

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 80/10  
5150734

BETWEEN                      RHYS WILLIAMS  
Applicant

AND                              BANKSIA HOLDINGS  
LIMITED  
Respondent

Member of Authority:      Yvonne Oldfield

Representatives:            David Collins for Applicant  
No appearance for Respondent

Investigation Meeting:     17 February 2010

Determination:              18 February 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] For period of just over a month, Mr Williams worked for the respondent as a Chef at Q65 Epicurion Café. He says he was dismissed unjustifiably and without the three weeks pay in lieu of notice to which he believes he was entitled pursuant to his individual employment agreement. Mr Williams claims pay in lieu of notice as well as compensation for the distress arising out of his dismissal (\$10,000.00) and lost wages for the period before he found another job (six weeks.)

**Non-appearance by respondent**

[2] There was no appearance for the respondent at the investigation meeting. Notice of the investigation meeting had been served on the address for service provided in the statement of reply which was lodged by the Restaurant Association of New Zealand on the respondent's behalf.

[3] In early January 2010 Ms Marisa Bidois (Employment Relations Advisor for the Restaurant Association) informed the Authority that she was no longer acting on behalf of the respondent and that the Authority should henceforth contact its director, Ivan Hayes, directly. The applicant's witness statement was therefore delivered to Mr Hayes at the restaurant.<sup>1</sup>

[4] I am satisfied that the respondent was properly served with the Notice of the investigation meeting through its authorised representative and also that it was supplied with the applicant's witness statement. In the absence of any further advice or explanation as to why there was no appearance for the respondent I proceed to issue a determination based on the information that I have.

### **Issues**

[5] Neither party supplied the Authority with a copy of an employment agreement although the statement in reply concedes that Mr Williams was employed at Q65 Epicurion Café as a breakfast chef. The terms of employment must therefore be determined as a first step. The remaining issues are whether Mr Williams was dismissed unjustifiably and whether he contributed to the situation giving rise to his grievance.

### **The terms of employment**

[6] It was Mr Williams' evidence that he started work for the respondent on 8 August 2008 and signed a written employment agreement approximately one week later. He told me that he requested a copy but this was never supplied. He told me that the employment was full time at \$18.00 per hour and that his usual hours of work were 5.30am until approximately 2.00pm each day. Mr Williams also says that he recalls that the agreement provided for three weeks pay in lieu of notice in the event of termination by either party.

[7] What Mr Williams has said is not inconsistent with the content of the statement in reply. In the absence of further evidence from the respondent I accept that the relevant terms are as outlined by Mr Williams.

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<sup>1</sup> A "CourierPost" track and trace confirmed service on Mr Hayes personally on 12 January 2010.

## **The Dismissal**

[8] Mr Williams told me that in the period between starting employment on 8 August 2008 and 4 September 2008 he worked almost every day with (by agreement) two or three days off at most. He said this roster was a result of staffing problems in the cafe. Mr Hayes himself worked most days from about 6.00am until 11.00am. Mr Williams told me that in the early part of his employment he observed that Mr Hayes could be “aggressive and bullying” to other members of staff but that initially, he did not behave this way to Mr Williams. Then on 3 September, according to Mr Williams, Mr Hayes was aggressive towards him (shouting and standing close beside him in an intimidating fashion) on two separate occasions. Mr Williams says both episodes related to minor matters and were completely unprovoked. He was shaken by this behaviour. After Mr Hayes had left the restaurant, and with the head chef’s permission, Mr Williams went home early.

[9] The next day (his rostered day off) Mr Williams sought assistance from Citizens Advice Bureau and from a lawyer. On their advice, he told me, he prepared a letter to Mr Hayes, took it into the restaurant and left it with Mr Hayes (without further discussion.) Mr Williams could not provide me with a copy of this letter but told me that in it he explained that he wanted the job but found Mr Hayes’ behaviour unacceptable. He said he stated in it that if the behaviour did not stop he “might have to take legal action.”

[10] When Mr Williams went in to work the next day, Mr Hayes sacked him. Mr Williams says the only reason given was that Mr Williams had threatened Mr Hayes with legal action. Mr Williams responded by demanding his “severance pay” and a letter confirming the dismissal. He refused to leave until he got them. In response, Mr Hayes called the police and had Mr Williams removed from the premises. Afterwards however he rang and arranged a meeting with Mr Williams. The upshot of the meeting was that Mr Williams returned to work at the restaurant on or about 8 September 2008. Once there he was asked to take on the duties of the head chef, who had left in the meantime. He told me he was willing to do so, conditional on an increase in his hourly rate. However this was not forthcoming and on 10 September he and Mr Hayes got into a further argument on the subject of Mr Williams rate of pay.

Once again, Mr Hayes resorted to firing Mr Williams, Mr Williams refused to leave until he got what he believed he was entitled to, and Mr Hayes called the police and had him removed from the premises.

[11] Mr Williams told me that he found the manner of his dismissal very distressing. In particular he told me he was very upset by the angry confrontations with Mr Hayes and by being evicted from the premises by the police.

[12] Much later, after Mr Williams had raised a grievance and Mr Hayes had sought advice from the Restaurant Association, Mr Williams received his final pay. He told me that it appeared that it included his holiday pay and outstanding wages for the days he had worked, but did not appear to include pay in lieu of notice. Mr Williams told me that he went on the dole for three weeks before finding part time work. That work increased to full time after another three weeks.

[13] As explained already, I have not had the benefit of hearing from the respondent. All I have to consider, apart from Mr Williams account, is a very brief statement in reply. It contains an outline of events which is broadly consistent with what Mr Williams told me. Its principal point of difference is that by the respondent's account, during the altercations on 4 September and 10 September, it was Mr Williams who behaved inappropriately, creating "scenes" in the restaurant with customers present so that Mr Hayes had to have him removed.

[14] Since Mr Hayes has chosen not to attend and give evidence, I must accept Mr Williams' account. It follows that the dismissal has not been justified and Mr Williams has made out his personal grievance claim.

## **Remedies**

[15] Mr Williams is entitled to three weeks pay in lieu of notice. He is also entitled to lost earnings for the period after he was dismissed. Mr Williams did not quantify these losses precisely. From what he told me, between the unemployment benefit and part time work, it would seem that he received approximately half what he would

have otherwise earned in the six weeks immediately after his termination. I therefore estimate his losses at \$2,160.00 gross.<sup>2</sup>

[16] Mr Williams also claims \$10,000.00 compensation for hurt and humiliation. I do not accept that this is warranted especially given the brevity of Mr Williams' employment, and the fact that he confirmed the employment by returning after the first argument with Mr Hayes. I note also that I do not accept that being removed by the police goes to the issue of humiliation. It was Mr Williams' choice to stay in the restaurant after being asked to leave and I find that was not a constructive approach to take.

[17] In all the circumstances I consider the awards for pay in lieu of notice and lost earnings adequately compensate Mr Williams for his grievance. I decline to make a further order pursuant to s. 123 of the Employment Relations Act.

### **Summary of orders**

[18] The respondent, Banksia Holdings Limited, is ordered to pay to Mr Williams \$2,160.00 pay in lieu of notice and \$2,160.00 lost earnings, that is, in total, \$4,320.00 gross.

[19] The issue of costs is reserved. Any claim for costs should be lodged within 28 days of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority

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<sup>2</sup> This estimate is based on a 40 hour week. Although Mr Williams had been working additional hours in the period before his dismissal he told me his base week was 40 hours.