

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 141/08
5076916**

BETWEEN BRUCE WALTON SMITH
 Applicant

AND PACIFIC PALMS INTERNATIONAL
 RESORT & GOLF CLUB LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Danny Jacobson for Applicant
 Gillian Spry for Respondent

Investigation Meeting: 5 July 2007

Submissions Received: 10 July 2007
 16 August 2007

Further information: 12 September 2007
 9 October 2007
 16 October 2007
 19 October 2007

Determination: 16 April 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Bruce Walton Smith ("Mr Smith") says he was unjustifiably constructively dismissed from his employment with Pacific Palms International Resort & Golf Club Limited ("Pacific Palms"). He resigned by this letter dated 2 October 2006:-

*2 October 2006
Mr Rocky Cribb
67 Gleneagles Drive
Katikati*

Personally delivered 10am 2nd October 2006

*Dear Rocky,
Re: Resignation from GM Resort Pacifica Position*

I regret to advise that having worked for you for over 4 years and as your General Manager for a 12 month period and done my absolute best in every possible way for you and in support of you, I have nothing left to give. We are very short of money, as you have been made aware on numerous occasions over a prolonged period and can no longer continue in this manner. I intend to seek alternative employment in an endeavour to pay our bills.

I did not ask for the position, but rather you insisted you wanted me to help you in the role of General Manager. I feel it has destroyed us financially through not being paid and as you know we are trying to sell our only asset — our home.

I am happy to have a financial audit of the accounts to show that every cent that is yours has come to you. I have not taken advantage of your offer to write myself a cheque and have simply accepted your offer that I should pay for fuel on work related expenses on the account. We have eaten in the restaurant at your suggestion, at no charge, as we simply do not have the money to pay. We have afforded on a few occasions, guests the benefit of a complimentary meal. I strongly object to the inference that we have been “ripping you off” in any way. I have paid the necessities to continue trading, out of my own account when there was nothing in the café account. We still have many of our personal items in the restaurant helping to make the place better.

Brenda is 64 today and I made myself a promise that I would not continue beyond this day in the current situation and I hope you will finally understand our trauma. I have been close to resigning previously but have tried to continue to support you in view of the difficulties you are experiencing.

I have dealt with you honestly and honourably in all things and find it totally unacceptable for the hurtful criticism we seem to be subject to from seemingly ever increasing sources, as relayed by you. I am continually harassed by Gary Pearce and find it unacceptable to deal with your new friendship with the Pearces after all that has been.

I have admired your tenacity to achieve what you have, but regrettably you will have to deal with it on your own now. I have run my race, I'm a spent force — I have nothing left to give and hereby formally resign from the position of Resort General Manager effective as from today, 2 October 2006.

*Regrettably
Bruce W Smith*

[2] Pacific Palms operates a resort comprising a golf course, club house and associated Golf Pro shop, café/restaurant and bar. It defends Mr Smith's claim and says that he was not its employee.

[3] Pacific Palms did not comply with the Authority's direction that the parties attend mediation.

The issues

[4] I shall first deal with matters of credibility. I have taken evidence on oath from both Mr Smith and Pacific Palms' sole shareholder and director Mr Robert (Rocky) Clifford Hoani Cribb ("Mr Cribb").

[5] I found Mr Smith to be an honest and reliable witness, and more than that, he impressed me as a person of the utmost integrity. I cannot recall a more convincing witness. In contrast I found Mr Cribb to be less than forthcoming, frequently inconsistent and too often obfuscatory. I have very serious doubts about his credibility. Consequently, I have no doubt whatsoever about Mr Smith's sworn evidence and I accept unquestionably. Where it is in conflict with Mr Cribb's, I accept Mr Smith's evidence in every instance.

[6] These issues arise for determination:-

- (i) was Mr Smith an employee? and if he was;
- (ii) was he unjustifiably constructively dismissed? and if he was;
- (iii) what resolution is appropriate to settle the employment relationship problem?

Was Mr Smith an employee?

[7] Before he became involved with Pacific Palms, Mr Smith worked very successfully in real estate.

[8] Mr Smith's wife worked in the shop at the golf club operated by Pacific Palms. Between December 2002 and September 2005 he and Mr Cribb became acquainted and eventually became close friends. During that period Mr Smith assisted Mr Cribb on a voluntary basis on a number of sub-divisional issues in relation to Pacific Palms development and expansion. Mr and Mrs Smith both became close acquaintances of Mr Cribb and he regularly stayed with them in their guest cottage and on occasion joined them for meals. On occasions when they dined out Mr Cribb met the cost.

