

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 45  
5504659

BETWEEN                      FRASER THOMSON  
Applicant

A N D                              DIANE McCAULEY  
First Respondent

A N D                              HEALTHY                      BUSINESS  
INVESTMENTS                      LIMITED  
trading as PURE KITCHEN  
Second Respondent

Member of Authority:              Helen Doyle

Representatives:                      No appearance for the Applicant  
Diane McCauley, Respondent and advocate for Second  
Respondent

Investigation Meeting:              11 March 2015 at Christchurch

Date of Determination:              9 April 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.      Healthy Business Investments Limited trading as Pure Kitchen is to pay to Mr Thomson unpaid wages in the sum of \$1350 gross.**
- B.      The claim for damages in not made out.**
- C.      Mr Thomson is to pay a penalty to Healthy Business Investments Limited of \$1500 for breaching his employment agreement when he failed to give any notice.**
- D.      Costs are reserved and submissions are to be lodged and served by 30 April 2015.**

**Employment relationship problem**

[1] Fraser Thomson says that he is owed nine days' pay from his employer, Diane McCauley, for work he undertook for her between 14 and 24 July 2014 both days inclusive as Head Chef at Pure Kitchen.

[2] Ms McCauley says that Mr Thomson was an employee of the second respondent, Healthy Business Investments Limited (HBI) which trades as Pure Kitchen between 14 July and midday 23 July 2014. She says that he entered into a written employment agreement with HBI dated 27 June 2014 before he commenced employment with that company as a head chef at Pure Kitchen.

[3] HBI says that Mr Thomson left his employment at midday on 23 July 2014 having worked 7.5 days without giving any notice and that it was entitled under the terms of the employment agreement to withhold his wages in their entirety. HBI says that Mr Thomson breached duties in his employment agreement to make sure all representations made by him in applying for the position were true and complete and that he failed to give three weeks' notice. It seeks a penalty and damages for the breaches.

[4] Mr Thomson did not attend the investigation meeting although I am satisfied that he was served with the notice of the investigation meeting, had attended a telephone conference with the Authority and had been in email contact with the support officers. Mr Thomson was residing overseas however understood that there would be no difficulty in having someone present to represent him at the meeting. The Authority understood he was returning to New Zealand at the start of 2015. He did not advise the Authority that he would not be present at the investigation meeting and in the absence of any good reason the Authority proceeded to hear evidence from Ms McCauley.

**The issues**

[5] The issues for the Authority to determine are as follows:

- (a) Who was Mr Thomson employed by?
- (b) How many days did Mr Thomson work?

- (c) Was Mr Thomson's employer entitled under the terms of his employment agreement entitled to withhold his wages?
- (d) Is the first or second respondent entitled to damages for the alleged breaches of his employment agreement? and
- (e) Should there be a penalty awarded for the failure to provide notice of intention to terminate the employment agreement and/or not truly representing his skills and attributes?

#### **Who was Mr Thomson employed by?**

[6] Mr Thomson dealt with Ms McCauley when he applied for the role and in email exchanges. Ms McCauley is a director of HBI and HBI operated Pure Kitchen and another entity. There is an email dated 27 June 2014 from Ms McCauley to Mr Thomson which has the employment agreement subsequently signed by Mr Thomson attached. The email refers to hard copies of the employment agreement being available for signature on Mr Thomson's start date which was 14 July 2014. The employment agreement states that the employer is the second respondent, HBI. I find that Mr Thomson was employed by HBI and not Ms McCauley. The claim against Diane McCauley is therefore struck-out.

#### **What period of time did Mr Thomson work?**

[7] I am satisfied that Mr Thomson only worked for half of his last day. That limits any dispute to whether Mr Thomson's last day was 23 or 24 July 2014 and whether he worked 7.5 or 8.5 days rather than 9 days.

[8] Ms McCauley, when she gave her evidence, was quite adamant that Mr Thomson left work on Wednesday, 23 July 2014 at about midday and Mr Thomson equally adamant from his correspondence, that his last day was 24 July 2014.

[9] There are no written time records. Mr Thomson was to be paid by way of a salary of \$46,800 per annum at an hourly rate of \$22.50. He was to work a minimum of 32 hours per week but Ms McCauley accepted that the work for the period of employment was 8 hours per day or a 40 hour week.

[10] I could not be satisfied that Mr Thomson finished work on 24 July rather than 23 July 2014. I think it would be unlikely that Ms McCauley would be mistaken about the day he left as it was a shock and a surprise to her. I find that Mr Thomson in all likelihood worked 60 hours (8 hours per day for 7.5 days) for the period of his employment and at his hourly rate of \$22.50 per hour would be entitled to have been paid the sum of \$1,350 gross.

**Was Healthy Business Investments Limited entitled to withhold that money?**

[11] I am not satisfied that HBI was entitled to withhold Mr Thomson's wages. Clause 7.5 of the employment agreement that *any sum which may be owing from the employee to the employer* is simply too general to be written consent under s.5 of the Wages Protection Act 1983. Clause 7.6 also provides that the employer is required to consult the employee beforehand as to the amount and intended method of recovery of any money for which wages could be withheld.

[12] I find that Mr Thomson is entitled to payment of the wages that he is owed in the sum of \$1,350 gross.

[13] I order Healthy Business Investments Limited trading as Pure Kitchen pay to Fraser Thomson the sum of \$1,350 gross being unpaid wages.

**[14] Is HBI entitled to damages and or a penalty for alleged breaches by Mr Thomson of his employment agreement?**

[15] HBI says that Mr Thomson breached his employment agreement in that he did not make a true representation of his skills and attributes and did not provide notice of his intention to terminate the employment agreement.

[16] In an amended Statement in Reply HBI seeks:

- (i) A penalty of \$1000 payable to HBI;
- (ii) The Sum of \$1290 paid by HBI to the Product Development Chef in training the applicant for the period of his employment;
- (iii) \$1,022.63 being additional sums paid to the Product Development Chef.

- (iv) \$425.50 being a sum paid to another employee as a result of Mr Thomson's departure.

[16] Ms McCauley said that Mr Thomson interviewed well and it was decided to offer him the position of Head Chef after a second interview. Mr Thomson had extensive experience within the hospitality industry including with foreign cuisines which was necessary for a potential contract that Pure Kitchen was negotiating with Buildtech. He had also had recent experience with large scale catering to schools and experience managing a team.

[17] Ms McCauley said that Mr Thomson's first week did not go as well as expected and she was advised by the Head Chef, Jen Hawke, that he needed more support than envisaged and appeared incapable of undertaking the work. Ms Hawke was to move into a new role as new Product and Development Chef but had been unable to fully attend to her role and spent time managing/supervising Mr Thomson.

[18] At 12 noon on 23 July 2014 Ms McCauley was advised by Ms Hawke that Mr Thomson had left his position and she was not sure if he was returning. Ms McCauley said that she was concerned for Mr Thomson's wellbeing and tried to contact him immediately. He did not respond but later called her back to say that for personal reasons which I do not need to set out here he needed to return to London. Mr Thomson advised that he was attempting to get the next flight to London and would not be coming back and that he was not expecting to be paid. Ms McCauley said that Mr Thomson apologised for the situation.

[19] Mr Thomson by email sought payment of his unpaid wages from in or about early August 2014.

[20] Ms McCauley says that the situation when Mr Tomson resigned without notice put the business under a lot of stress. Ms Hawke was not able to move into her new role and instead returned to the head chef role and undertook 50 hours per week. HBI was not able to get a Chef from an agency because of the very high hourly rate and as the date of the investigation meeting still had not fulfilled Mr Thomson's position. Ms Hawke eventually resigned due to exhaustion.

[21] Two temporary chefs were employed and negotiations did not continue for the Buildtech contract which was being negotiated at the time Mr Thomson was

employed as it became apparent that the role Mr Thomson vacated was not going to be able to be filled.

