

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 55
3004131

BETWEEN PIERRE WILLIAMS
 Applicant

AND TONG KHENG T/A MIXED
 BUSINESS
 Respondent

Member of Authority: M B Loftus

Representatives: Graeme Ogilvie, Advocate for Applicant
 Tong Kheng, on own behalf

Investigation Meeting: 4 July 2017 at Wellington

Submissions Received: At the investigation meeting

Determination: 5 July 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Pierre Williams, claims he was unjustifiably dismissed by the respondent, Tong Kheng, on or about 2 October 2016. He also claims he is due unpaid wages and holiday pay.

[2] Mr Kheng says he never employed Mr Williams but engaged him on a week-long trial period which he failed to complete successfully. Mr Kheng says Mr Williams was properly paid for the week he worked.

[3] Mr Kheng's appearance at the investigation was the first contact he had with the Authority. Prior to the meeting he had failed to either respond to documents sent to him or

participate in the Authority's process. This meant both the Statement of Problem and the notice of investigation meeting had to be personally served and this will become an issue when addressing costs.

Background

[4] Mr Williams worked at Mixed Business as a chef for some three years. He worked 38 hours a week.

[5] On 26 September 2016 the ownership changed and Mr Kheng, having recently purchased the business, took over its operation.

[6] Mr Williams says staff had already been introduced to Mr Kheng. Mr Kheng says he told the employees they would all be engaged on a week-long trial during which he would assess whether or not he could work with them and they should be retained. An employment agreement would then follow for those he chose to keep. Mr Williams denies Mr Kheng mentioned a trial period. He says Mr Kheng simply advised he would send new employment agreements to each employee but failed to do so. However both parties say it was agreed Mr Williams would be paid \$16.50 an hour.

[7] On Wednesday 29 September Mr Williams took a days' leave he had arranged with the previous owner. It was to be unpaid. He says he worked eight hours on each of the other four days that week. Mr Kheng has a slightly different view. He says Mr Williams was given a roster which required him to work 34 hours that week with 7.5 hours on Monday and Tuesday and 9.5 on both Thursday and Friday.

[8] Mr Williams claims that on the first day, 26 September, Mr Kheng advised he (Williams) was now a part-timer. Mr Williams says he replied a reduction in hours was unacceptable. He says that was followed with a request he work as a head chef with an earlier commencement time and reduced hours. Mr Williams says he replied by advising he was not trained sufficiently to be a head chef. Mr Kheng is said to have then commented he would get someone else to do the job before stating *If you don't want to be here then give us four weeks' notice.*

[9] Mr Williams says he then advised he did not wish to leave and Mr Kheng responded by shaking his hand and saying he (Kheng) would see Mr Williams on Monday (3 October). The following day, 1 October, Mr Williams says he received a telephone call from the

previous owner who advised he had been speaking to Mr Kheng who had said he had let Mr Williams go and at 10:38 the following day, Sunday 2 October, he received a text from Mr Kheng which read:

I make your last payment already n you can stop come to work from Monday.
The reason I stop u because you show me we can't work together. I hope you understand. Thank you
Tong Kheng.

[10] Mr Williams responded by saying:

Hi Tong. Its Pierre.
Can we please meet and discuss this in person. As an employer it is your responsibility to discuss this with me in person, and you have not done that at all.
Pierre Williams

[11] Mr Kheng replied saying Mr Williams could come in the following day between 4.30 and 5pm though Mr Williams says he became no wiser as to why he had been dismissed. His grievance was raised by Mr Ogilvie on 18 October 2016.

Determination

[12] Mr Williams claims he has been unjustifiably dismissed and is yet to be paid in full for work performed since Mr Kheng took over the business or to receive holiday pay for that period.

[13] As already said Mr Kheng relies on the existence of what he says was an agreed one week trial. Ancillary to that is Mr Kheng's contention the trial period meant Mr Williams was never employed.

[14] Addressing whether or not Mr Williams was employed. The answer must be yes. Irrespective of what label is applied to the period and for what period the arrangement was going to continue, the parties agree Mr Williams would perform work that would benefit Mr Kheng and as a result of which revenue would be generated. In return it was agreed Mr Williams would be paid \$16.50 an hour. The essential elements of an employment relationship are present and that I conclude is what this was – an employment relationship.

[15] That the employment was then brought to an end by the employer is also clear. Mr Kheng accepts he sent the text cited in [9] above. Its content is clear. It confirms a sending

away and Mr Kheng accepts it was meant to convey the message the arrangement was over. That is a dismissal.

[16] Once the fact of dismissal is established the respondent is required to justify it. This Mr Kheng attempts to do by claiming Mr Williams failed to successfully complete a one week trial. While Mr Williams disagrees such an arrangement existed that is a not a disagreement I need resolve. I can decide the issue by relying on Mr Kheng's assertions.

[17] Mr Kheng says the arrangement was for a one week fixed term and its purpose was to ascertain Mr Williams' suitability for on-going employment. If that is correct the arrangement would be unlawful and the employment would, as a result, have to be considered ongoing.¹

[18] The other alternate is Mr Kheng intended a 90 day trial period pursuant to sections 67A and 67B of the Employment Relations Act 2000 and that precludes Mr Williams from taking the dismissal claim. Putting aside the fact Mr Kheng does not claim this to be the case such an arrangement, if intended, would not be enforceable as the parties agree there is no written employment agreement, let alone one signed prior to the arrangements commencement.²

[19] No matter how I look at it I must conclude Mr Kheng is incapable of relying on the existence of a trial period to justify his decision to discontinue Mr Williams' employment. With one exception, and in the absence of any other defence or evidence as to why the employment ended, the dismissal must be found to be unjustified.

[20] The exception that may provide solace for Mr Kheng is a lack of resources excuses the deficiencies which exist here.³ For two reasons I conclude that is not an argument that is available to him. First Mr Kheng had access to and used the services of an accountant who, he says, gave him advice. Second I must be cognizant of the Court's conclusions in *The Salad Bowl Ltd v Howe-Thornley*.⁴ At paragraphs [94] and [95] the Court noted all-encompassing failures such as those which exists here are neither excusable nor minor which deprives an employer of a potential benefit under s 103A(5).

¹ Section 66(3)(b) of the Employment Relations Act 2000

² *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253 at [47]

³ Section 103A(5) of the Employment Relations Act 2000

⁴ [2013] NZEmpC 152

[21] The conclusion the dismissal is unjustified raises the question of remedies. Mr Williams found a replacement job after only one week but seeks two weeks wages in lieu of a reasonable notice period. He bases his claim this is reasonable on the grounds that is the notice period he had with the previous owner. He also seeks \$12,000 as compensation for hurt and humiliation.

[22] The reasonable notice period argument fails to convince. First the previous agreement was not produced and there was no written employment agreement with Mr Kheng and no specified notice period. Add to that the fact the pay period was a week which suggests that may be reasonable and that the claim was one of unjustified dismissal. The way in which wages lost as a result of an unjustified dismissal are calculated is specified in statute.

[23] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of that actually lost or 3 months ordinary time remuneration. Given he got another job Mr Williams' loss is capped at one week and for that he will be recompensed in full though there is some debate as to what a week was for Mr Williams. He say he worked 8 hours a day and but that is inconsistent with his claim he was engaged to work a 38 hour week by the previous owner. Mr Kheng says Mr Williams was required to work an average of 8.5 hours over the four days he was present. This creates a degree of uncertainty which I choose to resolve by saying Mr Williams would likely have worked a 40 hour week (8 hours a day) had he been present the week following his dismissal. To that holiday pay must be added.

[24] Turning to the claim for hurt and humiliation. While Mr Williams seeks \$12,000 the supporting evidence is sparse. It totals less than half a page and Mr Williams was clearly able to rebound quickly – he had a new job within a week.

[25] While I accept some hurt must emanate from what was clearly an unjustified dismissal it is hard to conclude, on the evidence before me, it warrants an award of the magnitude sought. I consider \$2,500 appropriate.

[26] There is then the wage claim. Mr Williams says he should, for the week he worked, have received \$528.00 gross plus \$42.24 holiday pay. The total would, according to Inland Revenues tax tables, suggest a payment of around \$481.42 net.

[27] \$247.50 net was deposited in Mr Williams account and the parties agree Mr Kheng paid a further \$160.00 cash. What they do not agree about is why the cash payment was made. Mr Williams says he had an arrangement with the previous owner whereby he got part

of his pay by direct credit and part in cash. He says the \$160 was a residual amount payable by the previous owner which Mr Kheng was passing to him. Mr Kheng says no – he was making the payment on his own behalf.

[28] On this I prefer Mr Kheng's evidence. There is no indication of any link between him and the previous operation and no credible reason why he would make such a payment. That still leaves a deficiency as the perusal of IRD's tax tables suggests the payment remains short by \$73.92 net. That is payable.

Costs

[29] Mr Williams seeks a contribution toward the costs he incurred in pursuing his claim. He also seeks reimbursement of the filing fee and the fee of \$60 for each of the two personal services that were required (paragraph [3] above).

[30] Normally the Authority will use a daily tariff approach when addressing a costs claim.⁵ At the time of this investigation the normal starting point was \$4,500 per day and from there adjustment might be made depending on the circumstances.

[31] This investigation took half a day meaning an award of \$2,250 should the tariff be applied. In this case I consider that appropriate. An award of costs is a contribution. In this case the evidence is actual costs exceed the tariff and there is no argument from either party as to why I should depart from the normal approach. To that I add the filing fee – it is a given. I also consider the service fees should be reimbursed as they were incurred as a result of Mr Kheng's decision to ignore documents served upon him. There had to be certainty he had received them and this was the only way to ensure that.

Conclusion and orders

[32] For the above reasons I conclude Mr Williams has a personal grievance in that he was unjustifiably dismissed and that he is due unpaid wages.

[33] As a result I order the respondent, Tong Kheng trading as Mixed Business, pay the applicant, Pierre Williams;

⁵ refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

- a. \$660.00 (six hundred and sixty dollars) gross as recompense for wages lost as a result of the dismissal; and
- b. a further \$2,500.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i); and
- c. a further \$73.92 net being unpaid wages and holiday pay. Mr Kheng is to ensure an appropriate additional amount is forwarded to the Inland revenue as PAYE on that amount; and
- d. a further \$2,441.56 (two thousand, four hundred and forty one dollars and fifty six cents) being a contribution toward the costs Mr Williams incurred in pursuing his claims.

[34] The above payments are to be made to Mr Williams no later than 4.00pm on 3 August 2017.

M B Loftus
Member of the Employment Relations Authority