also denies, in any event, that Mr McMillan was dismissed. It says he walked out of his employment.

The identity of the employer

[5] Mr McMillan commenced his employment with JBL in 2002. He was employed as restaurant manager in the 'Joy Bong' restaurant. It was common ground that Mr McMillan's strengths lay in front of house duties, and those were his focus.

[6] In February 2003 Andre Jeffery became involved in the running of the restaurant in an 'advisory' role. Subsequently he took the role of general manager, although not as an employee. During 2003 he became a minority shareholder in JBL, and the following year he became a director in the company. Also in 2004 Mark Griffen, whose family trust was by then the majority shareholder, became a director.

[7] In or about late 2004 Messrs McMillan, Jeffery and Griffen began discussing the formation of the company which was registered in March 2005 as JB 2005. Mr McMillan was seeking an interest in the restaurant's business, but did not wish to incur any liability for JBL's debts.

[8] There was a meeting in or about late March 2005, attended by the three men together with JBL's accountant Robert Hill. During the meeting it was confirmed that the new company would be formed to run the restaurant business and lease the assets of JBL. According to Mr Hill, JB 2005 was to run the restaurant business as a management company. Messrs McMillan, Jeffery and Griffen were to be the shareholders and Mr Griffen was to be the director. That part of the arrangement was subsequently reflected in the companies office records.

[9] Further, according a meeting note prepared by Mr Hill:

“5. Zach and Andre will become employees of the new company & will receive a salary/wages for the work performed at a market rate.

...

8. All employees will be rehired under Joy Bong 2005 Limited & the company will apply for PAYE status with the IRD to commence 01/04/2005, all wages will be paid out new bank account to be set up by Mark.”

[10] Mr Hill went on to say that his firm dealt with the payroll for JB 2005 and he made the necessary arrangements with the IRD regarding staff PAYE.

[11] Mr McMillan denied any express discussion of the parts of Mr Hill's note quoted above. Mr Jeffery was not present at the Authority's investigation meeting, but subsequently filed an affidavit deposing to his recollection of the meeting. He, too, said there was no discussion about the transfer of any employees' employment. Mr Hill's evidence, however, was that he gave the original handwritten version of his meeting notes to Mr Jeffery because Mr Jeffery was to action some of the points on it.

[12] There were no written employment agreements with either company. Mr Hill said, in effect that one of the action points following the March meeting was the preparation of employment agreements between JB 2005 and Messrs Jeffery and McMillan respectively. Mr Jeffery accepted the preparation of employment agreements would have been his responsibility had the alleged arrangements been made. As I have said, he denied that they were.

[13] The handwritten version of Mr Hill's meeting notes was not produced in evidence, so I cannot make any finding as to how closely it resembled the typewritten note that was produced. However Mr Hill said he prepared the typewritten notes a few days after the meeting, and that they record what was discussed at the meeting. I find the content of those notes logical and consistent with the circumstances surrounding the business. There was nothing obviously artificial about the inclusion of references to the employment agreements.

[14] Overall I found Mr Hill to be a credible witness and accept his evidence. For the avoidance of doubt, I record that Mr Hill filed a letter commenting on matters associated with affidavits and additional information filed after the end of the investigation meeting. I have not treated that letter as evidence, and much of it amounted to submission in any event, but as far as the facts are concerned it repeated matters that were covered in oral evidence during the investigation meeting. My findings about Mr Hill's evidence are based on what he said during the meeting.

[15] Returning to the identity of the employer, in the light of the overall strategy of fencing the restaurant business off from JBL and its liabilities it would be surprising if Messrs McMillan and Jeffery genuinely wished to remain associated with JBL as employees. It was common ground that the operation of JB 2005 was to amount to a 'clean slate,' and I consider it unrealistic to suggest that those two employees in particular intended to retain an employment relationship with JBL rather than to create a new one with JB 2005.

[16] Finally, JBL's accounts for the year ended 31 March 2006 support the allegations that JBL ceased to operate the restaurant business and was not the entity which paid staff wages.

[17] I therefore conclude that Messrs McMillan's and Jeffery's employment by JB 2005 was discussed and agreed. The employer party to this employment relationship problem is JB 2005.

