

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 140
3022896**

BETWEEN JULIO RIBEIRO
Applicant

AND PINE HARBOUR LTD t/a
FORMOSA GOLF RESORT
Respondent

Member of Authority: Eleanor Robinson

Representatives: Alex Kerjes, Advocate for Applicant
May Moncur, Advocate for Respondent

Investigation Meeting: 23 April 2018 at Auckland

Submissions received: 24 & 27 April 2018 from Applicant
23 April 2018 from Respondent

Determination: 03 May 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Julio Ribeiro, claims that he was unjustifiably dismissed by the Respondent, Pine Harbour Ltd (Pine Harbour) t/a Formosa Golf Resort (Formosa).

[2] Pine Harbour denies that it unjustifiably dismissed Mr Ribeiro and claims that it did not offer him employment.

Issues

[3] The issues for determination are whether or not:

- Mr An was an agent of Pine Harbour Limited t/a Formosa
- It was reasonable for Mr Ribeiro to rely on Mr An's representation that he was General Manager of Formosa

- Mr Ribeiro was an employee of Pine Harbour
- Mr Ribeiro was justifiably dismissed within a trial period by Pine Harbour
- Mr Ribeiro was unjustifiably dismissed by Pine Harbour.

Background Facts

[4] Pine Harbour trades as Formosa, a golf resort complex featuring a restaurant, sports facility, convention centre and accommodation sited in the Beachlands suburb of Auckland. The sole director and shareholder of Pine Harbour Limited is Ms Guirong Wen.

February 2017

[5] Ms Wen said that in February 2017 she entered into negotiations with Mr George Qiao and Mr Charles An with a view to their finding investors in, and selling Pine Harbour t/a Formosa to, a new owner.

[6] During 2017 Mr Ribeiro was employed as a Head Chef of a restaurant in central Auckland called the Crab Shack. During 2017 he was told by Mr Cheng Jun Wang, Commis Chef at the Crab Shack, that a Mr Charles An whom he had known since 2015, was looking to appoint a Head Chef.

[7] After Mr Ribeiro had expressed an interest in the position, Mr Wang arranged for Mr An to meet Mr Ribeiro at the Crab Shack on 11 June 2017. Mr Ribeiro said he and Mr An exchanged business cards and he made some dishes from the menu for Mr An to sample. The business card provided to him by Mr An was embossed with a Formosa Golf Resort logo and identified him as General Manager at Formosa.

[8] Following the initial meeting Mr An invited Mr Ribeiro for an interview on 14 June 2017 at an apartment in Hobson Street, central Auckland. Mr An held the interview in an office area which was part of the apartment. Mr Ribeiro was accompanied by Mr Wang. Also present was another man whom Mr An introduced as Mr George Chow, explaining he was also involved in Formosa.

[9] Prior to attending the interview, Mr Ribeiro said he had checked the reputation of Formosa through food representatives from several companies who supplied Formosa and who had given Formosa a good report.

20 June 2017: First Meeting with Ms Wen

[10] Mr Ribeiro was invited to visit Formosa on 20 June 2017 where he met Ms Wen whom Mr An introduced as the Owner, and he explained his background and experience to her.

[11] Ms Wen had shown him the kitchen where he was able to check the facilities. They were accompanied by Mr An and Mr Chow who later showed him around the facilities at Formosa, including the restaurant, sports facility, accommodation and convention centre.

[12] Ms Wen said she had been told that Mr Ribeiro was a chef and confirmed that she had taken him to look at the kitchen. She said she had not spoken to Mr Ribeiro directly and was not told his name.

[13] Following the visit to Formosa, Mr Ribeiro said he was verbally offered employment as Head Chef by Mr An. The terms of employment had been discussed, including that he would be provided with accommodation at Formosa.

27 June 2017: Second Meeting with Mr Wen

[14] Mr Ribeiro said he had been made a verbal offer of employment at Formosa by Mr An. He had met Ms Wen a second time on 27 June 2017 when she attended a 'celebration' lunch held to mark his acceptance of the verbal offer of employment. This lunch was held at the Crab Shack, and he and Mr Wang had joined Mr An, Ms Wen and Ms Mimi Zhao for the lunch.

[15] Ms Wen said she did not know why Mr An had taken her to the restaurant, but she had gone because Mr An was taking over the Formosa business. While she had recognised Mr Ribeiro as the person who had visited Formosa, she said she had not really spoken to him as her English was limited.

