

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 13/09  
5120282

BETWEEN                      NIKOLAI JAMES STAKES  
   Applicant  
  
AND                              GREY DOOR LIMITED  
   T/A        THE        BUNKER  
   RESTAURANT & BAR  
   Respondent

Member of Authority:      Helen Doyle  
  
Representatives:            Applicant appeared in person  
   Dale Lloyd, Counsel for Respondent  
  
Investigation Meeting:     11 November 2008 at Queenstown  
  
Submissions received:     12 December 2008 from Applicant  
   25 November 2008 from Respondent  
  
Determination:              5 February 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Nikolai Stakes commenced employed with Grey Door Limited which trades as The Bunker Restaurant & Bar (The Bunker) in Queenstown in April 2006. Mr Stakes was initially employed as barman but was promoted to Assistant Manager in December 2006. Mr Stakes remained in that position until he says he was unjustifiably dismissed from his employment either actually or constructively on 11 March 2008. Mr Stakes seeks recovery of lost wages together with compensation.

[2]     The Bunker does not accept that Mr Stakes was dismissed actually or constructively and says that he resigned during a meeting with the director and manager of The Bunker, Cameron Mitchell on 26 February 2008. The Bunker says

that when it was clear that there was confusion as to what occurred at the February meeting Mr Mitchell attempted to get the relationship back on track.

### **The issues**

[3] The issues for the Authority to determine in this matter are:

- Was Mr Stakes actually or constructively dismissed from his employment on 11 March 2008 or did he resign on 26 February 2008?;
- If Mr Stakes was dismissed then was the dismissal unjustified?;
- If Mr Stakes was unjustifiably dismissed then what remedies should he receive and are there issues of mitigation and contribution?

*Was Mr Stakes actually or constructively dismissed from his employment on 11 March 2008 or did he resign on 26 February 2008?*

[4] Mr Mitchell is responsible for the day to day operations of The Bunker. Mr Mitchell's wife, Tina Ashmore, is employed by the company as an account manager and works in the restaurant as and when required as a duty manager.

[5] Mr Stakes and Mr and Mrs Mitchell felt that the relationship between them deteriorated following a meeting in November 2007. Although I am not required to reach any conclusions as to why there were difficulties in the relationship, I do recognise that there were and they required addressing.

[6] Mr Mitchell talked to Mr Stakes about the possibility of alternative business ventures in early February 2008. He then advised Mr Stakes that unfortunately inquiries in that regard had not progressed but both Mr Mitchell and Mr Stakes agreed that there should still be a meeting because there were other issues that needed to be discussed.

[7] A meeting was held on 26 February 2008 and Mr Stakes and Mr Mitchell attended. It was at the end of this meeting when Mr Mitchell believed that Mr Stakes had resigned. Mr Stakes does not accept that he resigned at that meeting.

[8] Mr Stakes and Mr Mitchell both agreed that at the meeting Mr Stakes talked about matters that he was not happy with in the restaurant. Mr Stakes referred to those matters as operational. I find it likely that Mr Stakes referred at some point of

the conversation to having had other job offers. At the end of that discussion Mr Mitchell asked Mr Stakes what he wanted to do and Mr Stakes said *he would do what has to be done*.

[9] Mr Mitchell explored this statement with Mr Stakes and asked him if he wanted to resign/give notice. Mr Mitchell understood Mr Stakes' response to be affirmative and at some point in the conversation Mr Mitchell agreed, he said *I think it is a good time to leave*. I accept Mr Mitchell's evidence that he did not open with this remark.

[10] There was some discussion about a notice period that The Bunker may require. It is less clear about the context of this discussion. 48 hours was in all likelihood referred to by Mr Mitchell and the period of two weeks may also have been referred to. Mr Mitchell made it clear that he would not hold Mr Stakes to any particular notice period. It is likely that Mr Stakes asked what the notice period in his employment agreement was during the meeting, but Mr Mitchell did not have that information with him and said that he would find that out. Mr Stakes had been given an individual employment agreement but had never signed it as he was unhappy with its content.