### *Damages*

[22] The period within which Mr Thomson worked and the evidence was insufficient I find to be satisfied that he breached his employment agreement by not making a true representation of his skills and attributes. It is clear from the emails that an element of training was always envisaged. There cannot I find be a claim in those circumstances for the salary paid to Ms Hawke for training of Mr Thomson.

[23] Mr Thomson did breach his employment agreement by not giving written notice under clause 14.1 as set out in Schedule 1 of the agreement. Schedule 1 provides that the notice period is three weeks. It is often difficult to establish a damages claim for failure to give notice. The damages claim must be limited to loss that flowed from Mr Thomson's breach which is that he did not give three weeks' notice.

[24] There is a claim for the loss of the opportunity of further revenue from the Buildtech contract because of the inability to replace Mr Thomson. The loss of the opportunity of the contract and revenue from that and delay in Product Development arose I find in part if not mainly from the inability to replace Mr Thomson with a Head Chef with comparable experience and skills within a reasonable time beyond the three week period. Mr Tomson cannot be responsible for all of that loss.

[25] The second claim was for additional sums paid to Ms Hawke over and above her ordinary pay if there had not been a breach of the failure to give notice. One difficulty with that claim is that initially Ms Hawke's hourly rate was less than Mr Thomson's but a decision was made to increase her hourly rate from \$21.00 to \$23.50 after Mr Thomson resigned from his employment. Whilst there can be no criticism of that decision Mr Thomson should not be liable for a decision to increase Ms Hawke's hourly rate and any loss that flowed from that particularly when the role he was employed to do was previously undertaken by Ms Hawke.

[26] There was no doubt some loss for a three week period in developing new product because Ms Hawke was undertaking the Head Chef role and could not move into her new role of Product Development Chef. That loss was never quantified and it would have been difficult to have done so. The Authority also must take into account

that HBI was not paying a salary to a Head Chef and for the Product Development role. Although Ms Hawke was working some additional hours HBI was still required to pay less than it would have if the two roles were filled. In short the cost of the additional hours and those of the temporary chef were off-set by the fact that salary was not paid to both Mr Thomson and Ms Hawke.

[27] In all the circumstances there is difficulty I find for HBI in establishing actual loss/damage sufficiently linked to the breach that is recoverable. I make no award for damages.

### *Penalty*

[28] Section 134 of the Employment Relations Act 2000 (the Act) provides that every party to an employment agreement who breaches that agreement is liable to a penalty under the Act.

[29] In the case of an individual the penalty is not to exceed \$10,000 – s 135 (2).

[30] A penalty of \$1000 was sought in the second amended Statement in Reply but that was on the basis that there would also be an award of damages and there has not been a damages award. I do not consider I am limited in those circumstances to a penalty of that sum. Mr Thomson left without notice after a very short period of employment. His employment agreement required that he give three weeks' notice. HBI has spent time recruiting him for the role and ascertaining his suitability.

[31] I could not be satisfied that Mr Thomson had no intention of staying in the role from the time he commenced. I accept that there some unexpected personal matters but Mr Thomson did not talk to Ms McCauley about these issues before walking out. I was further not satisfied that a shorter period of notice could not have been worked until Mr Thomson was able to arrange tickets back to London. If he had done that and had been responsive and communicative then I would not have been minded to impose a penalty but that did not happen.

[32] I am satisfied that there was a breach of the employment agreement by Mr Thomson when he failed to give any notice of resignation and that such breach caused real difficulties for HBI and had financial implications. Under all the circumstances I am of the view that an appropriate penalty is \$1500 and under s 136 of the Act the whole of the penalty is to be paid to HBI.

[33] I order Fraser Thomson is to pay a penalty of \$1500 and that is to be paid to Healthy Business Investments Limited.

**Costs**

[34] I reserve the issue of costs. Both parties have had a measure of success. Any submissions as to costs are to be lodged and served by 30 April 2015.

Helen Doyle  
Member of the Employment Relations Authority