[9] Mr Cribb had other business interests and was frequently absent from Pacific Palms' operation or was unavailable. The relationship between Mr Smith and Mr Cribb reached a point where on 6 December 2002 Mr Cribb appointed Mr Smith as interim administrator of Pacific Palms. This appointment was recorded in writing signed by Mr Cribb the operative part of which was this:-

That (1) as governing director of the "Pacific Palms International Resort and Golf Club" I hereby appoint you as interim administrator with all delegated authority to act on my behalf on all matters (business or otherwise) regarding the above named entity.

...

This authority remains until cancelled by me personally.

[10] Mr Smith accepted the appointment on a part-time and voluntary basis and also continued with his real estate work.

[11] In September 2005 with Mr Smith's assistance, Pacific Palms obtained fee simple titles for its subdivision. Mr Smith suggested to Mr Cribb that a full-time resort manager be employed.

[12] I accept Mr Smith's evidence and find that Mr Cribb offered Mr Smith the position of resort manager with remuneration of \$100,000.00 per year. Mr Smith declined that offer. Mr Cribb remained hopeful however that Mr Smith would accept.

[13] In August 2005 I find that Mr Cribb again offered Mr Smith the position of resort manager but this time with remuneration of \$150,000.00. After a number of discussions in clarification of the terms of engagement, Mr Smith accepted.

[14] I find that Mr Cribb suggested that Mr Smith avail himself of mechanisms maximising tax advantages. Mr Cribb suggested that a company ought to be established as one such mechanism. In September 2005 Mr Cribb advised Mr Smith that he had had his solicitor establish such a company with Mr and Mrs Smith as directors and shareholders. Mr Cribb's solicitor prepared and despatched to Mr and Mrs Smith under cover of letter dated 1 October 2005 the documentation in respect of their offices as directors and as shareholders in a limited liability company known as

B & B Management Services Limited. These documents were duly executed by Mr and Mrs Smith and were promptly returned to Mr Cribb's solicitor.

[15] I find that on 2 October 2005 Mr Smith became engaged by Pacific Palms as its General Manager. I accept Mr Smith's evidence that Mr Cribb asked Mr Smith to prepare a suitable employment agreement. Mr Smith prepared a document entitled "Management Contract" dated 1 October 2005 as between Pacific Palms and the limited liability company B & B Management Services Limited. Mr Smith provided this document to Mr Cribb but Mr Cribb took no further steps in relation to the matter.

[16] Mr Cribb's solicitors wrote to Mr and Mrs Smith by letter dated 10 October 2005 enclosing a certificate of incorporation for the limited liability company B & B Management Services Limited. Both Mr and Mrs Smith held equal shares and were appointed directors.

[17] Mr Smith sought verification of his remuneration from Mr Cribb's solicitor. The solicitor acceded to Mr Smith's repeated requests and wrote to Mr Smith by letter dated 27 October 2005 in these terms:-

To Whom It May Concern

This letter is to confirm that The Pacific Palms International Resort and Golf Club Limited ("Pacific Palms") has entered into a Management Agreement with B & B Management Services Limited (Bruce Smith and Brenda Smith) for the management of the Resort Pacifica Development at 34 Sharp Road, Katikati, owned by Pacific Palms at a fee of \$12,000 per month.

[18] I accept that Mr Smith simply resigned himself to the arrangements that were effectively imposed on him by Mr Cribb and his solicitor. Mr Smith accepted revised remuneration of \$144,000.00 plus GST on submission of monthly invoices of \$12,000.00 plus GST.

[19] I now determine whether Mr Smith was an employee. That enquiry requires a determination of the real nature of the relationship between Mr Smith and Pacific Palms.

[20] The intention of the parties is relevant but is no longer decisive. Statements by the parties, including contractual statements are not decisive either. The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as the control, integration and the fundamental test. The fundamental test examines whether a person performing the services is doing so on their own account. Industry practice is also of assistance but is not determinative of the primary question.

[21] Usually, it is only after the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, is it possible to examine the relationship in light of the control, integration and fundamental tests.

The documents

[22] There is firstly the lawyer's letter dated 27 October 2005 purporting to confirm that the management of Pacific Palms was by way of a management agreement between the limited liability company B & B Management Services Limited of which Mr Smith was a shareholder and director.

