

Background

[4] LCL operates the Lobster Club Restaurant and Bar in Tauranga. The restaurant was formerly operated by the Grand Café Group Limited (GCGL), of which Edward and Donna Groves were the directors and shareholders. In or about March 2008 other commitments meant Mr Groves sought a partner in the Lobster Club business. Mrs Watkins was known to him as she had worked in the restaurant for some time. By 2008 she was employed as its manager, while Mr Watkins was employed as a chef in another restaurant. Both were interested in investing in the restaurant. Mr and Mrs Groves and Mr and Mrs Watkins reached an agreement in which all would invest in a new company named Lobster Club Limited, which would acquire the Lobster Club business from GCGL.

[5] In or about May 2008 the parties prepared a shareholders' agreement setting out their arrangement. The agreement was signed but not dated. Under its terms the parties were to incorporate a company to be known as the Lobster Club Limited, and Mr and Mrs Watkins and Mr and Mrs Groves would hold 500 shares respectively. The Watkins were to hold 500 "A" shares with the Groves holding 500 "B" shares. The "A" shareholders were to be employed by the company under separate contracts of employment, with neither of the "B" shareholders being employed although one of them was to be engaged as a consultant to the business. Clause 5 of the shareholders agreement provided that Mr Watkins be employed as chef, Mrs Watkins be employed as manager, and Mr Groves be engaged as a consultant.

[6] It was also a term of the agreement that the directors initially appointed would be all four of Mr and Mrs Groves and Mr and Mrs Watkins. Clause 6 went on to provide that each director would be entitled to one vote, and except as otherwise specifically provided in the agreement the board had full authority to make all decisions and take all actions concerning the company and its business. Clause 7 set out the matters requiring the unanimous approval of the shareholders. For the most part these concerned the company's financial and commercial activities, but the clause expressly included the appointment or removal of the general manager.

[7] LCL was registered on 4 June 2008. Mr and Mrs Groves and Mr and Mrs Watkins are the registered directors, and all hold 250 shares each.

[8] Although the agreement for sale and purchase of the Lobster Club business records a possession date of 1 June 2008, the purchase was completed in December 2008. The transaction was financed in part by the Watkins' purchase of shares, and in part by a loan from GCGL to LCL.

[9] Commencing on 1 June 2008 Mrs Watkins was employed in the position of general manager and Mr Watkins was employed as the head chef. Both entered into written employment agreements naming GCGL as the employer. Both agreements also state that Mr Groves is the person to whom Mr and Mrs Watkins reported.

[10] Unfortunately for the business, in April 2008 construction had begun on the construction of a new road and bridge on the causeway where the restaurant is located. According to Mr Groves, the effect of this on the restaurant's trade began to be felt late in 2008. He sought to discuss with Mr and Mrs Watkins ways of overcoming the effect on customers of the disruption caused by the construction, but was disappointed at the lack of input from them. There were monthly meetings up to and including May 2009, during which such matters were again discussed.

[11] By April 2009 Mr Groves, who was not resident in Tauranga at the time, had become very concerned about the deterioration in the business, a perceived lack of suggestions for improvement from Mr and Mrs Watkins, and lack of communication about the daily running of the business. He drafted but did not send an email message of 22 April 2009 in which he set out his concerns, and said: "I am offering you the first option to purchase Donna's and my interest as per our agreement." It was common ground that he discussed the email with Mr Watkins on the telephone, that most of the matters set out in it were raised during the conversation, and in particular that the offer to sell the Groves' interest in LCL was made.

[12] It was also common ground that matters of the kind set out in the email were discussed at a meeting in May 2009. Mr Groves repeated his concerns about the lack of effort the Watkins were putting into improving the business, and the continued high costs the business was facing. According to Mr Groves Mrs Watkins, who was pregnant, was working only one day per week but was receiving her full salary although Mrs Watkins said she continued to work full time.

[13] Mrs Watkins began maternity leave on 10 June 2009. She said she intended to return to work in or about September 2009 but there is no written record of her maternity leave arrangements. As the general manager, it was her responsibility to ensure the matter was properly documented.

[14] The Watkins' son was born on 23 June 2009. Mr Watkins was absent from work on full salary from 23 June to 17 July 2009. He was absent again on or about 21 and 22 July, but the wage record shows he was present for the rest of the fortnight ending 2 August. The record also shows he took three days' leave in the fortnight ending 16 August, and was present for the full fortnight ending 31 August. Mr Groves said Mr Watkins was absent for the whole of August. For reasons I discuss later, I find neither is quite correct.

[15] In or about late July 2009 Mr Groves spoke to Mr Watkins again about a possible purchase of the Groves' interest in the business. Mr Groves handwrote some figures for Mr Watkins, showing a likely purchase price and associated financial arrangements including a proposed rewriting of the loan from GCGL. It was common ground that the options discussed were that Mr and Mrs Watkins buy Mr and Mrs Groves' shares, or Mr and Mrs Groves purchase 10% of Mr and Mrs Watkins' shares. It was common ground that there was a discussion about Mr and Mrs Watkins' resignation as directors if 10% of their shares were purchased. Mr Watkins' evidence was also that Mr Groves said, if the latter occurred, Mr and Mrs Watkins would no longer be employed in the business either.

[16] Mr Groves denied any mention of the employment relationship or of dismissal. Even if that was true of the July discussions, the continuation of the Watkins' employment was raised later.

[17] Meanwhile in late July Mr Groves prepared a single page 'agreement for change of shareholders' which he provided to Mr Watkins at or about the time of their July discussion. The agreement first addressed the purchase of the Groves' shares by the Watkins. It went on to provide that, if the purchase did not proceed, the Watkins would sell the Groves 10% of their shares and would resign as directors. Finally it identified an execution date of 28 July 2009. Mr Groves believed the document embodied the parties' agreement.

[18] Mr Groves also believed that Mr Watkins had indicated a preference to buy out the Groves. Mr Watkins' evidence was that he indicated he would try to find the finance for such a purchase, but when he became aware of what he understood would be the full purchase price he told Mr Groves the purchase would not be possible.

[19] Mr Groves prepared a letter to himself from the Watkins dated 5 August 2009, after another meeting with Mr Watkins on or before that date. As he believed the letter embodied terms which had been discussed and agreed to, it was prepared for the parties' signature. In the letter Mr and Mrs Watkins offered their resignations as directors and employees effective immediately. Mr Groves said he had explained to Mr Watkins that, if the Watkins ceased to be shareholders, they would have to resign as directors and employees. Even so the letter went on to provide that the Watkins would maintain their 50% shareholding until some or all of it was purchased by the Groves or a third party, or the entire company was sold.

[20] Although there was confusion about the content and timing of meetings in August, it seems there was a meeting at the Watkins' home on Sunday 9 August. The possibility of a full or partial buyout of one couple's shares by the other remained unresolved and the 5 August letter was not signed. Further, the letter was not relied on as advice that Mr and Mrs Watkins were to resign. Indeed Mr Groves said his intention in the 5 August letter was to explain that the fate of the employment relationship depended on the fate of the shares.

[21] By emailed message dated 10 August 2009 at 7.14 pm Mr Watkins advised the Groves that he and Mrs Watkins would not resign as directors, unless shares were repurchased at the original purchase price and the Groves met the Watkins' share of the obligations under the loan to GCGL. The message said the Watkins would continue their employment, and were willing to accept reduced salaries if necessary. They believed the restaurant was a good business and would survive.

Events leading to the termination of employment

[22] Mr Watkins says he was dismissed on Tuesday 11 August, when he reported for work to find that the sous chef was carrying out the chef's duties.