[16] Ms Zhao, who had been assisting Ms Wen to promote the Formosa business and had been invited by Ms Wen, confirmed that at the lunch she had learnt that Mr An was looking for a head chef for Formosa and was interested in Mr Ribeiro for that position. She said that Ms Wen and Mr Ribeiro had not spoken together apart from having exchanged greetings.

23 June to 3 July 2017: Mr An's involvement in Formosa

[17] In the period between 23 June and 3 July 2017, Ms Wen said that Mr An had visited the Formosa premises on an almost daily basis, interacting with the Formosa employees.

[18] On 26 June 2017 Ms Wen had been informed by Ms Haiyan Zhang, Office Manager, that she had found business cards in an office used by Mr Qiao in the Formosa format and identifying Mr An as General Manager.

[19] The business cards had been printed by the printing company used by Pine Harbour and they were in the same format, with the Formosa logo. However the business cards contained Mr An's personal email address rather than a company email address. Ms Wen said she had spoken to the printing company and told them not to print business cards without her approval.

[20] Ms Wen said she had told Mr An he could not use the business cards.

3 July 2017: Staff meeting

[21] Ms Wen said she decided to accept Mr Qiao and Mr An's proposal to sell Formosa and agreed to introduce them to the Pine Harbour employees as the General Managers for the new company at a staff meeting held on 3 July 2017 at Formosa. At that meeting she advised the employees that Mr An was to be: "*the GM to handle the daily work and operations*".

[22] At the same meeting Ms Wen said she had informed the employees that she was the only person who could sign the employment agreements.

[23] Immediately following the meeting, Ms Haiyan Zhang, Office Administrator, said she had given Mr An two hard copies of the individual employments agreements, one for salaried employees and the other for waged employees, and a USB drive containing the soft copies.

[24] Ms Zhang explained she had done so because Ms Wen had instructed that Mr An was to be given access to all company records.

After 3 July 2017: Mr An's involvement in Formosa

[25] During cross examination at the Investigation Meeting, Ms Wen confirmed that after 3 July 2017 Mr An was continuing to work in the Formosa premises, familiarising himself with its operation.

5 July 2017: The Written Employment Agreement

[26] In July 2017 Mr Ribeiro met with Mr An at the Hobson Street apartment where he was provided with a written individual employment agreement (the Employment Agreement) the terms of which he and Mr An had discussed.

[27] Mr Ribeiro said that Mr An had written a note stating that accommodation would be provided to Mr Ribeiro at Formosa and that he would have use of the gym facilities on one of the copies of the Employment Agreement . Mr An had retained that copy.

[28] There were no notes to that effect on the copy of the Employment Agreement provided to the Authority by Mr Ribeiro.

[29] The written individual employment agreement (the Employment Agreement) was dated 5 July 2017 and contained the Formosa logo on the title page. It stated:

Pine Harbour Limited
T/A Formosa Golf Resort
Salaried Employment Agreement
Between
Julio Cesar Ribeiro
And Pine Harbour Limited T/A Formosa Gold Resort

[30] It included the following terms in Schedule 1:

- Position: Head Chef
- Commencement date: 3 August 2017
- Salary \$65,000.00 per annum
- Hours of work: 55 per week
- Notice period: 2 weeks

[31] It had been signed by Mr Ribeiro, and Mr An below the statement: **SIGNED for Pine Harbour Limited T/A Formosa Golf Resort by Charles An, General Manager.** Both signature were dated 5 July 2017.

15 & 16 July 2017: Third Meeting with Ms Wen

[32] Mr Ribeiro said he met Ms Wen in July, when he and his children had been provided with a complementary night's hospitality over the weekend of 15 and 16 July 2017. He said Mr An had been present, and he had told Ms Wen that Mr Ribeiro was the new Head Chef, and she had shaken hands with him.

[33] Ms Wen denied that she had spoken to Mr Ribeiro during the weekend and although she had been informed subsequently that Mr An would pay for Mr Ribeiro's accommodation, he failed to do so.

Events after 16 July 2017

[34] Mr Ribeiro had been due to commence employment on 3 August 2017 but his then current employer had required him to work a longer notice period than anticipated and Mr An had agreed to an amended start date of 21 August 2017.

[35] Between 25 July to 17 August 2017 Mr Ribeiro sent text messages to Mr An asking for information in order that he could transport his personal belongings to the promised accommodation at Formosa.