[23] Next there is the "Management Contract" prepared by Mr Smith but which was never executed once it was provided to Mr Cribb. That document was between Pacific Palms and B & B Management Services Limited. It provided for full time management. It referred to a General Manager, presumably Mr Smith. It set out the General Manager's duties and referred to the parties acting towards each other in good faith and treating each other with dignity and respect. It also provided for 21 days annual leave for the General Manager and precluded the General Manager from conflicting secondary engagements. It provided for a salary of \$150,000 per annum on provision of monthly GST invoices. The document was never executed once it had been provided to Mr Cribb.

[24] I do not regard either documents as decisive of the matter and instead concentrate on assessing the real nature of the relationship notwithstanding what the documents purport to be.

Common intention

[25] I accept Mr Smith's evidence that on 2 October 2005 he and Mr Cribb agreed that Mr Smith would be Pacific Palm's General Manager. That intention was common to both parties. But there was no common intention about the status of that engagement, typically an employment. I am unable to find that both parties had an explicit common intention that Mr Smith was to be specifically an employee.

The relationship in practice

[26] Following his appointment as General Manager, Mr Cribb suggested that Mr Smith obtain business cards showing his new designation as General Manager instead of Chief Executive Officer.

[27] Mr Smith attended a liquor licensing course to attain his "General Manager's Certificate" under the *Sale of Liquor Act*. Mr Smith was provided with an EFTPOS card to pay for urgent accounts, sundry cash purchases and various employment related expenses. Mr Smith was also provided with a Vodafone cellphone for his business use. He was required to wear Pacific Palms branded clothing. He was also reimbursed for vehicle expenses in respect of business use. Mr Smith was also a signatory to the Pacific Palms bank account and this arrangement permitted him to pay invoices and expenses as directed by Mr Cribb. Mr Smith also compiled and approved invoices for payment subject to authorisation by Mr Cribb.

[28] Mr Smith worked very long hours as the General Manager and regularly worked six days per week. He ran the resort and carried out a wide variety of duties including working on the golf course, food service, bar service and cleaning and maintenance. I am satisfied from Mr Smith's witnesses that Mr Smith was very dedicated, committed and hardly ever absent away from the operation.

[29] Mr Smith was in constant contact with Mr Cribb frequently several times a day. Mr Cribb gave Mr Smith instructions and directed his performance as General Manager.

[30] Mr Smith had to seek approval from Mr Cribb to take leave.

[31] Mr Smith was authorised to hire and terminate employees and did in fact do so in respect of many of Pacific Palms' employees.

The control test

[32] I find that there was significant control imposed on Mr Smith. This control was exercised by Pacific Palms over Mr Smith's work and how and when he performed it. That degree of control over Mr Smith during his working day was significant and I conclude that such control was characteristic of an employment.

Integration test

[33] I find that Mr Smith's role as General Manager was an integral part of Pacific Palm's operation and was not an adjunct position.

Fundamental test

[34] Was Mr Smith in business on his own account as an independent contractor?

[35] Mr Smith was required to render GST invoices each month. He duly did so. If he did not, he did not get paid. I say more about the true situation later. But I find the requirement for Mr Smith to produce invoices each was at Pacific Palm's initiative.

[36] I accept that Mr Smith was not subject to any business risk. He was entitled to regular fixed monthly payment on the mere production of an invoice. There was no risk to him in that situation.

[37] For all the above reasons, I am satisfied that that Mr Smith was an employee of Pacific Palms. **I determine the real nature of the relationship between Mr Smith and Pacific Palms was one of employment.**

Was Mr Smith unjustifiably constructively dismissed?

[38] I determine whether Mr Smith was unjustifiably constructively dismissed by applying this well settled test:-

- (i) Did Mr Smith resign?;
- (ii) Was Mr Smith's resignation caused by a breach of duty on the part of Pacific Palms?;
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[39] There is no doubt Mr Smith did resign. That is established beyond any doubt by his letter of resignation dated 2 October 2006. **I find that Mr Smith did resign.**

[40] Between October 2005 and September 2006 Mr Smith rendered 12 invoices the sum of sum of \$141,750.00 to Pacific Palms for payment in respect of what I have found was his service. Pacific Palms paid only four of those invoices in the sum of \$36,000.00.

