

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Scott Gardiner (Applicant)
AND Rock and Rolly Limited t/a Rock Pub and Café (Respondent)
REPRESENTATIVES Scott Gardiner In person
Daniel Anderson, Advocate for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 3 May 2005
DATE OF DETERMINATION 11 May 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Scott Gardiner the applicant (Mr Gardiner) alleges that wages have been withheld from him in relation to a short period of employment with Rock and Rolly Limited (Rock and Rolly) starting on 9 August 2004 and concluding on 16 August 2004.

[2] Rock and Rolly admit that the wages were not paid but claim the right to withhold them, either because the employment agreement allows for one weeks wages to be forfeited where there is no notice, or in the alternative, one weeks notice was offered by Mr Gardiner and accepted by Rock and Rolly but Mr Gardiner failed to make good on that commitment and left without working the requisite notice.

[3] The parties did not attend mediation because Rock and Rolly refused. I considered whether to direct the parties to mediation but decided that the better course of action was to convene an investigation meeting and deal with the matter promptly.

[4] The facts are in the main not disputed. Mr Gardiner was offered the position of chef at Rock and Rolly's Rolleston café and bar.

[5] An individual employment agreement was given to Mr Gardiner by Rock and Rolly on his first day at work, 9 August 2004.

[6] Mr Gardiner's evidence was that time pressures meant that he did not have an opportunity to look at the employment agreement and he seemed genuinely surprised when Rock and Rolly said at the investigation meeting that they were entitled to rely on a term of the employment agreement which meant that Mr Gardiner forfeited a week's pay when he failed to give a week's notice of his decision to leave. This suggested to me that Mr Gardiner had not in fact read the agreement properly (if at all).

[7] Certainly it is true that Mr Gardiner never signed the employment agreement.

[8] Mr Gardiner's evidence was that on 12 August (the Thursday of his first week) he spoke to Rock and Rolly's manager and indicated to her that the job was *not for him*. Mr Gardiner said that he reached this conclusion because he was working longer hours than he had been promised.

[9] Ms Philippa Cowan (Rock and Rolly's Manager) also gave evidence at my investigation meeting and her recollection was that the conversation in which Mr Gardiner indicated to her that the position was *not for him* took place on Saturday, 14 August 2004 and not Thursday, 12 August 2004.

[10] Mr Gardiner, in reflecting on the evidence that Ms Cowan had given me, accepted that her date was probably correct and accordingly I find that this significant conversation took place on Saturday, 14 August 2004.

[11] Mr Gardiner's evidence about this significant and important conversation was simply that he told Ms Cowan that the job was not for him and that he was intending to leave. He has no other recollection of any further discussion with Ms Cowan on that occasion and I accept that that is all that Mr Gardiner can remember. Plainly, he was stressed about the situation that he found himself in and by all accounts was unhappy with the employment relationship that he had entered into.

[12] Ms Cowan's evidence was that she remembered the conversation very clearly. She said, as I mentioned, that it took place on Saturday, 14 August and she remembered that Mr Gardiner spoke to her about 5pm when she was setting up tables for dinner. She agreed with Mr Gardiner's evidence that he had said that he could not continue and that he wished to leave.

[13] But critically, she added that she had asked him if he would give a week's notice and Mr Gardiner (she says) gave her his word that he would indeed give her a week's notice.

[14] Although Mr Gardiner does not recall that part of the conversation, he did accept in response to a question from me that it would have been a natural thing for an employer to ask when confronted with an employee who was unhappy and wishing to leave the employment.

[15] I accept Ms Cowan's evidence on this point as truthful. I accept therefore that Mr Gardiner promised to work out his week's notice and I accept also that Rock and Rolly relied on that promise.

[16] The evidence before me was that Ms Cowan had rung Mr Daniel Anderson who was her business partner in Rock and Rolly and she told Mr Anderson what had happened. Mr Anderson gave evidence that he had received this call from Ms Cowan and that she had told him that Mr Gardiner had given in his notice but promised to work the week out.

[17] On Monday, 16 August Mr Gardiner was rostered to work the lunch period and his evidence was that he did lunch for the guests who presented and then left never to return.

[18] Ms Cowan's evidence was that when Mr Gardiner left the business (her expression was *walked out*) she had to cook the last two lunches herself.

[19] This difficulty might have been particularly poignant for Ms Cowan because the day in question was her birthday and she had two friends in for lunch who were obviously inconvenienced by the dramas in the kitchen.

Issues

[20] The issues that I need to decide are as follows:

- a) can Mr Gardiner be bound by the terms of his unsigned employment agreement
- b) can Mr Gardiner be held to his promise to work out his notice.

Can Mr Gardiner be bound by the terms of his unsigned employment agreement?

[21] In my opinion Mr Gardiner cannot be bound by the terms of his unsigned employment agreement.

[22] I reach this conclusion because of the short duration of the employment (one week) and because the evidence available to me suggested that Mr Gardiner was unaware of the terms of the employment agreement.

[23] In particular, I do not think that Mr Gardiner was aware of the provision at clause 7.2.1 which says in part: *...where either party terminates the employment without giving the required period of notice, one weeks wages shall be paid or forfeited as the case may be by the defaulting party.*

[24] In not paying his wages, Rock and Rolly was purporting to rely on this provision (in the alternative). I do not think it is available to Rock and Rolly to do this given that Mr Gardiner did not sign the agreement and more importantly was employed in the business for a very short time, said that he had not studied the agreement and on the evidence available gave every appearance of being surprised by this provision when it was referred to at the investigation meeting.

[25] I think it follows that Mr Gardiner cannot be bound by this agreement in these particular factual circumstances.

Can Mr Gardiner be held to his promise to work out his notice?

[26] I have found as a fact that Mr Gardiner promised to work out his notice, that that promise was made to Ms Cowan and that she communicated it to her business partner Mr Anderson.

[27] Mr Anderson's evidence and Ms Cowan's evidence both confirmed that Rock and Rolly had relied on Mr Gardiner's assurance that he would work out his notice.

[28] There was ample evidence of the difficulty that Rock and Rolly were put to when Mr Gardiner simply walked out without having worked his notice as he had promised. There were significant financial costs to Rock and Rolly having to find alternative cheffing at the Rolleston business at very short notice.

[29] There was also significant social dislocation to Mr Anderson who is himself a chef. Mr Anderson was working at another of his businesses in Te Anau and in order to cover the gap created when Mr Gardiner walked out, Mr Anderson had to effectively commute between the two businesses.

[30] I have reached the conclusion that Mr Gardiner had made a promise to his employer to work out his notice, that that promise was relied upon by Rock and Rolly but that Mr Gardiner broke his word and did not in fact work out his notice at all but simply walked out two days after telling Ms Cowan that the job was *not for him*.

Determination

[31] Mr Gardiner is not entitled to recover his lost week's wages. While I do not think that the employer can rely on the terms of the unsigned employment agreement for the reasons I advance above, I do think Rock and Rolly could reasonably have expected to rely on Mr Gardiner's promise to work out his notice.

[32] In those circumstances, Mr Gardiner's application to the Authority fails.

[33] Costs are to lie where they fall.

James Crichton
Member of Employment Relations Authority