[36] On 17 August 2017, four days before he was due to start work at Formosa, Mr Ribeiro said Mr An arranged to meet him at his office in Hobson Street. When they met Mr An informed him that Formosa was withdrawing from the Employment Agreement with him, and he (Mr Ribeiro) no longer had a job working for it.

[37] In addition Mr An informed him that he personally had been dismissed from Formosa two weeks earlier.

[38] Mr Ribeiro said he had been in a state of turmoil as a result of what he had been told by Mr An. In reliance on the offer of new employment he had resigned from his then current employment where he was Head Chef, and given notice at his rented accommodation.

Determination

Was Mr An an agent of Pine Harbour Limited T/A Formosa?

[39] Ms Wen's evidence was that she entered into negotiations with Mr An with a view to selling Formosa to him and other investors for \$50,000,000.00. It appears that this proposal was terminated at some time after 26 July 2017 although Ms Wen did not confirm when questioned at the Investigation Meeting when and how the relationship had ended.

[40] No supporting documentation in relation to the purported purchase deal was presented to the Authority.

[41] Ms Wen had been informed on 26 June 2017 that Mr An had arranged for business cards to be printed by the same printing company used by Formosa in the company format and stating his title as General Manager.

[42] However despite Ms Wen being made aware on 26 June 2017 that Mr An had business cards identifying him as General Manager, Ms Wen did not confront Mr An or tell him to stop using the title of General Manager. In fact, Ms Wen's evidence was that:

- she introduced Mr An to her employees on 3 July 2017 as General Manager for the new company who would be handling the ‘daily work and operation’ of Formosa;
- she issued instructions to all staff members that he was to be provided with access to all company documents; and
- during the period after 23 June 2017, she had allowed Mr An to be at Formosa on an almost daily basis familiarising himself with its operation and interacting with the employees.

[43] In reliance on the instruction that Mr An was to be given access to all company records Ms Zhang had provided him with the necessary documentation to be able to issue Mr Ribeiro with the Employment Agreement.

[44] The evidence of Ms Wen is that she was not aware Mr Ribeiro had been offered employment by Mr An. However, even if she was unaware of the Employment Agreement being offered to, and accepted by, Mr Ribeiro, I do not accept that Pine Harbour is not bound by the terms of that Employment Agreement. This is because of the doctrine of “ostensible authority” as explained by Lord Justice Diplock in the UK case of *Freeman & Lockyer*¹ as follows:

... a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger.

He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.¹

[45] This doctrine was accepted into New Zealand law in *Hoyts Cinemas (New Zealand) Ltd (Hoyts Moorhouse) v Jacob*²

[46] It is clear that Ms Wen had given Mr An constant access to the Formosa premises where he interacted freely with the employees, including after 26 June 2017 when the business cards identifying him As General Manager of Formosa had been discovered. Furthermore Ms Wen advised employees on 3 July 2017 following this discovery that Mr An was a General Manager of the new company, and issued instructions that he was to be provided with full and unlimited access to all company documents,

[47] I find that during the period June to August 2017 Mr An was acting as an agent of Formosa.

Was it reasonable for Mr Ribeiro to rely on Mr An's representation that he was General Manager of Formosa?

[48] In *Nelson v Porirua Community Law Resource Centre Incorporated*³ the then Chief Judge Goddard set down the test to be applied in a situation in which there is an issue regarding ostensible authority:⁴

Ostensible means overt. The test is how did it look to the applicant? How would it have looked to any reasonable person in the same situation? ... The fact that as between them and the respondent there is a limitation of authority unknown to the applicant cannot be allowed to affect his position. It was up to the respondent to notify him of the existence of the limit.”

[49] Mr Ribeiro had met Mr An on several occasions. At the first occasion on 11 June 2017 Mr An presented him with his business card which had the Formosa logo and identified Mr An as the General Manager.

[50] Whilst Ms Wen's evidence was that the business card email address was not the standard Formosa business card email address, I find this would not have been apparent to Mr Ribeiro who had no knowledge of the standard format of the Formosa business card and that

¹ [1964] 2 QB 480 at 503

² [2002] 2 ERNZ 638

³ [1993] 2 ERNZ 1109 (WEC39/93)

⁴ Ibid at page 17

it was reasonable for him to rely on the face of the business card that Mr An was General Manager of Formosa.

[51] Mr Ribeiro subsequently met Mr An on 14 June 2017 at an apartment in Hobson Street.

