

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 153
5370505

BETWEEN JAMES SIMPSON
 Applicant

A N D HELIA LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in Person
 Alexandre Roux, Director of Respondent

Investigation Meeting: 29 April 2013 at Auckland

Date of Determination: 30 April 2013

DETERMINATION OF THE AUTHORITY

A. Helia Limited (Helia) unjustifiably disadvantaged Mr James Simpson in his employment.

B. Helia is ordered to pay Mr Simpson \$400 distress compensation plus \$71.56 to reimburse his filing fee.

Employment relationship problem

[1] Mr Simpson began working for La Cantine du Torchon, a French creperie and restaurant)¹ (the café/restaurant) in December 2009. He was initially employed for his barista skills but during the course of his employment he became involved in all aspects of customer service including serving tables, opening the café/restaurant, and operating the till.

[2] Mr Simpson was not provided with a written employment agreement.

¹ Owned and operated by Helia.

[3] There is no dispute that Mr Simpson was a good employee who was seen as an asset to the business. All of the owners of the café/restaurant were happy with Mr Simpson's work and Mr Simpson was committed to and enjoyed his job.

[4] Although Mr Simpson had always enjoyed a good working relationship with the owners and shareholders of La Cantine there was a change in shareholding in early 2012. In the lead up to that ownership some tensions occurred between Mr Alex Roux (one of the two directors and a 50% shareholder).

[5] Mr Simpson claims one of the departing shareholders in La Cantine told him Mr Roux wanted to get rid of him.² I consider that adversely coloured Mr Simpson's view of Mr Roux and his subsequent interactions with him. For example, Mr Simpson became worried that Mr Roux may seek to cut his wages and/or reduce his accrued holiday entitlements as a result of discussion they had on 7 January 2013.

[6] I find on the balance of probabilities that Mr Simpson misinterpreted that discussion which Mr Roux says was merely an attempt to find out if Mr Simpson had any ideas for reducing costs because the business was facing difficult times. No changes were made to Mr Simpson's terms of employment or entitlements subsequent to their discussion on 7 January.

[7] The Trainee Manager (and soon to be new shareholder) Mr Claude Pommier told Mr Simpson on 8 January that Mr Roux wanted Mr Simpson to remain behind the counter during service. Mr Simpson believed Mr Roux was punishing him and that the instruction was impractical and amounted to a "*radical change*" to his job.

[8] I consider Mr Simpson's view about that was unreasonable. Mr Roux as the business owner had good business and operational reasons for wanting Mr Simpson to remain focused behind the counter as he was the only person who was able to make coffees and he operated the till. I find it was not an instruction as Mr Simpson claims but merely a preference expressed by Mr Roux to Mr Pommier about how to ensure service ran smoothly. It was not a radical change to Mr Simpson's job because it merely involved him focusing on his core duties.

[9] I refer to these two matters because they form the background to the incident which occurred between Mr Roux and Mr Simpson on 22 January. It also sheds light

² Mr Roux denied that and the person who had allegedly told Mr Simpson now resides in France.

on Mr Simpson's feeling about and attitude towards Mr Roux and perhaps explains why a minor matter deteriorated into a heated argument in front of customers.

[10] There is a conflict between Mr Simpson and Mr Roux about what exactly was said and how it was said during the incident which occurred. However, there is no dispute that the incident occurred in front of customers and that it involved a heated exchange during which Mr Simpson admits calling Mr Roux a "*twot*".

[11] Mr Roux was extremely offended. He also felt it was completely unacceptable for one of his employees to abuse him in his café in front of his customers.

[12] Mr Roux pulled Mr Simpson aside into the courtyard area and remonstrated with him about the exchange that had occurred. During this discussion Mr Roux says he informed Mr Simpson his behaviour was unprofessional, unacceptable and that it was not possible for them to continue working together. Mr Roux admits repeating a number of times that they could not continue working together.

[13] Mr Simpson did not respond to this so a short time later Mr Roux asked Mr Pommier to meet with him and Mr Simpson to discuss the incident. Mr Roux does not recall the exact words used but he accepts Mr Simpson is correct when he says Mr Roux told him a number of times that they could not work together so he should resign.