The events leading to the termination of employment

[18] In or about October 2005 Mr Jeffery left the business, in apparently acrimonious circumstances not involving Mr McMillan. Messrs Griffen and McMillan discussed Mr McMillan's taking over the role of general manager, which Mr McMillan indicated he was able to do. He received a pay rise to reflect his new position.

[19] However no replacement restaurant manager was engaged, and Mr McMillan continued to carry out that role too. From the evidence it was clear that Mr McMillan did not have the range of financial and administrative skills required in a general manager, and to some extent he acknowledged this. Even so, during the relevant period he was attempting to cover the work of two people. It was equally clear that Mr Griffen has a bombastic and at times bullying personality and does not have the personnel management skills useful in an employer. Inevitably there were problems.

[20] Mr Griffen sought to characterise the difficulty as one of poor performance on Mr McMillan's part, which was met with attempts at 'counselling' and performance

reviews on his part. Mr McMillan did not co-operate in this process, choosing instead to refuse to communicate with Mr Griffen to Mr Griffen's increasing frustration.

[21] I do not accept that characterisation and find it self-serving. If it describes the approach to shortcomings in Mr McMillan's general management skills which Mr Griffen intended or attempted to take, then he failed entirely to give proper effect to it.

[22] It is not coincidental that there was a significant deterioration in the parties' relationship in the last quarter of 2005 and early 2006. Mr Griffen complained that Mr McMillan failed to attend meetings and refused to communicate with him. He was not specific about how many or which meetings Mr McMillan failed to attend. Mr McMillan said there were some unscheduled meetings, which he was unable to attend. He, too, did not provide any further details. Discussion in evidence was that JB 2005 board meetings were supposed to be conducted every Wednesday, and Mr Griffen said Mr McMillan's attendance in October 2005 was acceptable. Mr McMillan said that, with the exception of one or two meetings, he attended all meetings to late December 2005. Mr Griffen denied this, but asserted in any event that there were no meetings in December.

[23] There were meetings scheduled in December, and there were miscommunications in respect of at least two of them. One meeting did not go ahead because Mr McMillan was in Wellington – an absence he said had been arranged. A second did not go ahead because of a miscommunication over whether it was to be at the restaurant or Mr Griffen's home. Mr McMillan went to Mr Griffen's home for it, while Mr Griffen went to the restaurant. Mr McMillan returned to the restaurant in time to see Mr Griffen, who by then had become angry about Mr McMillan's absence and was abusive.

[24] The communication problem was exacerbated by the quality of the discussions that occurred during the meetings that went ahead, and Mr Griffen's approach to attempting to discuss matters when a meeting had not gone ahead. I have no hesitation in accepting Mr McMillan's evidence - generalised though it was - that when he attempted to raise issues during meetings he was 'shouted down' and there was a lot of swearing. I note, too, that Mr McMillan raised concerns as a shareholder,

and was dissatisfied with the response to questions he attempted to raise in that capacity. Overall I consider it likely he became increasingly sensitised to Mr Griffen's way of discussing issues, making matters worse.

[25] Communication deteriorated to the point that, in early 2006, Mr Griffen asked Mr Hill to act as manager. Mr Hill declined, but despite the refusal Mr Griffen wrote Mr McMillan a letter dated 20 January 2006 asserting that Mr Hill had been appointed as manager/CEO and that Mr McMillan was to report to Mr Hill. That letter was self-serving and extraordinary. However Mr Hill did at least discuss business-related matters with Mr McMillan during Mr McMillan's regular visits to his offices. Those discussions were amicable. While Mr Hill found himself in a position of go-between which was less than comfortable for him, it seems the discussions covered important matters relevant to the running of the restaurant. Mr Griffen alleged in correspondence that Mr McMillan was failing to engage with Mr Hill too, but there was no evidence of that beyond evidence of a difficulty in organising an initial meeting.

[26] Mr Griffen at least recognised the need to obtain managerial assistance for Mr McMillan, although he should have acted more promptly than he did. I accept there were difficulties in finding a suitable person, but that was no reason to leave Mr McMillan as unsupported as he was. In February 2006 Mr Griffen engaged Gareth Farry to act as a consultant in the restaurant. Mr Farry was a general management rather than front of house specialist. In principle his engagement struck me as appropriate, but Mr Griffen did not adequately communicate its basis to Mr McMillan. This caused difficulties initially between Messrs Farry and McMillan. However some time in or about early March 2006 there was a discussion between Messrs Griffen, Farry and McMillan about the roles of Messrs Farry and McMillan. The outcome was positive and it was common ground between Messrs Farry and McMillan that they came to understand each other's strengths and enjoyed a constructive working relationship for the brief period before Mr McMillan's employment ended.

[27] Mr Griffen drafted another very unfortunate letter to Mr McMillan, dated 9 February 2006. He said he did not send the letter, although it quickly came to Mr

McMillan's attention anyway. It purported to record the unsatisfactory outcome of a performance review, allegedly conducted in Mr McMillan's absence because he was refusing to attend meetings with Mr Griffen and was 'proving extremely difficult' with Mr Hill. It instructed Mr McMillan to return to his original duties and rate of pay, and advised that 'a consultant' (meaning Mr Farry) would be managing the business' 'general affairs' commencing 'on Monday at 9 am'.

[28] Not surprisingly, Mr McMillan saw this as a demotion. The decrease in the rate of pay was not actioned, although Mr Farry's engagement went ahead as I have described.

[29] On 14 February 2006 Mr Griffen filed a statement of problem in the Authority, alleging that Mr McMillan had abandoned his responsibilities by travelling to Wellington on 5 February without informing his manager, and complaining in general terms about Mr McMillan's failure to attend meetings. The statement of problem attached the 20 January letter and the allegedly unsent letter of 9 February. Mediation was sought.

[30] The Authority issued a direction to mediation. Mediation went ahead in late March 2006, but there was no resolution of the problem.

[31] On 8 March 2006 Messrs Griffen and Hill met with Mr McMillan and Rachel Dunne, a solicitor who was attending the meeting as Mr McMillan's support person and friend rather than in her professional capacity. There was a discussion about the matters raised in Mr Griffen's application to the Authority, as well as Mr McMillan's response. Mr Griffen expressed his concerns about Mr McMillan's attendance at meetings. Mr Farry's appointment was discussed, and Mr Griffen told Mr McMillan that Mr Farry was to be his boss. Mr McMillan was unhappy about the appointment, but Ms Dunn commented that good progress was made when discussion then turned to the way in which the relationship would work.

[32] Discussion deteriorated again when Mr Griffen informed Mr McMillan his salary would be reduced by \$12,500. The reduction was to reflect the loss of general manager's duties. Ms Dunn said discussion broke down entirely when Mr Hill was

asked to go through some of the financial concerns about the company and Mr Griffen began accusing Mr McMillan of stealing from the business. The upcoming mediation was mentioned, at which point Mr Griffen became angry and told Mr McMillan he would like to meet him across the table and slam him, that he would bring Mr McMillan down, and that Mr McMillan would never work for Mr Griffen or anyone associated with him again.

[33] Ms Dunn sought to end the meeting. Mr Griffen put it to Mr McMillan that his only option was to return to Joy Bong on a reduced salary and with Mr Farry as his boss. A further meeting was arranged for 11 March.

[34] That meeting was brief. Mr McMillan advised that he did not agree to the reduction in his salary and that he would like to go ahead with the mediation. Mr Griffen became angry and told Mr McMillan he had sought mediation so he could dismiss Mr McMillan. He told Mr McMillan that, if Mr McMillan went to mediation he could no longer work with him. In a very angry state he then left the room to take a telephone call. Ms Dunn and Mr McMillan left the premises and Mr McMillan's employment ended.

[35] I record that Ms Dunn's evidence was given by affidavit filed after the investigation meeting. She had made herself available to attend the meeting, but time ran short and the suggestion that her evidence be filed by way of affidavit was mine, made in the interests of avoiding more of the delays that had beset the investigation before then. Mr Griffen was given an opportunity to respond to the affidavit, which he did by questioning why Ms Dunn did not attend and suggesting her affidavit would not have stood up to cross examination. He did not specify where he disagreed with the contents of the affidavit, but he did say that by the time Ms Dunn became involved he was getting 'extremely desperate and was prepared to try any means to get Zac out of denial.' He also said he would 'freely admit plenty was said'.

