

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 146

File Number: 5336818

BETWEEN

MARK DEASON

Applicant

AND

DARRELL AND TAYLOR

ANTONOPOULOS t/a La Casa

Pasta Limited and Whonere

Holdings Limited

Respondents

Member of Authority: Denis Asher

Representatives: Peter McLuskie for Mr Deason  
No appearance by or for the respondents

Investigation Meeting Wellington, 16 August 2011

Submissions Received On the day of the investigation

Determination: 19 September 2011

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1] Was Mr Deason unjustifiably disadvantaged and unjustifiably dismissed by the respondents? Did the respondents fail to provide Mr Deason with an employment agreement per s. 65 of the Employment Relations Act 2000 (the Act) and the reasons for his dismissal, and – if so – should they be penalised? Is Mr Deason owed unpaid wages, including holiday pay? Did the respondents fail to provide the applicant with

wages and time records and – if so – should the respondents be penalised? Should the respondents be penalised for not acting in good faith?

[2] No statement in reply has been received from the respondents, or any other body of evidence setting out their position in any detail.

### **The Investigation**

[3] During a telephone conference on 16 May 2011 the parties, including Mr Darryl Antonopoulos on behalf of the respondents, agreed to a one-day investigation on 16 August 2011 and a timetable for filing witness statements.

[4] Mr Antonopoulos also agreed the respondents would undertake mediation but, as it happened, they took no steps to arrange and participate in the same; nor did the respondents meet the agreed timetable for filing their witness statements.

[5] No explanation was provided by the respondents in respect of these (serial) failures.

[6] Emails received from Mr Antonopoulos on 15 & 16 August sought an adjournment of the investigation on various grounds including that a lawyer he had engaged had withdrawn from the case because of the former's inability to pay, that he had no money, assets, business and employment and was anticipating a prison sentence arising out of a tax/IRD matter. I declined the request on the grounds that the proceedings and investigation date were well known to the respondents, the reasons given for supporting the application were not fresh, the respondents had failed to meet earlier commitments and the reasons given did not preclude Darryl and Taylor Antonopoulos from attending the investigation. The respondents' conduct raises serious bad faith questions.

### **Background**

[7] The undisputed evidence is that Mr Deason applied for, and was appointed to, the position of La Casa Pasta general/restaurant manager by Ms Antonopoulos on 5 or 6 October 2010. While Ms Antonopoulos represented herself as "*the boss*" and the

person who “*makes the decisions*” (par 2.2, statement of problem), and as is detailed below, Mr Antonopoulos subsequently intervened in the employment relationship and, in direct discussions, made crucial decisions in respect of the applicant.

[8] Ms Antonopoulos explained to Mr Deason that she had been running the restaurant for over 3-years prior to his appointment, and Mr Antonopoulos for over 8 years prior to that, having taken over the business from his father.

[9] The evidence before the Authority does not make clear which, if any, of the respondents owns the restaurant but it is unnecessary for me, in the context of this determination, to decide that matter.

[10] What is clear is that, in breach of s. 63A (2) (amended by s. 23 of the Employment Relations Amendment Act (No 2) 2004), no copy of the intended employment agreement was provided to Mr Deason in advance of his employment; he was also not advised of his entitlement to seek independent legal advice or given a reasonable opportunity to seek that advice.

[11] Within a short period of commencing his employment, and on 29 October and by way of a text message, Mr Deason was surprised to be asked to stay away from the business by Ms Antonopoulos.

[12] On 30 October Mr Deason received a telephone call from Mr Antonopoulos who claimed, he “*had concerns about me and did not want me at work*” (par 33 of the statement of problem).

[13] Mr Deason says he was “*horrified*” by the allegations (par 35, above) and put his response in writing to Mr and Ms Antonopoulos, including his concern he did not yet have an employment agreement (letter dated 30 October, attachment to statement of problem).

[14] Mr Deason says his subsequent efforts to communicate with Mr & Ms Antonopoulos, and in particular to meet with them, initially went unanswered.

[15] Mr Deason says he finally met with Mr Antonopoulos on 4 November: in the ensuing conversation the latter said (amongst other things), “*It’s just not working out. We’re not working well together*” (par 46 above) and – when pressed by the applicant on whether he was giving him notice – said that he would be paid a week’s wages in lieu (of notice and fair process, I understand).

[16] Mr Antonopoulos also advised the business was about to be sold.

[17] Subsequent efforts to obtain unpaid wages were largely unsuccessful; promises of payment often proved false.

