

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Rebecca Reij (Applicant)
AND Carlos Clements (Applicant)
AND Camand Holdings Limited (Respondent)
REPRESENTATIVES Rebecca Reij in person and on behalf of Carlos Clements
Mary Flannery, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 29 November 2005
DATE OF DETERMINATION 18 January 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problems

[1] Camand Holdings Limited owns and operates a business in Clyde called Olivers Restaurant and Lodge. Cameron Mouat is the sole shareholder and director of Camand Holdings Limited. Rebecca Reij was Mr Mouat's fiancée and she was closely involved in Camand's purchase and operation of Olivers. She and Mr Mouat lived together on the premises. At the relevant time, Carlos Clements worked for Camand as head chef.

[2] On or about 1 January 2005, the relationship between Mr Mouat and Ms Reij ended. Ms Reij left the accommodation at Olivers and went to stay with Mr Clements' mother. On or about 4 January 2005 there commenced a relationship between Ms Reij and Mr Clements. They told Mr Mouat about their relationship on 5 January 2005. Mr Clements and Ms Reij continued to work at Olivers until an altercation there between Mr Mouat and Mr Clements on 12 January 2005. There was a fight of sorts between Mr Mouat and Mr Clements and Ms Reij heard the commotion and intervened. Words were said then both Mr Clements and Ms Reij left. Neither has worked at Olivers since.

[3] Ms Reij accepts that she was not an employee of Camand Holdings Limited for most of her time at Olivers. However, she says that Mr Mouat asked her to continue working in the business but as an employee soon after their relationship ended. Mr Mouat denies that he engaged Ms Reij as an employee. Ms Reij further says that later on 12 January 2005 Mr Mouat told her she was banned from the premises and sent her a similar text message. She said that the effect of this was to dismiss her unjustifiably. Ms Mouat denies telling Ms Reij to leave. To resolve this problem, it will be necessary to set out in greater detail the events after 1 January 2005, particularly those of 12 January 2005. I will then need to assess the evidence of Ms Reij and Mr Mouat about the alleged employment and alleged dismissal.

[4] Regarding the altercation on 12 January 2005, Mr Clements says that Mr Mouat punched him, that they briefly wrestled before Ms Reij intervened and that he was then dismissed. However Mr Mouat says that he was punched without provocation by Mr Clements who he dismissed as a result. There were two other witnesses to the brief altercation between the two men. To resolve Mr Clements' problem, I will need to assess all the available evidence about the incident in the context of events that led up to the altercation. There is also an issue about whether any arrears of salary are owed.

[5] Because of the significant overlap in the relevant facts of both personal grievance claims, I convened one investigation meeting to consider both claims. It is also convenient to resolve both problems in this one determination.

[6] There are a number of factual issues over which the parties differed significantly but it will not be necessary to resolve and even refer to all those disputes.

The lead up to 12 January 2005

[7] Mr Mouat and Ms Reij agreed that words were said between them early in the morning on 1 January 2005 and Ms Reij then left their shared accommodation at Olivers. Ms Reij returned to Olivers on 2 January in the morning to collect some personal possessions. She then went to Queenstown and was there when Mr Mouat phoned her later on 2 January, which Mr Mouat said he *probably did, whether it was to ask [Ms Reij] back or something ...*. Ms Reij's evidence is that Mr Mouat asked her to come back to him but she refused. Mr Mouat then explained that it was busy and that he needed her there to help with the business. They then talked about her continuing her duties as previously and discussed and agreed a salary of \$47,000 per annum. As already mentioned Mr Mouat denies there was any offer or acceptance of employment.