[11] Mr Stakes said that he was not expecting the conversation to turn to a discussion about him leaving and that he needed time to think things through. He said that he left the meeting on the basis that he would think about things and then would let Mr Mitchell know. Mr Mitchell said the meeting ended on the basis that Mr Stakes would let Mr Mitchell know the term of his notice. I think it likely that at the end of the meeting they both shook hands.

[12] After Mr Mitchell left the meeting he attended a meeting with the other directors of The Bunker. He told the directors that Mr Stakes was leaving The Bunker. One of the other directors, Brendan Winder, said he had another position in another restaurant/bar which he wanted to discuss with Mr Stakes and Mr Winder did talk to Mr Stakes about that position.

[13] Mr Stakes worked at The Bunker after the meeting on 26 February but he was rostered off on 27 and 28 February 2008. Mr Mitchell said that although he had discussed the matter with his wife and the directors he did not advise any other staff, but that he was then approached by another staff member who referred to Mr Stakes

resigning. Mr Mitchell said that this also confirmed to him that this was Mr Stakes' intention. Mr Stakes said that he had not told anyone that he was resigning because that was not his intention.

[14] I also heard from Trina Amberger and Tania Labes. Ms Amberger flattered with Mr Stakes and his partner Petra Hrbackova. Ms Labes was an employee at The Bunker at the material time. Both Ms Amberger and Ms Labes gave evidence that whilst having a drink at The Bunker, in late February 2008, they heard Mr Mitchell say that Mr Stakes had resigned. Both Ms Amberger and Ms Labes said that they were surprised by this because they were sure that Mr Stakes would have told them if that was his intention. Ms Amberger said that she talked to Mr Stakes the next morning about what she had heard and that he was very upset because he had not resigned.

[15] I do not find that Mr Stakes gave unequivocal notice of his resignation to Mr Mitchell during the meeting on 26 February 2008. I find the communication about Mr Stakes' future intentions at the meeting was equivocal. Within a few days after the February meeting Mr Stakes knew that Mr Mitchell had misunderstood the communication as a resignation, which was contrary to Mr Stakes' intention. Mr Stakes was then required to make it clear to Mr Mitchell that he had not resigned or, suffer the consequences of standing by: *SADD v. Iwi Transition Agency* [1991] 1 ERNZ 438.

[16] On that basis I have analysed what occurred after 26 February 2008 to see if, as Ms Lloyd submits Mr Stakes simply stood by.

[17] The evidence supports that Mr Stakes was approached by Mr Mitchell several times after the 26 February meeting about his intentions. Mr Mitchell said that Mr Stakes did not respond to him and refused to speak to him. Mr Stakes did not accept that he refused to speak to Mr Mitchell. He said that Mr Mitchell asked him what he was going to do and that he told him that if he was to resign, he would put it in writing and work the full two weeks notice period, Mr Mitchell having confirmed that that was what was required in the employment agreement.

[18] Mr Stakes took from the discussions with Mr Mitchell, that Mr Mitchell was still wanting a decision from him as to whether he was going to resign or not.

Mr Mitchell however was wanting Mr Stakes to advise him of the date his resignation would take effect.

[19] I prefer Mr Stakes' evidence that he did make it clear to Mr Mitchell that he had not resigned during the meeting of 26 February 2008. I have reached that view taking into account the evidence and the text messages sent to and from Mr Mitchell and Mr Stakes' cell phones from 5 March 2008. I do not intend to set out the text messages in full but I am satisfied from my perusal of them that this is not a situation where Mr Stakes simply stood back and let Mr Mitchell believe that he had resigned. I find that it would have been clear to Mr Mitchell that whilst he believed that Mr Stakes had resigned during the meeting on 26 February that was not Mr Stakes' view and Mr Mitchell knew that there was no agreement on that.

[20] On 8 March 2008 Mr Stakes suffered an out of work injury. As it was an accident Mr Stakes was covered by ACC and a medical certificate was supplied to Mr Mitchell about his likely return to work date.