[18] Mr Deason’s extensive efforts (particularised in his oral evidence during the Authority’s investigation) to find subsequent employment were not successful until 4-months later, at the start of March 2011.

[19] During the Authority’s investigation Mr Deason amended the remedies he sought as follows:

- a. Lost wages from 4 November 2010 until March 2011 @ \$18 p.h. X 35 hours p.w. = \$10,920.00
- b. Wages not paid for 6 October – 4 November 2010 less \$200 received = \$230.00
- c. Unpaid holiday pay at 8% for 3-weeks = \$201.60
- d. Hurt & humiliation = \$10,000.00; and
- e. Various penalties, including for breach of s. 65 of the Act; with payment to be made to the applicant.

### **Discussion, Findings and Remedies**

[20] There is no evidence before the Authority to challenge the applicant’s allegation that he was an employee of Mr and Ms Antonopoulos (either directly or

through the cited companies) and that the respondents, in breach of well-known case law and statutory obligations, failed to provide him with an intended employment agreement, failed to keep a record of Mr Deason's wages and time record and to provide it to him when he sought it, failed to pay him wages and holiday pay owed, and terminated his employment without providing the applicant with proper notice of his alleged performance deficiencies nor an opportunity to address those concerns.

[21] I have no reason to doubt Mr Deason's claims he is owed unpaid wages and holiday pay of \$230 and \$201.60 respectively.

[22] I also accept the applicant's claim that, despite his best efforts, he was unable to find fresh employment for four months and therefore should be compensated lost wages for that period of \$10,920. I arrive at this decision in the absence of any information as to the fate of the restaurant at which Mr Deason was employed, in particular if it has been sold (and if so, when) which otherwise may have impacted on the applicant's expectations of ongoing employment.

[23] Similarly, I have no reason to doubt Mr Deason's evidence as to the level of distress caused him by the respondents' arbitrary and unfair conduct. I am satisfied his amended claim for \$10,000 is appropriate compensation for the unjustified distress occasioned him by the respondents' conduct.

[24] I also accept that the respondents have breached their statutory obligations to Mr Deason, particularly in failing to provide an intended employment agreement or to keep a wages and time record (ss 63A: inserted by s. 24 of the Employment Relations Amendment Act (no 2) 2004; and s. 130 (1) of the Act). In the circumstances I am satisfied a penalty of \$1,500 should apply in respect of each breach and that half of that money, i.e. \$1,500, should be paid to the applicant: ss 136 (2) of the Act applied.

[25] The claimed breach of the Wages Protection Act 1983 is, however, I find less clear. Which provision of that Act is alleged to have been breached has not been particularised by the applicant. I am therefore satisfied that it is more appropriate for me to make clear findings – and apply penalties to the respondent – in those areas that are clear, i.e. namely failing to provide an intended employment agreement and to keep a wages and time record.

[26] So as to avoid any 'double-dip' possibility, and because of the overlap of unacceptable conduct by the respondents, I am also satisfied that the alleged breach of good faith under s. 41 (1) of the Act is better addressed by way of an award for damages in respect of Mr Deason's successful personal grievance allegation.

[27] Finally, I note here that s. 120 of the Act makes no provision for the application of a penalty in the event of an employer breaching their absolute obligation to provide a statement of reasons for dismissal..

### **Contributory Fault**

[28] There is no evidence of conduct by Mr Deason that in any way contributed to the situation giving rise to his successful grievance: s. 124 of the Act applied.

### **Report in Relation to Good Faith**

[29] The respondents' conduct in this employment relationship problem may well warrant, in the event of a challenge to this determination, a report pursuant to the provisions of s. 181 of the Act.

### **Determination**

[30] The respondents, jointly and severally, are to pay to Mr Deason the following monies:

- a. Lost wages from 4 November 2010 until March 2011 @ \$18 p.h. X 35 hours p.w. = \$10,920.00 (ten thousand, nine hundred and twenty dollars) gross;
- b. Wages not paid for 6 October – 4 November 2010 less \$200 received = \$230.00 (two hundred and thirty dollars) gross;
- c. Unpaid holiday pay at 8% for 3-weeks = \$201.60 (two hundred and one dollars and sixty cents) gross; and
- d. Hurt & humiliation = \$10,000.00 (ten thousand dollars).

[31] The respondents, jointly and severally, are to pay to the Crown penalties totalling \$1,500.00 (one thousand and five hundred dollars) and penalties to Mr Deason totalling \$1,500.00 (one thousand and five hundred dollars).

[32] As requested by Mr Deason, costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**