

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 21
5331239

BETWEEN RESTAURANT BRANDS
LIMITED
Applicant
AND LEONARD HAROLD BOND
Respondent

Member of Authority: P R Stapp
Representatives: S Duncan Counsel for Applicant
J Langford Counsel for Respondent
Investigation Meeting: 9 August 2011 at Wellington
Submissions: 31 August 2011, 5 and 13 September 2011
Determination: 23 February 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a claim for special damages and damages. Restaurant Brands Limited (Restaurant Brands and/or the applicant) believes it is entitled to an award of \$9,545 in special damages. The sum is made up of \$5,000 for engaging a private investigator, Paragon, to investigate discrepancies at a KFC store in Upper Hutt and \$3,000 costs for the applicant's employees' time and expense in the Paragon investigation and the employment process and disciplinary meetings. Also the sum includes \$1,545 legal costs prior to lodging the employment relationship problem in the Authority.

[2] In addition Restaurant Brands claimed general damages of \$3,000 for Mr Bond's involvement in the theft of money while he was employed in a senior position.

[3] Restaurant Brands has also claimed the costs for the application lodged in the Authority. By consent this claim will be reserved until later.

[4] The respondent denied the claims, and says that the sum of \$9,545 claimed by Restaurant Brands for alleged theft is based on suspicion and speculation only. Mr Bond accepted that he was convicted for putting \$80 in his pocket from the till. He conceded in cross examination that he took a small amount more money other than the \$80 caught on video camera. Otherwise he denied any claim for general damages.

Issues

[5] Is the applicant entitled to special damages, general damages and costs, and if so, how much?

[6] Which party should receive costs for the Authority's investigation and how much?

The facts and findings

[7] A brief summary of the facts include that Mr Bond was employed by Restaurant Brands for up to 30 years and employed at the Upper Hutt store for up to 20 years as the general manager. Mr Bond had no employment agreement so his terms were oral terms.

[8] Paragon investigators were brought in to investigate monetary discrepancies found in an audit involving the Upper Hutt store. Covert security cameras were installed and Mr Bond was observed in suspicious activity at the till on 19 and 22 June and 9 July 2009. From the video he was observed on 22 June taking an identifiable sum of \$80. Mr Bond was interviewed on 22 July 2009 by the private investigators from Paragon, and Mr Sharad Awadh, Loss Prevention Officer, employed by Restaurant Brands. Mr Awadh was Restaurant Brands' contact person with the Paragon investigators. Mr Bond was caught taking the money and provided a feeble and implausible explanation at the time. Mr Bond was dismissed on 28 July 2009 for taking company funds, which constituted serious misconduct. He accepted

at the Authority's investigation meeting that he had taken cash on more than one occasion, but did not accept it happened on numerous occasions. Following his dismissal a complaint was laid with the Police. He was charged and pleaded guilty to the theft of \$80.

[9] Restaurant Brands says it has incurred costs for Paragon's work and has proportioned its monetary claims on Mr Bond's level of responsibility according to his seniority in the Upper Hutt store and that he was one of three people actually caught. The sum claimed is \$5,000 as a contribution for the Paragon costs.

[10] Restaurant Brands reasonably engaged Paragon with expertise in the use of cameras and interviewing techniques to investigate the discrepancies in the Upper Hutt store. I am satisfied that Restaurant Brands would not usually call in private investigators, but for this occasion the discrepancies were considered to be serious and significant given the amounts believed to have been taken.

[11] Mr Bond's partial contribution towards the costs for Paragon has been reflected in an amendment to the claims sought in the statement of problem lodged by Restaurant Brands. Its amended claims were set out in advance of the investigation meeting by a memorandum. The amended claim recognised that at the very least the two other people were involved and the rounding out of the sums reflected a component for Mr Bond's seniority in the store and the responsibility placed in him. This loss has been quantified by the production of an invoice from Paragon and a summary of expenses. Because it has been proportioned I hold the sum claimed is fair.

[12] Other Restaurant Brands' in house employees were involved helping Paragon's investigation, in addition to Mr Awadh. They were Messrs Craig Soal and Nick Thomson (both area managers at the time). Messrs Awadh, Soal and Thomson were taken off their normal duties and required to attend to the Paragon investigators and Mr Bond. They were required for the initial investigation between 19 and 20 July. I am satisfied this involved them in an amount of time to investigate the discrepancies and review of the video footage with Paragon. Their time and expenses have also been claimed.

[13] Restaurant Brands claimed that it has incurred the cost of Messrs Soal's and Thomson's time out of the management of their usual areas of work that caused a loss of opportunity that could have involved their time being better invested in building the business and managing Restaurant Brands' operations. Restaurant Brands' claimed that its employees' time and expenses would not have been incurred if Mr Bond had been trustworthy and fulfilled the requirement to act honestly. Messrs Soal's, Thomson's and Awadh's actions involved drafting and preparing letters and preparing for and attending meetings with Paragon and in the employment disciplinary process. These were part of their normal duties. However, I am satisfied that Mr Bond's behaviour was such an extreme breach he caused a proportion of the extra cost that was incurred. There was also an impact because two other senior employees were also found to be involved and rosters had to be rearranged to cover for Mr Bond's and his two assistants' absence. It was open to Restaurant Brands to have an investigation, and including Mr Bond in the investigation, because of the reasonable prospect that he was involved at the time too. The discovery of Mr Bond taking money supported Restaurant Brands' decisions, I hold.

[14] However, the claim was inflated because of an error relating to a calculation of Mr Awadh's time allegedly for being at a meeting on 27 July 2009, which he says he was not present at. The meeting time for Mr Awadh should not have been included. Because the expenses have been proportioned and on an actual and reasonable basis I am satisfied that it represents a fair proportion that Mr Bond should be required to pay.

[15] Next there is a claim for \$1,545 legal costs incurred by Restaurant Brands that has been supported by an invoice for costs prior to the lodging of the current statement of problem in the Authority. The claim relates to advice in relation to potential damages for recovery after Mr Bond's termination. There is a link between Mr Bond's behaviour and the advice and preparation with legal costs to pursue the matter and to recover the losses and money taken and not recovered during Mr Bond's employment.

[16] Next is the claim for general damages based on a take it all or nothing amount as claimed. Restaurant Brands has claimed that Mr Bond manipulated stock figures and data, including using vouchers, at the store until he was caught. It is also claimed

that Mr Bond behaved in a manner to cover up his alleged theft. Although there was reference in the evidence to this Mr Bond was never interviewed by Paragon about it and it did not form the reason for his dismissal at the time, but has relied upon it to support the claim that Mr Bond took much more money. He denied the sum Restaurant Brands claimed has been taken.

[17] Also, Restaurant Brands claimed that Mr Bond deliberately did not take significant accumulated annual leave and worked every Monday to count the till and tally the stock at the end of each week to cover his actions. This was never put to him at the time either. At the Authority's investigation meeting he accepted he had a lot of leave and did attend most Monday shifts, but otherwise he denied Restaurant Brands' allegation.

[18] Restaurant Brands claimed that Mr Bond did take more money based on him being caught in one incident, i.e. the \$80, and when he was seen on two other occasions as recorded by the security cameras. Mr Bond did accept in the course of cross examination that he did take more than the \$80, but he says the sum he pocketed was small. Restaurant Brands claimed that this information supports its claim that Mr Bond took significantly more than the \$80.

[19] Restaurant Brands claimed that the thefts could have been as high as \$100,000 taken from the company by Mr Bond and other employees over time. The estimated amounts allegedly taken have been assessed without any direct and independent evidence, I hold. The assessment did take account of there being two other employees involved and Mr Bond's seniority in his employment to try and proportion the loss.

[20] Mr Bond's action of taking \$80 was a breach of the implied duty of fidelity in his employment with Restaurant Brands. He accepted that he had a senior position and that his employer relied on his honesty and integrity. Such terms are embodied by the widened provisions of the Employment Relations Act and applied to Mr Bond when he was caught, despite not having an employment agreement in writing.

[21] Restaurant Brands' loss was foreseeable as a consequence of the breach. Mr Bond accepted this under cross examination. This ordinarily would be a matter for special damages because of Mr Bond's breach of trust, by him taking \$80 and taking

an unspecified sum of more money without any reasonable explanation. He was in breach of his duty of fidelity and caused a loss to Restaurant Brands because of the money he took. He deliberately breached the trust required in him and in the position he held. However the sum claimed is based on a measure of fact and speculation, and without establishing the extra amount that Mr Bond has been accused of taking.

[22] The parties attended mediation and it falls on the Authority to make a determination.

[23] The claim from Restaurant Brands' was quantified in the Memorandum filed in the Authority on 1 July 2011. I have considered this in conjunction with the final submissions filed in writing from Restaurant Brands' Counsel.

Determination

[24] I accept the first part of the claim for special damages for \$5,000 for the costs for Paragon because it is a proportion of the actual costs. Although the evidence supports that the costs claimed are open to being challenged as to whether or not they are fair and reasonable, the claim has been proportioned fairly. I am supported in my finding that Mr Bond should pay some of the costs because Restaurant Brands reasonably engaged Paragon to conduct an investigation that was supported by the evidence that Mr Bond did take \$80 and was implicated in the discrepancies.

[25] The sum of \$3,000 claimed for special damages for Restaurant Brands' employees' time and expenses is reasonable considering how the sum claimed has been calculated. However, I have deducted the cost of Mr Awadh's time (\$618.59) to reduce the claim to \$2,381.41. The claim reflects that someone was needed as a contact with Paragon in duties not normally undertaken and that the three employees were taken off their normal duties for a much more serious matter. I have to balance that with their normal duties. I hold that their normal duties were extended and that this incurred costs and expenses, which would not normally be incurred. I am satisfied that the expenses associated with their involvement were genuine as the details were provided and quantified.

[26] Mr Bond's behaviour in taking money that was not his and his failure to recognise some responsibility is linked to Restaurant Brands' legal costs in assessing its options to get some recovery of its losses. There is a link between Mr Bond's actions and Restaurant Brands' decision to obtain legal advice given the seriousness of the matter and the alleged losses in seeking recovery that means he should be liable for the \$1,545 as claimed, I hold.

[27] The claim for general damages has been based on Mr Bond's theft for taking money. The claim is based on suspicion about the level of the thefts over and above the \$80 Mr Bond acknowledged that he took. However, the extent of the money he took has not been able to be quantified accurately enough because I have been asked to draw inferences from the evidence. Also although Mr Bond made an admission of taking more than the \$80 it has not been established how much he actually did take. Because the claim for \$3,000 can not be specified I am not able to recompense the actual damages as claimed.

Orders of the Authority

[28] I hold that Mr Bond is to pay Restaurant Brands Limited a total of \$8,926.41 made up of:

- a. \$5,000 special damages for the costs of Paragon's costs and expenses paid by Restaurant Brands; and
- b. \$2,381.41 special damages for executive time and expenses incurred by Restaurant Brands for its employees' involvement in the matter and assisting Paragon at the time; and
- c. \$1,545 legal costs prior to lodging a matter in the Authority based on an invoice produced.

[29] The claim for general damages is dismissed.

[30] Costs for the Authority's investigation meeting are reserved.

P R Stapp
Member of the Employment Relations Authority