[21] Matters came to a head on 10 and 11 March 2008. On 10 March Mr Mitchell sent a text to Mr Stakes advising that he had spent some time with a lawyer and that the situation with his (Mr Stakes) resignation must be sorted. Mr Stakes advised by text dated 11 March 2008 that he believed his words were if and when he resigned Mr Mitchell would receive a resignation in writing. Mr Stakes suggested in his text that Mr Mitchell's insistence could be viewed as professional bullying.

[22] Mr Mitchell duly responded again by text, and said that he was actually going to offer a solution and that there was no bullying but he was wanting to do the right thing for his business. Mr Stakes indicated again by text that he was happy to discuss the matter.

[23] On 12 March 2008 Mr Mitchell sent an email to Mr Stakes in which he said, amongst other matters, that when Mr Stakes informed him of his decision to leave he decided to make the Assistant Manager's position redundant effective from 11 March 2008. He noted that Mr Stakes had disputed the fact that he resigned or gave notice. Mr Mitchell said that although he was never advised of the term of the notice that was irrelevant because Mr Stakes' position was now redundant.

[24] Mr Stakes responded to that email and sent two emails on 13 and 14 March 2008. Mr Stakes said that he had not resigned and that he did not understand how his

position could be redundant. Mr Stakes said in one of the emails that he was off work with a serious injury and that he was still an employee. Mr Stakes said in his email of 14 March that he was happy to discuss the matter and the possibility of returning to work when fully recovered and again disputed that he had resigned.

[25] Mr Stakes did not receive a response to his emails, but he did receive a letter from Mr Mitchell dated 18 March 2008. Mr Mitchell said in this letter that it appeared he had misunderstood what Mr Stakes wanted at the end of the February meeting and that he wished to have a further meeting to discuss matters raised at that meeting. Mr Mitchell referred to performance concerns that required discussion. Mr Mitchell also set out in the letter that whilst it remained the case that the Assistant Manager position would be redundant if Mr Stakes left The Bunker's employment, at this stage Mr Mitchell said he was only looking at positions and updating job descriptions. Mr Mitchell was not sure of the date that Mr Stakes would be cleared to return to work so he left the date for return blank on the letter.

[26] I find it likely that Mr Mitchell's letter crossed with a letter from Mr Stakes' lawyer raising a personal grievance and asking for compensation.

[27] I find in conclusion that Mr Stakes was actually dismissed from his employment with The Bunker when he was advised by email dated 12 March 2008 from Mr Mitchell that his position at The Bunker was redundant as at 11 March 2008.

*If Mr Stakes was dismissed then was the dismissal unjustified?*

[28] I have not found that Mr Stakes unequivocally resigned from his employment at the meeting on 26 February 2008 and further he did not simply stand by when he understood that Mr Mitchell believed that he had resigned but made it clear that he had not resigned. I am not satisfied from the evidence that the redundancy was genuine or that it was undertaken in a procedurally fair way. I find that Mr Stakes' dismissal was unjustified because under s103A of the Employment Relations Act 2000 it was not what a fair and reasonable employer would have done in all the circumstances.

[29] Mr Stakes has a personal grievance that he was unjustifiably dismissed on 11 March 2008.

## Remedies

### *Contribution*

[30] The Authority is required, in considering the nature and extent of the remedies, to consider whether the actions of Mr Stakes contributed toward the situation that gave rise to the grievance. If the Authority considers that Mr Stakes' actions did, then the Authority is required to reduce the remedies that would otherwise have been awarded.

[31] I have found there to have been various communication difficulties in this relationship. Those difficulties needed to be resolved. I do not find however that Mr Stakes was uncommunicative about whether he had resigned or not. I find it more likely that Mr Mitchell felt that Mr Stakes failed to communicate a date by which he intended to leave, rather than whether or not he had resigned. In this regard I have placed some weight on part of the text from Mr Mitchell to Mr Stakes dated 5 March 2008 in which Mr Mitchell says ... *we have people who really want to work here and without the attitude, so don't you think it would be fair to make room for someone who really wants to be here?*

[32] I find that Mr Stakes made it clear that he did not consider that he had resigned but that Mr Mitchell kept pressuring for a date by which Mr Stakes was to leave and when that was not forthcoming Mr Mitchell said the position that Mr Stakes held was redundant.