[23] On Mr Watkins' account, after the sous chef told him Mr Groves had asked him to come in to work, Mr Watkins spoke to Mr Groves. Mr Groves told him he thought Mr Watkins had resigned based on the 9 August meeting. Mr Watkins said he was not resigning, to which Mr Groves replied saying if Mr Watkins did not resign the restaurant would be closed. Mr Groves also told Mr Watkins that Mrs Watkins' employment had ended and she would not be returning when her maternity leave ended. When Mr Watkins asked Mr Groves how the loan was to be repaid, Mr Groves told him 'you will find a job' and when he asked about holiday pay was told 'you will get it'.

[24] Mrs Watkins' account of how and when the termination of her employment occurred was that:

“On the 8th (sic) of August 2009 when Chris was dismissed, he came home to tell me that he had been dismissed by Edd and that I was also dismissed even though I have never received any official advice of this dismissal. It had merely been indicated to Chris that I no longer had employment upon the expiry of my maternity leave and at subsequent meetings indications were given by Edd that he would agree to have me back provided the 'old Keren' came back.”

[25] Mr Groves said that on the evening of 10 August he arranged for the sous chef's attendance the next day because after the 9 August meeting he was unsure of whether Mr Watkins would report for work. He said he told the sous chef that he thought Mr Watkins was resigning.

[26] He agreed that he spoke to Mr Watkins on 11 August, but denied threatening to close the restaurant and denied saying Mrs Watkins was not to return. He said he told Mr Watkins that decisions needed to be made, and that if no resolution was reached the restaurant would fail. Mr Watkins took his knives and left. Mr Groves accepted there was a conversation about the repayment of the loan, but said that occurred at the end of August.

[27] By letter dated 13 August 2009 Mr and Mrs Watkins' solicitor raised their personal grievance, saying that on 11 August Mr Groves advised Mr Watkins that he and Mrs Watkins were dismissed although no other details were provided. The letter went on to set out the remedy sought in respect of the personal grievances, and made a settlement proposal in respect of the sale of the shares.

[28] There was a further meeting on either 15 or 22 August.

[29] It was common ground that Mr Groves asked Mrs Watkins whether she was coming back to work, to which she replied that she was confused because she thought Mr Groves had said she did not have a job. It was also common ground that Mr Groves referred to having 'the old Keren' back. Although the context in which that was said was not clear I do not accept that the remark went as far as saying that Mrs Watkins' job was not available, or as imposing a condition on her return. Finally it was common ground that Mr Groves asked Mrs Watkins when she would return. She replied that she did not know when and if she would return. She told Mr Groves she believed he had said she and her husband were not returning, to which Mr Groves replied the only time he had said that was when he expressed his view of the possibility to the sous chef on 10 August.

[30] I understood it also to be common ground that Mr Watkins' return was not otherwise discussed. Mr Groves said his focus was on Mrs Watkins' maternity leave and that he believed Mr Watkins would return if that matter was resolved.

[31] Again matters remained unresolved overall. By an email message to the Watkins dated Wednesday 26 August Mr Groves commented that he had read the letter from the Watkins' solicitors, referred to an expectation that the Watkins would 'call on Monday' (being the preceding Monday) and explained it was impossible to purchase the Watkins' shares. He said the restaurant would die if the parties could not get together.

[32] In a further email dated 28 August Mr Groves said he said he had not heard from the Watkins for a week, and he assumed they were not returning to the restaurant. He also said:

"The last time we met I told you I would continue running business and negotiate with landlord on the premise we would solve our problem and expecting your return. I now need to make decisions based on your silence that this will not happen."

[33] The parties' disputes continued unresolved, and the Watkins did not return to the restaurant.

Whether there was a dismissal

[34] If I stand back and consider the entirety of the dispute while I am mindful that Mr and Mrs Watkins have rights as employees that must be observed, they were also in the relatively unusual position of being directors in and half owners of their own employer. Moreover their employment was a condition of their shareholding, the fate of which was the real basis of the parties' dispute. Accordingly while I observe the distinction between the Watkins as employees and the Watkins as directors of and shareholders in LCL, in the present circumstances these roles cannot be seen as entirely separate from and unaffected by each other.

[35] Further to the events of 11 August, I address first whether Mr Groves had the authority to dismiss the Watkins. It was put to him that he was 'in charge' of employment issues, and he denied the proposition. There was nothing in the shareholders agreement or in any other company record to indicate that the board or the shareholders had given him such authority. On the contrary the dismissal of Mrs Watkins, as general manager, expressly required the unanimous agreement of the shareholders which plainly had not been given.

[36] Matters were less clear in respect of Mr Watkins, although as well as the absence of evidence of an express provision or a resolution giving Mr Groves the authority to dismiss there was nothing inherent in the voting powers of the directors or shareholders capable of giving Mr Groves authority to act in that way.

[37] It appears that the Watkins rely on the reporting provision in the agreements citing GCGL as the employer. However when they entered into those agreements they were not directors and shareholders in GCGL. I do not accept that the provision was sufficient on its own to abrogate the decision-making and voting rights they obtained in the new company, LCL, which became their employer.

[38] If I am wrong in this, then the existence of a dismissal depends on what was said during the conversation of 11 August. I had some concern about the accuracy of the evidence about the content of the discussions on 9, 11 and 15 or 22 August. However I consider it likely that Mr Watkins' account of the conversation on 11 August was an amalgamation of conversations occurring on 9 and 11 August in

particular, and that he took what was said on 9 August out of the context of the true dispute between the parties. I consider it likely, too, that Mr Groves was impatient for a resolution of the shareholding issues and sought to press for a resolution by saying the Watkins' jobs would no longer exist if the matter could not be resolved, but I am not persuaded he went further.

[39] That does not mean I have no reservations about Mr Groves' conduct. He considered the word of Mr Watkins as he understood it to be unreliable, and his view of the Watkins' absences from work in association with the birth of their child coupled with his general frustration with them means I consider it likely the discussion was heated and that Mr Groves was overbearing. I found some of his explanations of his conduct on 9 August to be unconvincing.

[40] Even so, taking all of those matters into account, I would not accept that the exchanges on 11 August amounted to a dismissal of either Mr or Mrs Watkins.

[41] For these reasons I find Mr and Mrs Watkins were not dismissed.

Holiday pay

[42] Mr Watkins seeks \$2,976.93 as unpaid holiday pay, based on the accumulated figure identified in a payslip generated by the MYOB software the business used.

[43] The figure was identified on the payslip for the period ending 16 August 2009, which in turn records that Mr Watkins worked for 7 days in the preceding fortnight, and took 3 days' annual leave. The citing of this figure appears to reflect Mr Watkins' allegation that he was dismissed on 11 August.

[44] However the record shows that Mr Watkins was paid as if he attended work in the fortnight to 31 August. It is unlikely that Mr Watkins attended work during that period because he was taking the view that he had been dismissed. The amount Mr Watkins received during the period was \$1,730.77 (gross), which I treat as part of his final pay. I deduct this from the amount claimed, leaving \$1,246.16 (gross).

[45] Payment of that sum is ordered accordingly.

[46] Mrs Watkins seeks \$1,353.84 based on her last payslip prior to taking maternity leave. Although there was a disagreement about her hours or work prior to taking leave, there is no evidence other than Mr Groves' assertion that she was not working full time, so I rely on the record.

[47] Payment of \$1,353.84 (gross) is ordered accordingly.

Summary of orders

[48] LCL is ordered to pay:

- a. \$1,246.16 (gross) to Mr Watkins as unpaid holiday pay; and
- b. \$1,353.84 (gross) to Mrs Watkins as unpaid holiday pay.

[49] I further order that interest be paid on the above amount at the rate of 3.3% pa from 11 August 2009 to the date of payment.

Costs

[50] Costs are reserved.

[51] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority