

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 298/07
5046143

BETWEEN DYLAN MEREDITH
 Applicant

AND GENGY'S INVESTMENTS
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in Person
 Mr Wonki Cho, for Respondent

Investigation Meeting: 19 September 2007

Determination: 25 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent, Gengy's Investments Limited, runs a number of restaurants in the Auckland area, including one at Henderson where the applicant, Mr Dylan Meredith, was employed by the company.

[2] Mr Meredith's employment began in December 2005 and ended on 7 July 2006. Mr Wonki (Monty) Cho, Gengy's managing director, confirmed the termination of Mr Meredith in a letter to him dated 7 July 2006:

Dear Dylan

You have been employed at Gengy's Restaurantas manager on three month trial from the third of April 2006.

During this time you worked hard and made every effort to fulfil this role.

I appreciate your efforts and the hard work you have undertaken on behalf of Gengy's restaurant but after careful review I wish to inform

you that I feel you do not fit the requirements that this difficult and demanding position entails.

I wish you success in your future endeavours, and wish to thank you again for all your efforts.

Sincere Regards

Wonki Cho

[3] A personal grievance was raised by Mr Meredith a few days after termination, when he wrote to Mr Cho on 19 July 2006 complaining that his dismissal had been substantively unjustified and procedurally flawed. The Authority has now investigated that complaint with a view to resolving the employment relationship problem.

[4] Mr Meredith had begun his employment with Gengy's as a bar attendant, for which he was paid at an hourly rate.

[5] In April 2006, Mr Cho agreed that Mr Meredith could start as the restaurant manager, for which he received a salary of \$32,000.

[6] Unfortunately the terms and conditions of Mr Meredith's employment were not ever set out in any written agreement, as they should have been. They were probably not in writing at all, although Mr Cho thinks there may have been a letter but which he now cannot locate.

[7] Even in the absence of a written agreement it is clear that Mr Meredith was employed from 3 April 2006 as restaurant manager on a three month trial. That is the evidence of both Mr Meredith and Mr Cho. What is less clear is whether his employment was permanent, although commencing with a three month trial phase, or whether his employment was for a finite term of three months, during which his suitability for the management position could be assessed.

[8] I am satisfied from Mr Cho's evidence that he intended the latter. I find that he intended the employment would be for three months only but that if Mr Meredith showed he was suitable then he could be offered permanent employment after completion of the trial.

[9] Having failed from the outset to comply with s 65 of the Employment Relations Act 2000 by providing Mr Meredith with a written individual employment

agreement, Gengy's further failed to comply with the Act by having a reason that was genuine for the fixed term nature of Mr Meredith's employment. Section 66(3)(b) provides that limiting the term of an employment agreement to enable the suitability of an employee for permanent employment to be assessed, is not a genuine reason for having a fixed term of employment.

[10] The consequence of not complying with the Act in this regard is expressed by s 66(6) to be that an employer cannot rely on the fixed term as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective. By challenging the justification for his dismissal this is what Mr Meredith has done. He was entitled to do this even after the employment had ended.

[11] That election however does not prevent an employer from establishing that it was justified in dismissing the employee in the circumstances. In this case, the only possible justification for dismissal could be that the performance of Mr Meredith during his three month *trial* was of such a low standard that his employer, acting fairly and reasonably, could end the employment as if it had been a permanent one to begin with.

[12] After Mr Meredith lodged an application in the Authority, Gengy's sent in a statement in reply expressing the following view of the problem;

*THAT ALL PROCEDURES OF EMPLOYMENT WERE
CONDUCTED CORRECTLY EVEN THOUGH DONE ONLY
VERBALLY WITH*

[13] The statement referred to an attached memorandum in which the history of the employment was set out, and it included the allegation that:

*The applicant had failed to properly disclose his problems with
alcohol and problems with medication for medical conditions which
we believe affected his performance.*

[14] The memorandum attached to the statement in reply was apparently written by Mr Kevin Sam who was the supervisor of Mr Meredith. The memorandum records that Mr Sam had *monitored and mentored* Mr Meredith on a one-to-one informal basis during the period between 3 April and 10 June 2006. It then records that on 10 June there was a meeting at which Mr Cho had told Mr Meredith of the many complaints he had received about his performance as manager. These included:

- *Abusive communications to staff members;*
- *Loss of confidence and respect in Dylan by staff making it harder to manage;*
- *Argued with Nicky in front of customers (60 people booking cancelled);*
- *Poor and erratic work attendance records;*
- *Poor organisation of staff and restaurant procedure;*
- *Inability to delegate;*
- *Lied to Wonki about computer course.*

[15] Gengy's memorandum goes on to say that Mr Cho had told Mr Meredith on 10 June that he was not happy with his performance and did not believe that Mr Meredith could improve sufficiently to successfully complete his trial period.

[16] In his evidence, Mr Cho confirmed to the Authority that by 10 June 2006 he could see little possibility that Mr Meredith would in the remaining few weeks of the trial period, improve enough to be taken on permanently. Therefore, as the memorandum records, Mr Cho offered Mr Meredith the choice of being paid out for the balance of the trial period and leaving the employment immediately to look for other work, or working for the rest of his trial period and trying to successfully complete it. Mr Meredith chose the latter option but, as the memorandum from Gengy's also records, on 7 July Mr Cho informed Mr Meredith that his trial period was complete and that he did not believe that Mr Meredith was able to satisfactorily fill the position. The memorandum seems to avoid the use of the word *dismissed*, or *dismissal*, but talks about Mr Meredith being notified of his *failed trial period* on 7 July 2006.

[17] Gengy's statement in reply also includes a typewritten *diary of events* relating to the employment of Mr Meredith at the restaurant. Over the three month period there are 12 different dates, alongside of which matters of performance are briefly noted. On four days Mr Meredith is recorded as going home or being off sick. One relates to his going home early because he was still drunk from his birthday. In one instance, it is recorded that Mr Meredith had a *fierce argument* with a member of the staff. Two other dates relate to an instruction that had been given by Mr Cho for the kitchen and bar to be cleaned up and then, the following day, the Health Department inspecting the premises and giving them a *D* rating. In one instance the record is that Mr Meredith had not shown up for work. On 28 May 2006 the record is that he had tried to purchase goods from a bakery outlet on Gengy's account for his personal use,

without authorisation. A meeting about bar sales is the subject of another entry and the final matter is the *evaluation meeting* that took place on 10 June, at which Mr Meredith was offered the option of going with three weeks wages or staying for the remainder of his trial period.

[18] The Authority has questioned both Mr Cho and Mr Meredith about these various matters noted in Gengy's reply to the grievance claim. A difficulty for Gengy's is that Mr Kevin Sam, who had supervised Mr Meredith at Henderson, has since left and Mr Cho has been unable to contact him with a view to presenting his evidence. While Mr Cho was entitled to receive and consider reports from Mr Sam about the performance and conduct of Mr Meredith, before reaching any final conclusions he needed to make sufficient inquiry directly of Mr Meredith himself about these matters, to see if he had any explanation in relation to them.

[19] Over a three month period, four days off sick does not seem excessive or unreasonable for someone such as Mr Meredith who I accept is particularly susceptible to bouts of flu. Between 28 April and 28 May the only matter recorded is that Mr Meredith did not turn up for work on one day. Little inquiry seems to have been made by Mr Cho about the reason for this. There is only the one entry in relation to hygiene, and there is also only one entry in relation to an argument with a staff member.

[20] A matter seeming to go to the honesty of Mr Meredith is hotly disputed by him. Where Mr Cho would have it that Mr Meredith had tried to misuse the company's account for his own personal purposes by buying goods from a baker, Mr Meredith claims that he had jocularly invited the baker to give him some hot cross buns. The major problem for the employer with relying on this major item of conduct is that Mr Meredith was never told about it at the time it is alleged to have occurred and has only heard about it after his dismissal. He was never asked to give an explanation for a quite serious allegation relating to his honesty. Although the baker's representative has been contacted by Mr Cho to see if she can assist the Authority, apparently she is afraid to do so and did not wish to supply even a contact phone number to the Authority.

[21] Overall, the Authority concludes that the trial of Mr Meredith for a three month period was not a fair one and that his conduct did not give the employer sufficient grounds to summarily dismiss him, as it did on 7 April 2006. A fair and

reasonable employer, in my view, would have made its standards much clearer to Mr Meredith, given him reasonable deadlines to meet in showing that he could perform to the standard required, and objectively measured his performance against those standards. If all was not lost by 10 June and Mr Meredith remained under assessment afterwards and until 7 July, he should also have been given notice of termination or payment in lieu of notice, since the purported fixed term of the contract was unlawful in the circumstances.

[22] I find that the most likely reason why the employer did not concern itself too much with measuring and monitoring the performance of Mr Meredith was that it thought his employment would end anyway after three months, leaving a choice to be made by Gengy's to offer him permanent employment or not.

Determination

[23] For the above reasons I find that Mr Meredith was unjustifiably dismissed. He is entitled to remedies for that wrong. It seems, and this is supported by a medical certificate, that a particular condition Mr Meredith suffers from was exacerbated by his sudden dismissal and that this prevented him from looking for employment immediately after his dismissal for a while. In the three months following his dismissal he did have employment for two weeks and earned approximately \$600 in that time. However, given that he is an experienced bar/restaurant worker, had he made reasonable efforts to find employment he ought to have reduced some of the loss of wages in that three month period.

[24] While I consider there were aspects of his performance that the employer was entitled to be concerned about, these ought to have been addressed properly in the context of a measured and monitored trial period. I do not consider that these matters were necessarily matters of blame simply because their existence had been detected. Standards should have been made clear and warnings issued, before the conduct of concern could be regarded as blameworthy. There is also a problem with showing a causal link between the conduct and the unjustified dismissal, since the employer regarded the employment as terminating upon the expiry of the fixed term rather than by action taken at its initiative.

[25] I therefore consider that for lost wages an amount of two months' wages should be paid by Gengy's Investments Limited to Mr Meredith. That amount takes

into account the wages that were earned for two weeks and a degree of failure to mitigate loss during that period. The sum to be paid is \$5,333.

[26] I find that Mr Meredith suffered humiliation and distress at being dismissed in the way he was and that this caused him clinical anxiety requiring medical treatment. He has claimed \$5,000 for compensation for this harm and I consider that an award of \$3,000 is appropriate. Gengy's Investments Limited is to pay that amount to Mr Meredith in addition to the lost remuneration of \$5,333.

A Dumbleton
Member of the Employment Relations Authority