[36] In any event I heard oral evidence about the meetings from Messrs Griffen and McMillan. Mr Griffen effectively denied or put a different slant on most of the threats Ms Dunn had recorded. At the same time, regardless of whether the issue was discussed in Ms Dunn's presence, he did not deny telling Mr McMillan his salary was

to be reduced. His response was variously that the reduction was not put into effect, or if there was to be a reduction it would have been put into effect. He insisted that he sought mediation only to get Mr McMillan to communicate with him, and that he told Mr McMillan he did not want to go to mediation but did want to keep the business going. He said he asked Mr McMillan whether ‘we are going to mediation or work it out here’, and that Mr McMillan said something like ‘are you just doing this so you can fire me’. He acknowledged that he may have said ‘yes’. Finally he suggested that Ms Dunn and Mr McMillan wanted to orchestrate a walkout, and that they did walk out when he took his call. I do not accept that suggestion.

[37] I prefer Ms Dunn’s and Mr McMillan’s accounts because they strike me as the more likely, both in the light of Mr Griffen’s conduct overall and because of some of the congruence in the accounts Mr Griffen has given.

Whether there was a dismissal

[38] A constructive dismissal may occur in the following circumstances:

- (a) an employer gives an employee a choice between resigning or being dismissed;
- (b) an employer follows a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; or
- (c) a breach of duty by the employer causes the employee to resign.¹

[39] The absence of a letter of resignation here is not material. Mr McMillan left the premises at the end of the meeting of 11 March because he felt the employment relationship could not continue. Mr Griffen says Mr McMillan abandoned his employment, but Mr McMillan’s departure amounted to a constructive dismissal if it met one or more of the broad tests set out above.

[40] Mr Griffen’s conduct and threats during the 8 and 11 March 2006 meetings were sufficient in themselves to amount to a breach of the obligation to accord fair

¹ **Auckland etc Shop Employees IUOW v Woolworths NZ Limited** [1985] 2 NZLR 372; (1985) ERNZ Sel Cas.

and reasonable treatment to Mr McMillan. Employees are not expected to put up with conduct of that kind. I would have found the behaviour was sufficient in itself to found a conclusion that Mr McMillan was constructively dismissed. Moreover I do not accept Mr Griffen's protestations that he was 'desperate' to communicate with Mr McMillan and that he was, in effect, driven to behave as he did in order to 'get Zac out of denial'. Even if the concerns about Mr McMillan's willingness to communicate were well-founded that did not excuse Mr Griffen's behaviour.

[41] The attempt to bully Mr McMillan into reducing his pay would also in itself support a breach of duty by Mr Griffen. Although I have accepted that Mr McMillan did not have the range of skills of a general manager, Mr Griffen's approach to the problem did not meet the standard expected of a fair and reasonable employer. Having appointed Mr McMillan, Mr Griffen did not give him any support and assistance for a period of some three months, and did not hire a replacement restaurant manager to assist with the workload. I accept, too, that Mr McMillan 'put his hand up' for the job. That in itself does not justify Mr Griffen's reaction to the subsequent difficulties.

[42] The above is sufficient for a conclusion that Mr McMillan was constructively dismissed and I find accordingly.

Justification for the dismissal

[43] For the reasons discussed above, the dismissal cannot be justified. Mr McMillan has a personal grievance.

[44] By way of remedy for his personal grievance, Mr McMillan seeks:

- (a) \$7,288.48 as reimbursement of remuneration lost as a result of his grievance; and
- (b) \$30,000 as compensation for injury to his feelings resulting from his personal grievance.

1. Reimbursement of lost remuneration

[45] Mr McMillan obtained alternative employment on 24 April 2006, at a salary of \$45,000 pa. His salary had been \$57,500 pa, plus a vehicle. I was not told how the figure claimed was calculated, but it is not inconsistent with the above information and Mr McMillan is entitled to the payment. I order accordingly.