[8] What is clear is that Ms Reij did work at Olivers between 3 and 12 January 2005 except for 9, 10, 11 January 2005. Throughout that time, she was living in Alexandra and not Clyde. She attended to the same duties as before 1 January 2005 and her attendance to those duties followed her discussion with Mr Mouat on 2 January 2005. Mr Mouat explained that by saying that Ms Reij was present at Olivers during this time as the *lady of the house* just as prior to 1 January 2005. By that, I took Mr Mouat to mean that Ms Reij simply continued to assist him in his operation of the business by dint of their personal relationship. I do not accept that Ms Reij continued her involvement in the business on that basis. Their relationship as a couple ended acrimoniously on 1 January 2005 if not earlier and Ms Reij showed no sign of wavering from that position. She had no reason to be at Olivers after 1 January 2005 except in accordance with an arrangement with Mr Mouat for her to be there. She also needed her own income. In the circumstances, I prefer Ms Reij's evidence as an explanation of her continued involvement in the business.

[9] On or about 5 January 2005, Ms Reij and Mr Clements told Mr Mouat that they had commenced a relationship.

[10] Ms Reij and Mr Clements did not work on Sunday 9 January, Monday 10 January or Tuesday 11 January 2005. In its statement in reply Camand Holdings Limited says that Mr Clements *failed to attend work without excuse* on 10 and 11 January 2005. Ms Reij and Mr Clements produced hand written rosters which show the three days as rostered days off. Mr Mouat says that he has never seen these documents before and there is evidence that another person (Matthew Carter) was responsible for rostering. Matthew Carter says that he helped Mr Mouat prepare the January rosters and that the restaurant closure on the three days due to Mr Clements' absence was not planned.

[11] Mr Mouat, Ms Reij and Mr Clements agree that they met on the evening of 11 January 2005 although they dispute who initiated the meeting. Mr Mouat arranged for his friend (Shane McLellan) to be present. The meeting on 11 January 2005 followed a meeting called by Mr Mouat of some staff and friends where Mr Mouat spoke of his belief that Mr Clements was involved with illegal drugs. Following this first meeting, Mr Mouat reported his belief about Mr Clements' involvement with drugs to the local Police. It is not necessary to determine whether there is any truth to what Mr Mouat says about Mr Clements' involvement with drugs or whether the allegations result from Mr Mouat's dislike of Mr Clements or were a misguided attempt to regain Ms Reij's affections. If Mr Mouat's evidence is accepted, he knew by December 2004 of Mr Clements' drug use and did nothing about it. It was not referred to in a letter sent to Mr Clements after the fight advising of his dismissal and it was not something that Mr Mouat gave any thought to on 12 January 2005 at the time that he dismissed Mr Clements.

[12] The meeting that occurred during the evening of 11 January 2005 was somewhat acrimonious, at least in part. Mr Mouat spoke of his meeting from the day before. He made the allegation about Mr Clements being a drug user. Mr Mouat said that he wanted to fire Mr Clements but Mr Clements made it clear that it would not be easy to do that. I accept the evidence that Mr Mouat said that he wanted to rip Mr Clements' throat out or something similar. The meeting on 11 January 2005 lasted perhaps 30 minutes or a bit longer. Reference to just the above exchanges would convey an inaccurate impression of the meeting. To some extent, it was an attempt for the three who were emotionally involved to clear the air in the knowledge that Ms Reij and Mr Clements would be working at Olivers until the end of the season, which is what had been discussed with Ms Reij on 2 January 2005. The meeting ended with the expectation that work would continue as usual the next day.

Events of 12 January 2005

[13] Overnight, Ms Reij and Mr Clements decided to talk again with Mr Mouat about the matter of the drug allegations. They did that when they arrived at work at 2pm. No one else was present. Again there are claims and counterclaims about what was said during this discussion. It is not necessary to canvas or resolve the disputed accounts. As Mr Clements says in evidence *After the meeting with Cameron I returned to the kitchen to prep for dinner service and Rebecca went back to the office ... to continue to follow up with booking inquiries*

