

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 54
5337820

BETWEEN	AMBER ROSE WATERS Applicant
AND	LOUISE SIMPSON / CAFÉ CIBO LIMITED t/a CAFÉ VILLAGGIO Respondent

Member of Authority:	K J Anderson
Representatives:	Mark Webster, Counsel for Applicant Louise Simpson, Advocate for Respondent
Investigation:	On the papers
Submissions Received:	27 September 2011 for the Respondent 11 November 2011 for the Applicant
Determination:	16 February 2012

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Preliminary Matter

[1] In the *Statement of Problem* lodged with the Authority on 7th March 2011, the applicant, Ms Waters, claims that she was unjustifiably dismissed on or about 14th April 2010. But the respondent says that Ms Waters was employed on a 3 month trial basis and she was informed shortly before the expiry of the trial period that she would not be offered permanent employment.

[2] During a conference call convened by the Authority on 5th September 2011, it became apparent that there is a preliminary issue relating to whether Ms Waters was in an employment relationship with Ms Louise Simpson as cited, or whether the employer was Café Cibo Limited trading as Café Villaggio. It was agreed that the Authority will determine this preliminary matter on the papers. It is particularly

relevant that matter of the employment relationship should be determined as the business, Café Villaggio, has been sold. And Ms Simpson says that the business was owned by Café Cibo Limited, hence if the claims of Ms Waters were to succeed, she should not personally be liable for any potential liability. The Authority has received material from both parties including an affidavit from Ms Waters and submissions for her. Ms Simpson has provided wage records and tax schedules relating to when Ms Waters was employed, all of which identify Café Cibo Limited as the apparent employer.

The evidence

[3] Ms Waters attests to making first contact with Ms Simpson while employed at a Gisborne supermarket. The outcome being that she commenced employment at the Café Villaggio on 14th January 2010. Ms Waters says that she considered that Ms Simpson was her employer. Ms Waters also refers to receiving her wage slips with *Café Cibo Limited* evident and raising this with Ms Simpson on one occasion.

[4] Regrettably, there is not an employment agreement in existence and hence the Authority is left with the only tangible evidence being the pay slips, a schedule of earnings and the *Employer monthly schedule* for employees; all of which identify Café Cibo Limited as the apparent employer of Ms Waters.

[5] The submissions for Ms Waters urge the Authority to find that Ms Simpson was the employer based on:

- (a) The initial discussion between Ms Waters and Ms Simpson at the supermarket prior to Ms Waters commencing her employment at Café Villaggio;
- (b) A meeting at Café Villaggio when the terms of employment for Ms Waters were discussed prior to her beginning work;
- (c) The conduct of Ms Simpson during the course of the employment relationship; and
- (d) The content of a *To Whom It May Concern* letter (undated) from Ms Simpson referring to Ms Waters being employed in a permanent position.

[6] The submissions for Ms Waters refer the Authority to *Colosimo v Parker*¹ where it was held that the onus of proving the identity of the employer rests on the employee; on the balance of probabilities. The Court also stated that:

While it is desirable that the true identity of the employer should be known to the employee at the outset, that unfortunately is not always the case. That is so in the present case. The Court is then placed in the position of having to make an objective assessment.

And so it is with the circumstances involving the parties here. While it seems that all of Ms Waters' contact, before and during her employment, was with Ms Simpson, that in itself, is not conclusive of the employment relationship, particularly given the nature of the business and the active day-to-day involvement of Ms Simpson.

Determination

[7] Taking an objective view of the limited evidence that is before the Authority, particularly the wage records, I conclude that it is more probable than not that the employer of Ms Waters was Café Cibo Limited and not Ms Louise Simpson personally. Therefore, should Ms Waters wish to continue with her claim of unjustified dismissal, an amended Statement of Problem will be required; citing Café Cibo Limited as the respondent party.

Costs:

[8] Given that Ms Simpson was the advocate for both of the potential respondent parties, costs are not a matter for consideration.

K J Anderson
Member of the Employment Relations Authority

¹ (2007) 8 NZELC 98,622 (EmpC AC 68/06)