[14] Mr Simpson was not prepared to resign. He had not been offered a termination package and did not believe he had done anything wrong. The meeting was left on the basis that Mr Roux would consult with his lawyer and that Mr Simpson would consider whether he wanted to resign.

[15] As it turned out Mr Simpson did not resign but returned to work as normal. Mr Roux agreed not to attend the café/restaurant while Mr Simpson was working. Mr Simpson's employment subsequently ended in September for reasons unrelated to the 22 January incident.

[16] Mr Simpson claims that Mr Roux's repeated comments on 22 January that he should resign unjustifiably disadvantaged in his employment.

Issues

[17] The following issues need to be determined:

- a. Was Mr Simpson disadvantaged in his employment?
- b. If so, was the disadvantage justified?
- c. If not, what if any remedies should be awarded?

Was Mr Simpson disadvantaged?

[18] I find that Mr Simpson was disadvantaged in his employment. He was told a number of times by one of the owners and directors of the business that he should resign. Although Mr Simpson did not resign these comments understandably made him feel insecure and stressed about his ongoing employment, which I accept disadvantaged him.

Was the disadvantage justified?

[19] Justification is to be determined in light of the new section 103A justification test in the Employment Relations Act 2000 (the Act). This requires the Authority to assess whether *“the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the [...] action occurred”*.³

[20] I find that a fair and reasonable employer would not have pressured Mr Simpson to have resigned in the way that occurred. Mr Roux elected to raise his concerns about Mr Simpson’s comments whilst he was still angry and upset. Mr Roux’s state of mind caused him to inappropriately and unfairly pressure Mr Simpson to resign a number of times. I find that what occurred is not what a fair and reasonable employer could have done in all the circumstances.

[21] I therefore find that Mr Simpson was unjustifiably disadvantaged in his employment when he was pressured numerous times to resign.

³ Section 103A ERA

What remedies should be awarded?

Lost remuneration

[22] There was no evidence that Mr Simpson lost any remuneration as a result of his unjustified disadvantage grievance.

Distress compensation

[23] I accept Mr Simpson's evidence about the stress and distress he says he suffered as a result of being inappropriately pressured to resign. Mr Simpson devoted considerable time and energy to trying to resolve the problem which had arisen. This included him taking legal advice and writing a number of letters to Mr Roux.

[24] Mr Simpson's evidence was that he felt demeaned and humiliated by Mr Roux's behaviour. He says it is the worst thing that has happened to him in his entire career and it has adversely affected his previous enthusiasm to work in the hospitality industry.

[25] Mr Simpson strongly believes that his character, reputation and integrity have been impugned by the manner in which Mr Roux raised his concerns on 22 January and as a result of the exchanges which have occurred since then whilst he has been attempting to resolve the problem. Mr Simpson feels strongly that he has had to bring these proceedings in order to "*clear his name*".

[26] I order Helia Limited to pay Mr Simpson \$600 under section 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his unjustified disadvantage grievance.

Contribution

[27] Having determined that Mr Simpson has a personal grievance claim, s.124 of the Act requires me to consider the extent to which his actions contributed towards the situation that gave rise to his grievance and if so to reduce remedies accordingly.

[28] I find Mr Simpson did contribute to the situation which gave rise to the grievance. Mr Roux's attempts to get Mr Simpson to resign were a direct result of the angry exchange which occurred in front of customers.

[29] I find Mr Simpson engaged in blameworthy conduct by calling Mr Roux a “*twot*” and by engaging in an angry exchange in front of customers. I consider that remedies should be reduced by \$200 to reflect Mr Simpson’s contribution.

[30] Helia is therefore ordered to pay Mr Simpson \$400 distress compensation (rather than the \$600 awarded).

Costs

[31] Mr Simpson represented himself so there is no issue as to legal costs. He is however entitled to be reimbursed \$71.56 for his filing fee, so Helia is ordered to pay him that amount.

Rachel Larmer
Member of the Employment Relations Authority