[52] I find that meeting at the Hobson Street Apartment was not a reason for Mr Ribeiro to suspect Mr An was not General Manager for Formosa. I note that it was a more convenient location for the parties to meet being situated in central Auckland rather than Beachlands where Formosa is located, and contained a separate office area.

[53] Moreover I find support for this being a reasonable belief on Mr Ribeiro's part by the fact that Mr Ribeiro subsequently visited Formosa's premises shortly after this meeting on 20 June 2017 where he was introduced to Ms Wen as the owner of Formosa by Mr An.

[54] At that meeting he had explained his experience as a chef to Ms Wen who had shown him the kitchen area. There is no evidence that Ms Wen acted to ascertain why Mr Ribeiro was being shown the kitchen or the other facilities, nor did she inform Mr Ribeiro that Mr An had no authority to act in any matter on behalf of Formosa.

[55] The second time Mr Ribeiro met Ms Wen was at the Crab Shack at a lunch which Ms Wen attended. There is no evidence that during that lunch Ms Wen queried why Mr Ribeiro was joining them at the table to participate in the lunch despite her recognising him from the visit to Formosa.

[56] I also observe that she had attended the lunch on 27 June, the day following the discovery of the business cards on 26 June 2017 identifying Mr An as General Manager, but nonetheless took no steps to ascertain why she was meeting and having lunch with Mr Ribeiro to whom she had shown the kitchen at Formosa a few days earlier.

[57] I also note that at the lunch Ms Wen did not inform Mr Ribeiro that Mr An was not the General Manager of Formosa and had no authority to act in any matter on behalf of Formosa.

[58] Ms Wen met Mr Ribeiro a third time on the occasion of his complimentary stay at Formosa on 15 to 16 July 2017. On that occasion she also took no steps to ascertain the reason for his stay or to inform Mr Ribeiro that Mr An was not the General Manager and had no authority to act in any matter on behalf of Formosa

[59] I observe that Ms Wen had met Mr Ribeiro on three occasions, and on any of these it would have been possible for her to question why Mr Ribeiro had been present on those

occasions. If she had done so, she would have had the opportunity to notify Mr Ribeiro that Mr An was not the General Manager of Formosa and of the limit of Mr An's authority, but she failed to take any of the opportunities offered to do so.

[60] Mr Ribeiro had been provided with the Employment Agreement which had been signed by himself and Mr An as General Manager signing on behalf of Pine Harbour Limited trading as Formosa Golf Resort.

[61] The Employment Agreement had been prepared using the template provided to Mr An by Ms Zhang acting on the instructions of Ms Wen.

[62] I find that Mr Ribeiro's belief that Mr An had authority to act on behalf of Pine Harbour to be reasonably held.

[63] In summary, Mr An (i) used a Formosa business card with the title General Manager, (ii) produced an employment agreement in the name of Formosa, (iii) signed the agreement as General Manager of Formosa, and (iv) introduced Mr Ribeiro to Ms Wen as the owner of Formosa. I find that such actions give Mr An apparent authority as an agent.

[64] I determine that Mr An was an agent acting on behalf of Pine Harbour when offering employment to Mr Ribeiro.

Was Mr Ribeiro an employee of Pine Harbour t/a Formosa?

[65] The Employment Act 2000 (the Act) defines a person intending to work in s5 as:

Person intending to work means a person who has been offered and accepted work as an employee;

[66] An employee is further defined in s6 (b)(ii) as: "*a person intending to work*".

[67] I find that Mr Ribeiro was a person intending to work by virtue of the fact that he had been offered and had accepted the position of Head Chef at Pine Harbour.

[68] I determine that Mr Ribeiro was an employee of Pine Harbour t/a Formosa.

Was Mr Ribeiro justifiably dismissed within a trial period by Pine Harbour t/a Formosa?

[69] The Employment Agreement contained a trial period provision at clause 3.2.

[70] Trial periods are set out in s.67A and s.67B of the Act which state:

s.67A. When employment agreement may contain provision for trial period for 90 days or less

- (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3) and an employer.
- (2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –
 - (a) For a specified period (not exceeding 90 days), starting at the beginning of the employee’s employment, the employee is to serve a trial period; and
 - (b) During that period the employer may dismiss the employee; and
 - (c) If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- (3) **Employee** means an employee who has not been previously employed by the employer.

S 67B Effect of trial provision under section 67A

- (1) ...
- (2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.
- (3) Neither this section, or a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).

[71] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal. On that basis, as stated by the Chief Judge in *Smith v Stokes Valley Pharmacy*: “Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally”⁵

[72] In order to comply with s 67A (2)(a) of the Act, the trial period provision must be for a specified period (not exceeding 90 days) and starting at the beginning of the employee’s employment).

⁵ [2010] NZEMPC 111at [48]

[73] The trial period provision must also state that the employee is: “*to serve a trial period*”.

[74] I note that Mr Ribeiro did not start his employment with Formosa, meaning that the trial period had not started at the beginning of his employment; nor did he serve a trial period as his employment was terminated before he had any opportunity to serve the trial period.

[75] In order to comply with s 67A (2)(b) of the Act, the trial period provision must state that: “*during that period the employer may dismiss the employee*”.

[76] Pine Harbour did not dismiss Mr Ribeiro during the trial period since it did not commence.

[77] In interpreting s 67A of the Act strictly I find that Pine Harbour could not rely upon the trial period provision at cl 3.2 of the Employment Agreement to terminate Mr Ribeiro’s employment.

[78] I determine that Mr Ribeiro was not justifiably dismissed within a trial period by Pine Harbour t/a Formosa.

Was Mr Ribeiro unjustifiably dismissed by Pine Harbour t/a Formosa?

[79] Mr Ribeiro was dismissed by the action of Mr An in withdrawing the offer of employment.

[80] I find no substantive reason supporting that decision, and there was no procedure followed.

[81] I find that pursuant to s 103A of the Act that the dismissal was unjustified.

[82] I determine that Mr Ribeiro was unjustifiably dismissed by Pine Harbour t/a Formosa.

Remedies

[83] Mr Ribeiro has been unjustifiably dismissed and he is entitled to remedies

Notice Period

[84] Mr Ribeiro was entitled to a two week notice period as set out in Schedule 1 of the Employment Agreement.

[85] **Pine Harbour is ordered to pay Mr Ribeiro \$2,500.00 gross in respect of the contractual notice period.**

Lost remuneration

[86] Mr Ribeiro was unemployed from 21 August 2017, the agreed commencement date with Formosa, but was able to find alternative employment within a short time, within the same group of companies as his previous employer, but in a lesser position as Commis Chef and at a lower salary.

[87] **Pine Harbour is ordered to pay Mr Ribeiro the difference between the gross amount he would have earned (\$13,759.00) and the gross amount he actually earned in the 11 week period following 5 September to 17 November 2017 pursuant to s 128(2) of the Act.**

Holiday pay

[88] Mr Ribeiro is also entitled to statutory holiday pay for the period 21 August to 17 November 2017.

[89] **Pine Harbour is ordered to pay Mr Ribeiro statutory holiday entitlement (calculated as 8% of the difference between the gross wages he would have earned and the actual wages earned) pursuant to s24 of the Holidays Act 2003.**

[90] The parties should be able to resolve the amounts involved. If they are unable to do so, leave is granted to revert to the Authority for assistance.

Lost benefit

[91] Mr Ribeiro did not receive a bonus of \$2,500.00 to which he would have been entitled had his employment with Crab Shack not ended prematurely as a result of his accepting the employment offer with Pine Harbour.

[92] **Pine Harbour is ordered to pay Mr Ribeiro the sum of \$2,500.00 pursuant to s 123 (1) (b) of the Act.**

Compensation pursuant to s 123 (1)(c)(i) of the Act

[93] Mr Ribeiro resigned from his then current employer on the basis that he had accepted new employment with Pine Harbour t/a Formosa. He had also given notice at his rented accommodation at which he was able to host his two children at the times when he had custody rights.

[94] As a result of Pine Harbour's actions, he was left without employment and without accommodation and consequently having to find alternative accommodation in which he could continue to have his children to stay. Whilst I acknowledge that he was able to stay in the rented accommodation that was not guaranteed from the outset. I accept that in the interim period he had great distress at the prospect of having no home for himself or his children.

[95] Whilst Mr Ribeiro was able to find alternative employment within a short space of time, I accept that he was placed in a humiliating situation as a result of which he felt compelled to leave that employment at a later stage.

[96] I find that Mr Ribeiro was placed by Pine Harbour in a very humiliating and distressing situation through no fault of his own.

[97] **Pine Harbour is ordered to pay Mr Ribeiro the sum of \$15,000.00 pursuant to s 123 (1) (b) of the Act.**

Contribution

[98] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[99] I find no contributory conduct on the part of Mr Ribeiro and there is to be no reduction of the remedies ordered.

Costs

[100] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[101] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority