

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 142/09
5159948

BETWEEN TUAHINE TAUNOA
 Applicant

AND NEW ORLEANS DINNER
 CLUB LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Colin Ross for the Applicant
 No attendance by or for the Respondent

Investigation Meeting: 29 September 2009 at Wellington

Submissions Received: 29 September 2009

Determination: 29 September 2009

ORAL DETERMINATION OF THE AUTHORITY

Introduction

[1] No one attended at the investigation meeting to represent the respondent, the New Orleans Dinner Club Limited (the Club). The Club's sole director, Mr Nick Land, confirmed during a previous directions conference that it was Mr Taunoa's employer. Although Mr Land was not directly involved in the running of the venue at that time, he was informed by a previous director and principal, Mr Don Cliburn, that Mr Taunoa had resigned. At the directions conference, Mr Land agreed to go to mediation.

[2] No statement in reply has ever been received in this matter. Mr Land has twice agreed to go to mediation, but did not attend on either occasion. As at today's date, the Club is still registered with the Companies Office. Mr Land has been unable to be contacted, as the phone numbers supplied to the Authority were not functioning.

I am satisfied the notice of investigation meeting has been served at the Club's registered address.

[3] No good cause for the respondent's failure to be represented has been shown and therefore I have determined, pursuant to clause 12 of Schedule 2 to the Act, to act as fully in the matter as if the Club had been represented.

[4] The evidence before the Authority consists of that of Mr Taunoa and a former co-worker. It is consistent with the documentation provided by Mr Taunoa, which has never been specifically refuted by the Club. Mr Taunoa and the other witness have also answered questions from me in an acceptable manner. I therefore accept their evidence and find as follows.

The Facts

[5] In September 2008, Mr Taunoa, a disabled beneficiary, was employed as a kitchen hand at the Club. He worked six days a week over the lunch time, thus working 24 hours per week, at \$12 per hour. The Club has never supplied his wage and time records, despite several requests, and except for the first day he worked, Mr Taunoa never received any pay slips. During November 2008, Mr Taunoa started, on occasion, to be underpaid and/or paid in kind.

[6] In December, Mr Taunoa was forced to take three weeks off work because the Club's premises were being relocated from Lambton Quay to Allen Street. Mr Taunoa was very concerned about having enough money to make ends meet. On 11 December he told the wages clerk that if he was not going to be paid he would have to look for new work.

[7] On 19 December, following intervention by the Workers' Rights Service, Mr Taunoa went in to see a former director and principal of the Club, Mr Don Cliburn, who told him that there was not enough money in the business to pay him. He took it from that that he had been sacked.

[8] On 31 December, an amount of \$368 was paid into Mr Taunoa's bank account, which he took to be his final wages. However, he believes that holiday pay is still owed to him.

[9] Without the records, it is difficult to calculate exactly how much Mr Taunoa is owed for holiday pay, but given that he worked for approximately fifteen weeks, 8% of those earnings would be \$345.60 gross, which is still owing.

[10] On 12 January 2009, a representative from the Workers' Rights Service was told by Mr Cliburn that Mr Taunoa had resigned. He was told that Mr Taunoa must be confused because he was *slow* and had a speech impediment.

[11] Mr Taunoa was very upset by this claim. A personal grievance was raised on his behalf and the employment relationship problem was referred to the Authority on 24 April.

[12] As noted above, Mr Land, who is now the sole director of the company, agreed to mediation on two occasions, but never attended. Similarly, no statement in reply has ever been provided.

[13] The New Orleans Dinner Club has not traded since July 2009, although it remains on the Companies Register.

[14] Mr Taunoa was unable to find work to replace that he did for the Club, particularly given the prevailing economic conditions and his disability. I accept that he has properly attempted to mitigate his loss.

Determination

[15] Mr Taunoa's comment that if he was not paid he would have to look for other work does not constitute a resignation. Rather, Mr Taunoa was dismissed when he was told that there was not enough money in the business to pay him. Despite this, the Club was up and running again after it was relocated.

[16] This was clearly a dismissal without good cause and without any semblance of a fair process. It therefore follows that the Club's actions and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time. Mr Taunoa's dismissal was therefore unjustifiable and he is entitled to remedies accordingly.

[17] In the three months to 1 April 2009, Mr Taunoa lost the sum of \$3,774 gross. I am not prepared to exercise my discretion to extend lost remuneration beyond the statutory level of three months, as there is no certainty Mr Taunoa's employment

would have lasted any longer than that, especially given that the business closed down a few months later.

[18] I accept that Mr Taunoa has been greatly affected by his dismissal. He had no income over Christmas. Because of his disability and current economic conditions he has found it impossible to find any substantive work since. He has been embarrassed by the whole process, and has been unable to think about anything else since.

[19] Mr Taunoa has been very poorly treated. Taking into account the part time nature of his work and the short length of his employment, I consider that compensation of \$6,000 is appropriate.

[20] Mr Taunoa has been a victim of circumstances and therefore can not be said to have contributed to his dismissal in any way.

[21] Mr Taunoa is also entitled to recoup expenses of \$70 being the filing fee he has had to pay.

Conclusion

[22] Mr Taunoa's dismissal by the Club was unjustified. I order the respondent, the New Orleans Dinner Club Limited, to pay to the applicant, Mr Tuahine Taunoa, the following sums:

- \$345.60 gross in unpaid holiday pay;
- \$3,774 gross in lost remuneration;
- \$6,000 compensation under s.123(1)(c)(i) of the Act; and
- \$70 in expenses.

G J Wood
Member of the Employment Relations Authority