[41] I accept Mr Smith's evidence that despite repeated requests to Mr Cribb for payment and repeated promises by Mr Cribb to pay, Pacific Palms did not pay Mr Smith what he was owed. The sum owed to Mr Smith is \$105,750.00.

[42] I accept Mr Smith's evidence that because of his close relationship with Mr Cribb he remained extremely tolerant and trusted Mr Cribb to pay. On 1 October 2006 however his tolerance and patience had run its limits.

[43] On 2 October 2006 Mr Smith personally delivered his letter of resignation to Mr Cribb effective immediately.

[44] I find that Pacific Palms' failure to pay Mr Smith for his service was a fundamental breach of the employment relationship. Pacific Palms failure to pay constitutes a breach of duty that was owed to Mr Smith. **I find that breach of duty caused Mr Smith's resignation as evidenced by the letter of 2 October 2006.**

[45] The work/wage bargain is fundamental in an employment relationship. That fundamental breach was very serious. Pacific Palms' actions were repudiatory. Mr

Smith affirmed the repudiatory action and resigned. **I find that the breach of duty owed to Mr Smith by Pacific Palms was so serious and fundamental that it was reasonably foreseeable that there was a substantial risk that Mr Smith would resign.**

The determination

[46] Having applied the test, **I find that Mr Smith was unjustifiably constructively dismissed. He has a personal grievance for unjustifiable dismissal and he is entitled to have that problem resolved by formal orders of the Authority.**

[47] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the *Employment Relations Act 2000* to consider the extent to which Mr Smith's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find no contributory conduct on Mr Smith's part. There is therefore no basis to reduce the nature or extent of remedies to be provided to him.

Reimbursement

[48] Mr Smith was out of employment from the time of his resignation on 2 October 2006 until 28 February 2007. I accept that this was a very worrying and anxious time for him and his family.

[49] On 28 February 2007 Mr Smith obtained temporary employment and his earnings from 2 October 2006 through to 31 March 2007 were \$4,511.94. I am satisfied that he took steps to mitigate his losses by obtaining other employment.

[50] I am satisfied that Mr Smith has lost wages as a result of the personal grievance I have found. I think it proper that he be awarded his claimed and actual lost wages for the period from October 2006 to 31 March 2007 and I exercise my discretion to do so. I calculate the sum to be reimbursed as \$72,000.00. **I order Pacific Palms**

International Resort and Golf Club Limited to pay to Bruce Walton Smith the gross sum of \$72,000.00 as reimbursement.

Compensation

[51] Mr Smith gives evidence to the Authority that he was extremely hurt and humiliated by Mr Cribb's and Pacific Palms behaviour towards him. The situation was exacerbated by his personal friendship with Mr Cribb and his sense of devotion and commitment to Mr Cribb and the breach of trust involved. It was distressing for Mr Smith to learn of rumours, hurtful criticism and untrue allegations that were being made against him and his wife by Mr Cribb.

[52] Mr Smith and his family were put in an extremely precarious financial position because he was not paid. The situation was so bad that by July 2006 Mr Smith and his wife had little choice but to list their residential property for sale because they were unable to pay their mortgage. The family home is Mr and Mrs Smith's only financial asset. He says they had to sell it to survive. As it was the sold the property at a loss.

[53] I am satisfied that Mr Smith has suffered loss of dignity and hurt and humiliation as a result of the personal grievance. Having regard to his evidence, his length of service and the nature of the personal grievance, **I order Pacific Palms International Resort and Golf Club Limited to pay to Bruce Walton Smith the gross sum of \$15,000.00 as compensation.**

Recovery of arrears of wages

[54] I am satisfied Mr Smith is owed outstanding wages in the gross sum of \$105,750.00. He is also owed a further 11 days for statutory holidays and three weeks annual leave. That is a total of 33 days which I round to one further month in the sum of \$12,000.00. **I order Pacific Palms International Resort and Golf Club Limited to pay to Bruce Walton Smith the gross sum of \$117,750.00 as arrears of wages.**

Interest

[55] As Mr Smith has stood out of the funds due to him I think it fit that he have interest on the arrears of wages I have determined. **I order Pacific Palms**

International Resort and Golf Club Limited to pay to Bruce Walton Smith interest on the sum of \$117,750.00 at the rate of 10% per annum running from 2 October 2006 until the date of payment.

Costs

[56] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Jacobson is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Spry is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority