



[4] Following the adjournment, the Authority attempted to set down a second date, however the Authority was given misinformation about who was representing the Respondent in the investigation and this led to delays in setting the matter down.

[5] The matter was eventually set down for investigation on 21 May 2010, which was also adjourned as a result of the ill health of Mr Michael Blagojevich, the major witness, shareholder and director for Le Grand Hotel Limited (“Le Grand”). It was agreed that the matter would finally proceed to an investigation meeting on 9 June 2010.

[6] On 3 June, in the absence of the Respondent’s witness statements, the Authority contacted Le Grand’s then representative and sought to have the documents lodged that day and reminded the representative that wage and time records were to be made available at the investigation meeting, as agreed by the parties on the conference call on 8 February 2010.

[7] In response Le Grand’s representative advised the Authority that it had no instructions to act and would not be in attendance at the investigation meeting on 9 June. The Authority immediately contacted the Respondent requiring that the documents be lodged that day. By 8 June no documents had been lodged in the Authority and a further request was made to the Respondent for the documents to be lodged. No further contact has been made by the Respondent or his representatives.

[8] The respondent failed to attend the investigation meeting on 9 June. The Authority is satisfied the respondent and its representatives were served with the documents notifying it of the investigation meeting and the consequences of non-attendance. Pursuant to clause 12 of schedule 2 to the Employment Relations Act 2000 I proceeded to hear, and have determined the matter, as if Le Grand Hotel Limited had attended or been represented.

[9] At the date of the investigation meeting the respondent continued to be a registered company. The Authority has been advised that on 10 August 2010 Le Grand was put into liquidation.

### **The employment relationship problem**

[10] Mr Keily Smith was employed by Le Grand as its Assistant Operations Manager, on 5 May 2008. Mr Smith reported to Mr Alan Scicluna, Operations

Manager. Mr Smith had responsibility for assisting in all the operations of the Hotel. His main duties involved managing the finances of the Hotel, creating budgets and initially sorting through historical finances to prepare goals for the hotel.

[11] Each week Mr Smith, together with Ms Maria Cornes would meet with Mr Scicluna and Mr Blagojevich to discuss issues relating to the hotel business. As the hotel was not running profitably, initially the meetings focused on developing and implementing a new business plan, reducing overheads and paying of the hotels many debts.

[12] On 28 July a meeting was held with Mr Blagojevich, Mr Scicluna and Mr Smith. Present also at the meeting was Mr Mark Flyger, a financial adviser to Le Grand. The meeting had been arranged by Mr Blagojevich to discuss the Hotel's performance. All those present at the meeting were aware of the financial situation being faced by the Hotel.

[13] At the beginning of the meeting Mr Smith discussed the finances. Then he, with Mr Scicluna, outlined their plan to turn the hotel back to profitability. Mr Smith says he and Mr Scicluna made it clear that in order to achieve profitability, their recommendations for changes had to be implemented. It was agreed that Mr Scicluna would meet with department heads and get their feedback on the proposals discussed at the meeting. It was also agreed that following his meetings with department heads a review meeting would take place to discuss the feedback received from the department heads.

[14] After agreeing with the plan, and at the same meeting, Mr Blagojevich criticised Mr Scicluna and Mr Smith for not bringing in any new business and suggested that they should both be dismissed. Mr Smith says Mr Flyger dissuaded Mr Blagojevich from dismissing them and instead Mr Blagojevich issued the two men with verbal warnings. Mr Smith says there was no notice or any indication that the meeting was for the purpose of discussing performance related issues and neither was it indicated that it could become disciplinary in nature.

[15] The meeting ended with an agreement to meet a week later to discuss the proposed financial plan and budget.

[16] The next meeting was held on 4 August 2008. Mr Smith and Mr Scicluna presented the proposed budget and plan. Mr Blagojevich told both men that he would

discuss the information presented by them with Mr Flyger and would get back to them.

[17] Mr Smith and Mr Scicluna adjourned to their shared office where they carried on with their work. At about 3.45pm Mr Flyger entered the office and advised them that their employment would terminate immediately as a result of Mr Blagojevich having no confidence in either of them. The dismissal was effective immediately.

[18] Mr Smith claims he was disadvantaged unjustifiably when he was given a verbal warning on 28 July and that he was unjustifiably dismissed on 4 August.

### **Disadvantage claim**

[19] I am required to examine Le Grand's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable 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 the dismissal or action occurred.

[20] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Le Grand's actions disadvantaged Mr Smith in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.<sup>1</sup>

[21] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Le Grand establishes justification for a disadvantageous action, there is no grievance.<sup>2</sup>

[22] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon

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<sup>1</sup> *Mason v Health Waikato* [1998] 1 ERNZ 84

<sup>2</sup> *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.<sup>3</sup>

[23] It is well known that a warning may constitute a disadvantage. I find the verbal warning issued to Mr Smith on 28 July caused him a disadvantage, in that his employment was now in jeopardy but no indication as to why. I also find the action by Le Grand in issuing the verbal warning in all the circumstances of this case, to be unjustified and not an action a fair and reasonable employer would have taken.

[24] Mr Smith is entitled to remedies for his unjustified disadvantage.

### **The dismissal**

[25] There is no dispute that Mr Smith was dismissed on 4 August 2008. The Authority is required then, to scrutinise the conduct of the Respondent pursuant to the Act.

[26] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer<sup>4</sup>.

[27] Although the Authority does not have unbridled licence to substitute its decision for that of the employer<sup>5</sup> it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred<sup>6</sup>.

[28] Mr Smith's dismissal came out of the blue. The unchallenged evidence of both Mr Smith and Mr Scicluna was that there was no indication prior to the meeting on 4 August that either of them could be facing dismissal. In the absence of any notion of procedural fairness I find the dismissal of Mr Smith to be unjustified. In all the circumstances of this case, the actions of Le Grand and how it acted in implementing the decision to dismiss falls short of how a fair and reasonable employer would have acted.

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<sup>3</sup> *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

<sup>4</sup> *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

<sup>5</sup> *X v Auckland District Health Board* [2007] 1 ERNZ 66.

<sup>6</sup> *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

**Remedies**

[29] I have found that Mr Smith was unjustifiably disadvantaged on 28 July 2008 and unjustifiably dismissed on 4 August 2008. He is therefore entitled to remedies.

[30] Mr Smith seeks reimbursement of lost wages. Mr Smith has provided evidence that he has attempted to mitigate his loss. Mr Smith was unsuccessful in his attempts to find alternative employment and in November he decided to become self-employed. Mr Smith did not receive any income for his services until March 2009.

[31] Mr Smith is entitled to be reimbursed for his lost income for the period of three months after his dismissal which amounts to \$12,499.99.

[32] Mr Smith gave compelling evidence as to the humiliation he experienced as a result of his sudden dismissal and the unjustified verbal warning. Mr Smith is to be compensated for the humiliation and distress occasioned by the unjustified dismissal and unjustified disadvantage. Le Grand is to pay to Mr Smith the sum of \$5,000.00.

[33] There is to be no reduction to the remedies for contribution.

**Costs**

[34] Mr Smith also seeks a contribution to his costs. The principles appropriate to the exercise of the Authority's discretion in relation to costs are set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>7</sup>. Costs will generally follow the event and awards are modest.

[35] The investigation into the Mr Smith's claim took less than ½ a day and was heard in conjunction with similar claims by Mr Scicluna. The Authority is advised that the costs expended to date are in the order of \$3,000.00. I am satisfied the costs expended by the Applicant are very reasonable.

[36] Having regard to the nature and length of the investigation meeting and in the principled exercise of my discretion Mr Smith is to be paid an amount of \$1,000 which includes any disbursements, as a contribution to his costs.

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<sup>7</sup> [2005] 1 ERNZ 808.

**Summary of orders**

Pursuant to section 123 of the Act Le Grand Hotel Limited is ordered to pay the following amounts to Mr Smith within 28 days of the date of this determination:

- Lost wages - \$12,499.99
- Compensation - \$5,000
- Costs - \$1,000

Vicki Campbell  
Member of Employment Relations Authority