[14] On 12 January 2005, Mr Clements made a statement to the Police in which he described his interactions with Mr Mouat between the 2pm exchange and the fight that occurred at about 6.15pm. In the statement, Mr Clements says *Tonight twice he [Mr Mouat] asked to talk with me outside the restaurant. On both occasions I just walked away. I could tell he was angry and he had been drinking. ... he then rang me on Rebecca's phone and asked if we were going to be open tonight. He asked me to come and talk with him outside the front door of Olivers. I went out and could see he was ready to have a go so I just walked away. He started following me and I went back to the kitchen. I don't know where he walked to* In evidence, Mr Clements' account of the third exchange is more colourful. He says that Mr Mouat abused him calling him a *maggot, parasite, bottom feeder* and a *drug fucked chef* and so on before he (Mr Clements) walked away. I find that the latter is probably the more accurate account of that part of the interaction between the two men. Mr Clements was no doubt angry towards Mr Mouat as a result of this abuse.

[15] After the last exchange with Mr Mouat, Mr Clements went to the office to see Ms Reij. He was there for a brief time and then headed back to the kitchen. His route took him outside through the main garden. The fight between the two men occurred when their paths crossed as Mr Clements was heading back to the kitchen.

[16] There are two witnesses to what happened. Mr McLellan and Jason Lopez were having a drink in the garden area. In evidence, Mr Clements says that this was set up so there would be witnesses to back Mr Mouat. However, there is no evidence to support this assertion and I reject it. In evidence, Mr McLellan says that he saw a couple of punches thrown, one from each man, but none landed. Mr Clements then had Mr Mouat in a bear hug and they went to ground. Ms Reij arrived on the scene and threw herself in between. There were *some verbals* and Mr Mouat told Mr Clements he was sacked. The evidence given orally by Mr McLellan is at variance with his prepared statement which says that he saw Mr Clements hit Mr Mouat with a punch to the head and then saw Mr Clements hit back. Mr Lopez is a business associate of Mr McLellan's. He was interviewed by the police on 12 January 2005 and said that he saw Mr Clements hit Mr Mouat with a short left hand punch, they both fell on the lawn and he was sure that Mr Mouat also got a punch in. Mr Lopez was not present at the investigation meeting to give evidence on oath.

[17] Mr Mouat says that he was punched by Mr Clements but did not land any punches himself while Mr Clements says that he was punched by Mr Mouat a number of times and did not land any punches himself. There are photos of Mr Clements, which I accept were taken the day after the incident. They show Mr Clements with bruising under his left eye, and some bruising and possibly a bite mark on his left arm and right chest. There is no reason to think the marks were caused by anything other than the fight. The bruising under the eye is consistent with the evidence of Mr Clements and Mr Lopaz that Mr Mouat punched Mr Clements. It is also consistent with the evidence that Mr Mouat dislocated his little finger on his right hand. On the photographic evidence, Mr Mouat must be wrong as must Mr McLellan's oral evidence. I find as a fact that Mr Mouat punched Mr Clements on or near the right eye. The other bruising was also caused by Mr Mouat.

[18] I accept Ms Reij's evidence that both men were on the ground when she arrived on the scene, having come the short distance from the office. That is consistent with Mr Lopez's statement. Ms Reij put herself between the two men pushing them apart and the fight stopped. Mr Clements hurriedly left the scene but as he went, Mr Mouat told him he was sacked. Mr Clements departed through the kitchen where he gathered a few belongings and went out to his car to wait for Ms Reij to join him, which she did once she had collected some of her personal possessions from the office. As Ms Reij left the scene, Mr Mouat told her she was banned from the premises.

[19] While it is clear that Mr Mouat punched Mr Clements, I have not yet determined if and when Mr Clements punched Mr Mouat. Mr Lopez in his police statement says that he heard two people arguing then the two men came through a gate onto the lawn grabbing at one another before Mr Clements punched Mr Mouat. Mr McLellan says that both voices were raised before Mr Clements punched Mr Mouat. Ms Reij says that she heard something that she could not identify then Mr Clements saying *Stop it – don't hit me*. I prefer the sequence indicated by Mr Lopez and Mr McLellan that Mr Clements hit Mr Mouat first, following provocation in the form of abuse mentioned above. Mr Mouat then hit Mr Clements.

The aftermath

[20] Mr Clements and Ms Reij both took drug tests, apparently arranged before the fight to establish for Mr Mouat that his allegations were false. The diagnostic tests, dated 13 January 2005, were negative for Ms Reij and indicated a low level of cannabinoids for Mr Clements.

[21] Ms Reij and Mr Clements returned to Olivers on 12 January accompanied by police to recover some gear and Ms Reij returned again accompanied by police the next day. Ms Reij recovered her duvet from the shared accommodation area. Mr Mouat says that some cash takings from the business were stored in the duvet and that Ms Reij must have taken that money. There is a statement apparently from a friend of Ms Reij's to the effect that Ms Reij later told the friend that she did take the money. However, there is not sufficient evidence to conclude on the balance of probabilities that Ms Reij took anything other than her duvet.

[22] On behalf of Camand Holdings Limited, Mr Carter sent a letter dated 26 January 2005 to Mr Clements to *formerly advise of your termination of employment*. Mr Clements was accused of serious misconduct, being assault of Mr Mouat and a failure to open and operate the kitchen between the 10th and 12th of January. I do not accept that any alleged failure to open the kitchen on those dates was something that Mr Mouat considered when he summarily dismissed Mr Clements on 12 January 2005 after the fight.

[23] The result of the police investigation into the respective allegations of assault was a decision not to prosecute either Mr Clements or Mr Mouat.

[24] Solicitors for Mr Clements wrote to Camand Holdings Limited on 23 February 2005 raising his grievance claim. In a separate letter of the same date, the solicitors also raised a grievance for Ms Reij and (alternatively) a relationship property claim. Ms Reij has not pursued the relationship property claim.

Justification for dismissal of Mr Clements?

[25] Whether the dismissal is justified 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. Although Mr Clements came off second best in the fight, there is still the finding that he punched Mr Mouat first. Mr Clements was not acting in self defence but Mr Mouat was. Inevitably, punching your employer would comprise serious misconduct justifying summary dismissal by a fair and reasonable employer despite the provocation. I note that the employment agreement permits the employer to summarily dismiss for serious misconduct. That is what Mr Mouat did and it is what any fair and reasonable employer would have done. Accordingly, there is no merit in Mr Clements' claim for compensation.

Mr Clements' other claims

[26] The documentation about the salary including bonuses payable to Mr Clements as head chef is inconsistent. There is a written employment agreement with hand-written changes apparently initialled by the parties, unsigned printed documents dated 20th November 2004 and 12 January 2005 and a printed document dated 5th November 2004 signed by Ms Reij and Mr Clements that differs from the other two unsigned printed documents. However, I accept Mr Carter's evidence that he prepared a printed document as a basis for a discussion with Mr Clements but Mr Clements never agreed to the food cost and labour costs targets for a bonus to be payable. It follows that Mr Clements cannot succeed with that part of his claim.

[27] However, I accept Mr Clements' evidence that his salary was \$42,000.00 per annum paid weekly plus a further payment monthly of \$1,000.00. I accept Mr Clements' evidence that he split his salary that way to ensure he received a lump sum each month. The result is that Mr Clements was entitled to an annual salary of \$54,000.00 from the date he commenced as head chef until 12 January 2005, plus holiday pay. The respondent is to calculate the amount due on that basis, compared with what its records show was paid to Mr Clements over the same time and now pay him the difference. Leave is reserved if there is any difficulty with calculating the quantum of arrears.

[28] I am not satisfied that the respondent still holds any property belonging to Mr Clements.

Dismissal of Ms Reij?

[29] I have already accepted Ms Reij's evidence that she was offered and accepted employment on 2 January 2005. After the fight on 12 January 2005, Mr Mouat told her she was banned from the premises and he repeated that message when she attended with the police later on 12 January 2005. Later the same evening, Mr Mouat sent Ms Reij a text message telling her and Mr Clements not to

come back to Clyde as ...*the molestation order is now in place* Those communications amount to a sending away or a dismissal of Ms Reij.

[30] Camand Holdings did not attempt to justify any dismissal of Ms Reij, instead arguing that there was no employment or that any employment was abandoned by Ms Reij. I do not accept the point about abandonment. Mr Mouat dismissed Ms Reij when he told her to leave. Accordingly, I find that Ms Reij was unjustifiably dismissed and has a personal grievance against Camand Holdings Limited.

[31] Ms Reij did not contribute in a blameworthy manner to the situation giving rise to her grievance. She was dismissed because her partner hit Mr Mouat after being provoked and was dismissed. What lay behind Mr Mouat's behaviour on 12 January and the preceding days were no doubt his continued feelings towards Ms Reij following her bringing their relationship to an end. However, Ms Reij's decision to end the relationship is irrelevant for present purposes.

Remedies

[32] Ms Reij suffered lost remuneration as a result of her dismissal. Her claim is for three months lost remuneration and I accept the evidence that she derived no income from alternative employment during that period. It is appropriate to limit the claim to the three months immediately following the dismissal because she did not intend to continue working at Olivers beyond the end of the season. At a salary of \$47,000.00 pa, Ms Reij is entitled to be paid \$11,750.00 compensation for lost earnings.

[33] Ms Reij seeks \$10,000.00 compensation for distress arising from her dismissal. I accept that Ms Reij suffered distress from the whole situation but there is power only to compensate Ms Reij for distress caused by her dismissal. Ms Reij was (and is) angry at Mr Mouat for abusing, assaulting and dismissing her partner but that is not compensatable. However, Ms Reij is also angry about the untrue comments made by Mr Mouat about her drug use and mental health and those matters are sufficiently connected to the circumstances of her dismissal. Ms Reij also suffered financial difficulties as a result of the dismissal. I assess compensation for distress at \$6,000.00.

[34] Ms Reij also claims reimbursement of \$4,000.00 being a loan to her from a finance company that was apparently drawn down for the purposes of Camand's business. That arrangement was entered into well before the end of Ms Reij's and Mr Mouat's relationship. I do not accept that repayment of that loan was ever part of the oral employment agreement between Ms Reij and Mr Mouat. It follows that the Authority has no jurisdiction to make any order.

[35] Ms Reij seeks the return of various personal possessions that she left at Olivers. However, all the items mentioned were at Olivers because of her personal relationship with Mr Mouat rather than in connection with her brief employment. It is not a matter for the Authority.

Arrears

[36] Ms Reij was never paid for the time worked by her. She worked during the week ending 9 January 2005 and is entitled to a weeks' salary for that amounting to \$903.85 and she should be paid a days salary for her work on 12 January 2005, a further \$180.80. However, from that must be deducted the value of items purchased by her at the Paper Plus Alexandra on Olivers' account on 13 & 14 January 2005. The invoices attached to the statement of reply show a total of \$512.24 after allowing for credits on returned items.

Summary

[37] Mr Clements does not have a sustainable personal grievance against Camand Holdings Limited.

[38] Camand Holdings Limited is to pay arrears of salary and holiday pay to Mr Clements based on a salary of \$54,000.00 for the time worked by him as head chef up to 12 January 2005. Leave is reserved if there is any difficulty calculating quantum.

[39] Camand Holdings Limited unjustifiably dismissed Ms Reij and is to pay her compensation for lost remuneration of \$11,750.00 and compensation for distress of \$6,000.00.

[40] Camand Holdings Limited is to pay Ms Reij arrears of salary of \$1084.65.

[41] Ms Reij is to repay \$512.24 to Camand Holdings Limited.

[42] All other claims are dismissed.

[43] Costs are reserved. There is a difference in the outcomes for Ms Reij and Mr Clements so that may result in a different treatment of costs. If any party wants to make a claim for costs against another party, they should lodge and serve a written submission and the responding party should then lodge and serve a written response without delay.

Philip Cheyne
Member of Employment Relations Authority