[46] With reference to the reasons why I have found Mr McMillan was unjustifiably and constructively dismissed, there are no grounds on which to order a reduction in respect of contributory fault, and I make no such order.

2. Compensation for injury to feelings

[47] Mr McMillan is entitled under s 123(1)(c)(i) of the Employment Relations Act 2000 to compensation for injury to his feelings. The amount claimed is well in excess of the usual range of awards. While I accept there was injury to Mr McMillan's feelings, the injury does not support an award that high. JB 2005 is ordered to pay to Mr McMillan the sum of \$5,000 as compensation in respect of the injury.

Payment of wages

[48] Mr McMillan seeks payments of wages and holiday pay calculated as follows:

- (a) Unpaid wages in respect of the week ending 12 March 2006, in the sum of \$1,105.77;
- (b) 9 days' annual leave outstanding, in the sum of \$1,652.59;
- (c) Payment in lieu of 7 days' time off when a qualifying statutory holiday was worked, in the sum of \$1,105.77; and
- (d) Additional payment for working on 7 statutory holidays, in the sum of \$1,156.40

[49] The total claimed is \$5,020.53. These calculations were not disputed.

[50] There was a discussion in the immediate aftermath of the termination of employment to the effect that, in lieu of wages, Mr McMillan keep the company vehicle then in his possession. No agreement was reached and Mr McMillan returned the vehicle.

[51] It was common ground that Mr Griffen made a final payment on behalf of Mr McMillan to the finance company which financed Mr McMillan's loan for the purchase of shares in JB 2005. Details filed after the investigation meeting show the sum was \$745.85, and was paid on 31 May 2007. Mr Griffen asserted that, by agreement, the amount was paid in lieu of wages owed. However he did not produce any evidence of an agreement in those terms, and the sum falls far short of the amount outstanding. In the absence of evidence of such an agreement I do not accept the payment was made in full and final settlement of wages outstanding.

[52] On the other hand Mr McMillan said he had discussed with Mr Hill the fact that he was still owed wages and I do not accept the payment was merely gratuitous. I would accept Mr Griffen sought to make the payment on the basis that it would at least be deducted from wages owed to Mr McMillan, but unfortunately he discussed that matter with the finance company rather than with Mr McMillan. At the same time counsel for Mr McMillan filed a copy of a letter from the finance company to Mr Griffen and copied to Mr McMillan. It referred to a request from Mr McMillan that the payment be made from 'monies due to him by Joybong.' Hearsay though the letter is, I do not accept Mr McMillan's assertion that the reference was to a payment of dividends or other shareholder payments owed as there was no evidence any such payments were owed. In all of the circumstances I consider it likely there was an arrangement under which the payment was to be offset against wages owed.

[53] JB 2005 is therefore ordered to pay to Mr McMillan the sum of \$5,020.53, less \$745.85. The remaining amount is \$4,274.68.

Penalty for failure to provide written employment agreement

[54] The responsibility for the failure to provide a written employment agreement was Mr Jeffrey's.

[55] Although the obligation to provide employees with a written employment agreement is an important one, in the circumstances here I do not believe anything will be gained by imposing a penalty for the failure to meet that obligation. Therefore there will be no order for a penalty.

Summary of orders

[56] JB 2005 is ordered to pay to Mr McMillan:

- (a) \$7,288.48 as reimbursement of remuneration lost as a result of the personal grievance;
- (b) \$5,000 as compensation for injury to feelings as a result of the personal grievance;
- (c) \$4,274.68 as unpaid wages and holiday pay; and
- (d) interest on:
 - (i) the sum in (a) above at the rate of 8.9% per annum from the date of this determination to the date of payment, and
 - (ii) the sum in (c) above, at the rate of 8.9% from 12 March 2006 to the date of payment.

Costs

[57] Costs are reserved.

[58] If the parties seek a determination on the matter Mr McMillan shall have 28 days from the date of this determination in which to file and serve a memorandum setting out his position, and JB 2005 shall have a further 7 days from the date of receipt of the memorandum in which to file and serve its response.

R A Monaghan

Member of the Employment Relations Authority