[33] In the circumstances I do not find that Mr Stakes contributed to the situation.

### *Lost wages*

[34] Mr Stakes was not cleared fit to return to work until 8 April 2008. He was on ACC and there are no lost wages leading up to that date. Mr Stakes was then overseas for six weeks from 26 April 2008 and when he returned to New Zealand he immediately started in a new position.

[35] An employee has an obligation to mitigate loss suffered as a result of having employment terminated. In that regard I have considered a letter from Mr Mitchell of 18 March 2008 which offers to reinstate Mr Stakes back to his position. The letter in my view from Mr Mitchell was an attempt by him to remedy the situation.

Mr Mitchell accepted in his letter that it appeared that he misunderstood Mr Stakes' wishes with respect to resignation and apart from setting out some general comments about matters that were discussed at the meeting that led him to view that Mr Stakes had resigned, he does not attempt to lay further responsibility for that misunderstanding at Mr Stakes' door.

[36] Mr Mitchell does mention the need for a further meeting to discuss Mr Stakes' performance. I am of the view that both parties needed to meet and attempt to resolve issues in order to get employment back to a functional level because of the real communication issues and unhappiness in the relationship.

[37] On that basis I do not find the requirement to attend a meeting constituted a ground for Mr Stakes to have rejected the offer. The redundancy letter was not dealt with particularly well, but again in my view is not sufficient reason for the offer to be rejected.

[38] I find that Mr Stakes refused to accept an offer to return to work when medically fit. He did so on the basis that it was not genuine. I find the offer was reasonable and failure to accept it amounted to a failure by Mr Stakes to mitigate his loss of remuneration between the date he was reasonably fit to work, being 8 April 2008 and the date he went on holiday.

[39] In those circumstances I make no order for lost wages.

### *Compensation*

[40] Mr Stakes says that Queenstown is a small place and the hospitality workers are a close knit bunch. He said that he heard rumours and stories about what people had been told about the situation between him and Mr Mitchell and that it was distressing. Mr Stakes also said that he believed that Mr Mitchell had attempted to sabotage his new employment. Although there was a discussion between Mr Mitchell and Mr Stakes' new employer, this was initiated by Mr Stakes' employer. There was no evidence to support that this discussion had impacted on the new relationship and Mr Stakes' new employer was clearly supportive of Mr Stakes as an employee.

[41] I accept though that Mr Stakes suffered some humiliation and loss of dignity and was distressed that people were being told he had resigned when he had not. I have also taken into account that these matters were occurring during the period when

Mr Stakes was injured and that he lost friends and contacts as a result of this matter when they took sides.

[42] I have taken into account that Mr Mitchell did offer to reinstate Mr Stakes and in my view this would have reduced the humiliation and could have enabled some of the friendships and contacts to continue.

[43] In all the circumstances I am of the view that there should be a moderate award .

[44] I order Grey Door Limited T/a as The Bunker Restaurant & Bar to pay to Nikolai Stakes the sum of \$3,000 compensation without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

### **Costs**

[45] Mr Stakes was not represented and it not entitled to costs in terms of the investigation meeting but, I do note on the perusal of the file that Mr Stakes did incur some legal fees initially and he did refer at the investigation meeting to the cost of bringing a witness from out of Queenstown. Mr Stakes will also be entitled to reimbursement of his filing fee of \$70.00.

[46] I will give Mr Stakes an opportunity to provide details of any legal fees incurred with respect to this matter and any costs in terms of witness attendance from out of Queenstown. Mr Stakes is currently in Lapland although he is able to be contacted by email. I will give him until the end of February 2009 to provide that information.

[47] Ms Lloyd has two weeks from the date of receipt of that information to make any response to whether or not there should be an order that her client contribute towards some of those expenses.

Helen Doyle  
Member of the Employment Relations Authority