

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 318
3138843

BETWEEN

JASON SHAND
Applicant

AND

VIETNEW CORPORATION
LIMITED T/A SAIGON
RESTAURANT & BAR PALMY
Respondent

Member of Authority: Michael Loftus

Representatives: Kelly Coley, advocate for the Applicant
Jeremy McGuire, counsel for the Respondent

Investigation Meeting: 1 March 2022 at Palmerston North

Submissions Received: 14 March 2022 and 13 April 2022 from the Applicant
28 March 2022 from the Respondent

Date of Determination: 13 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Jason Shand, initially claimed he was both unjustifiably disadvantaged and then unjustifiably dismissed, albeit constructively, by the respondent, Vietnew Corporation Limited (Vietnew). Ms Coley accepted, in a telephone conference, that the disadvantage claims related to the manner in which the dismissal occurred and the claims could be treated as one - unjustified dismissal. Mr Shand also claims he is due unpaid wages.

[2] Vietnew denies it dismissed and initially raised two possible defences. They were that Mr Shand abandoned his employment and/or resigned. The abandonment argument was withdrawn with the defence now being that Mr Shand simply resigned of his own volition.

[3] Vietnew denies the wage claim on the grounds *the claim does not specify the date on which the alleged hours are owed* and nor was it raised at the time. In its Statement in Reply Vietnew also airs various performance concerns and asks Mr Shand be ordered to reimburse it for two unauthorised contracts he entered into on its behalf, the value of a Canon printer and the return of a \$100 cash-back he claimed when buying the printer.

Background

[4] Vietnew, as its trading name suggests, operates hospitality venues and was, at the time of these events, establishing and opening a new one in Palmerston North. Giang Do is Vietnew's sole shareholder and director.

[5] The evidence is Messrs Shand and Do first met in July 2020 at which time Vietnew was in the process of establishing a new outlet in Palmerston North. The evidence is the initial arrangement was somewhat ad-hoc with Mr Shand, who was then a beneficiary, performing various tasks aimed at completing the restaurant and preparing it for opening on 1 September 2020. In return he would supplement his benefit with 10 hours pay a week from Vietnew.

[6] With the restaurants opening the arrangement altered and Mr Shand was engaged as a full time "General Manager." The terms of his employment were stipulated in an individual employment agreement with one of those being *The agreed hours of work are 40 hours per week.*¹

[7] During the investigation a number of events were discussed though they do not, in my view, impinge on the claim I must decide – namely whether or not Mr Shand was constructively dismissed. Essentially Vietnew is now alleging various infractions while Mr Shand denies all accusations. He says nothing was raised until 8 December 2020 and other than saying there was one discussion in which Mr Do "*tried to talk nicely about the issues*" Vietnew accepts nothing was done to address their now numerous concerns.

[8] Further comment needs to be made about Mr Do's admission. It refers to a meeting in mid-October which followed a written "*formal complaint*" sent to Mr Do by a staff member and which contained what might be considered serious allegations. The meeting was attended by the complainant, Mr Do and Mr Shand. I have already referred to Mr Do's summation of the meeting, nice, which he reinforced by accepting "*I did nothing*" either then or after. Mr

¹ Mr Shand's IEA at [5.1]

Shand's evidence clearly shows he failed to understand there were serious issues which would appear a fair conclusion given the evidence of the complainant. She said the meeting constituted a chance for her to voice some dissatisfaction which primarily related to the way Mr Shand treated staff when reacting to issues which arose in the workplace and his alleged drinking on the job. She said it was low key and nothing came of it.

[9] Here comment must also be made about the accusation Mr Shand was drinking excessively on the job as it is now being aired repetitively much to his annoyance. When giving oral evidence about this the complainant said it ceased to be a concern after the meeting.

[10] I also note Mr Shand claims he was feeling increasingly stressed as a result of working excessive hours and addressing issues arising from bedding down a new establishment.

[11] On 8 December 2020 everything changed with Mr Shand being sent an email by Mr Do which, amidst other things, contained various observations about Mr Shand's performance. They can definitely be perceived as critical though Mr Shand labelled them *derogatory*. Included therein was an accusation "*most staffs have lost their respect and belief in you*" as a result of Mr Shand "*not handling staffing issues and problems well.*" There were also numerous comments about inadequate cost control.

[12] The e-mail then stated:

I was expecting you to free me up after the first month after opening but now I could not be confident to leave this business in your hands. Also, recently I have had to get extra staff to do your job which hurts our business profit.

I am very sure that you are a person I can trust and you have the potential to be good for our company in the future. So I don't want to give up on you. But we need to work together to realise your potential.

[13] The e-mail then went on to outline what it labelled as a suggestion Mr Shand work 30 of his weekly hours in accordance with a roster over six days of the week; that he provide a weekly report about how he spent his time including the 10 hours over and above the rostered 30 and that he inform either Mr Do or "Phil" before making any large stock purchases.

[14] The e-mail then advised "*Notes: Phil is now working full time for our company as Administration and Account manager.*"

[15] Phil's initial contact with Vietnew was as an eftpos installer who then started to perform various functions for Vietnew before becoming a full time employee tasked with

performing a variety of office and administrative tasks including some previously performed by Mr Shand. It also transpires Phil was well aware of the 8 December e-mail having proof read it before it was sent, though Mr Shand was probably unaware of that until this investigation.

[16] Mr Shand, who as I have already said labelled the e-mail of 8 December *derogatory*, definitely saw it as an affront given what he considered his excessive efforts on Vietnew's behalf. He says he was already stressed and tired and receipt of the e-mail gave him a panic attack – he simply didn't know how to respond and rang his doctor. Mr Shand says that after some questioning the doctor agreed he needed a break and Mr Shand therefore "*called in sick.*" That said the absence of his personal doctor meant he could not arrange a physical examination until 17 December when he was certified as unfit for work until 31 December. The certificate was passed to Vietnew.

[17] In the interim, and on 9 December 2020, all of the Mr Shand's work phone calls and emails were diverted and his access as the administrator of Vietnew's social media pages was removed as was access to his company credit card. It is Vietnew's claim the phone and e-mails were diverted as bookings were going to a phone held, but not being answered, by Mr Shand resulting in what was portrayed as a "*shambles*".

[18] Phil states Mr Do instructed he change the Facebook permissions as a reaction to Mr Shand having precluded his (Phil's) access. He also said Mr Shand was advised by e-mail and objected "*at length*" but no conversation occurred – the instruction was simply actioned.

[19] On 20 December Mr Shand was asked to return an item of company property simultaneous to which he was hearing rumours some of his business contacts were being told he was no longer employed by Vietnew. The item in question was a personalised number plate reading "*Saigon*" with Phil stating the request was made on the grounds it was an advertising tool that was not being used though it is not suggested that was explained.

[20] These events led to Mr Shand seeking assistance which, in turn, led to a letter being sent to Vietnew on 21 December. It raised dissatisfaction with the 8 December e-mail and the accusations made therein. It also complained about some of Mr Shand's duties being passed to Phil and raised a claim that as a result of having worked excessive hours and being paid a salary, Mr Shand was now being paid less than the minimum statutory hourly rate on some days.

[21] Before then inviting Vietnew participate in mediation the letter stated:

Jason considers there is a serious employment relationship problem and he is concerned that he is being undermined and pushed out of his role and employment. These issues need to be addressed sensitively and urgently. You need to be aware that Jason is considering resigning. If this occurs it will be in the context of a constructive dismissal.

[22] On 30 December 2020 Mr Shand obtained a further medical certificate advising he remained unfit for work till 14 January 2021. It was passed to Vietnew.

[23] On 18 January 2021 Mr McGuire wrote advising he was acting for Vietnew though the parties agree the letters content is such it is not appropriate the Authority view it. That said there is a debate I cannot therefore resolve about whether or not it addressed all the issues raised by Mr Shand on 20 December. There is also an allegation it stated Vietnew required evidence concerning Mr Shand's wage claim before the company would agree to mediation which can be addressed by reference to what then occurred.

[24] Vietnew's letter elicited an e-mail response the following day advising its proposal (assuming, given the parties agree the letter contained without prejudice material, that there was one) was unacceptable and again asking if Vietnew was willing to attend mediation. That brought a response within 12 minutes simply advising "*Not until he at least explains his position with evidence thanks Kelly.*"

[25] Three minutes later Ms Coley responded by mentioning the duty of good faith and its requirement the parties engage, before observing those provision were relevant as one of them had raised concerns which were not confined to the arrears alone. Before again requesting the parties attend mediation she stated:

If you client is unwilling to attend mediation then my client will have no other option but to resign. If that action is necessary it will be in the context of a constructive dismissal, which your client has already been put on notice of.

[26] The response, again within minutes, was "*Mediation about what Kelly? You need to give a full explanation first.*" Ms Coley's immediately replied "*The issues outlined in my correspondence dated 21 December 2020. If you require a copy please let me know.*"

[27] To that Mr McGuire replied "*Thanks Kelly but that doesn't change anything as you have made assertions of arrears of wages and not provided any evidence for those assertions.*" Ms Coley then advised she would take instructions.

[28] The following day, 21 January 2021, and as a result of Vietnew's refusal to address his concerns Mr Shand advised his resignation via Ms Coley. Mr McGuire responded as follows:

And this is entirely rejected Kelly as I asked for evidence or details of his alleged arrears of wages and you still haven't sent them.
 Also I never said my client would not attend mediation and very your (sic) serious allegation is denied.
 The resignation is noted but he has property that belongs to my client: (followed by a list of 5 items)
 Please advise when these will be returned to the employer.

[29] That was followed by the formal raising of the personal grievance on 9 February 2021. To that there was a short response – Mr Shand resigned though the letter then went on to allege Ms Coley had threatened Mr McGuire. It expressed displeasure at her unlicensed and unregulated status and an *opportunistic cottage industry* that offered no win no fee services (which incidentally Ms Coley rarely does). Perhaps unsurprisingly given that and an increasing list of previously unaired allegations about Mr Shand's performance and behaviour the parties were unable to resolve their differences.

Discussion

The dismissal

[30] As already said Mr Shand claims he was constructively dismissed.

[31] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*² the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign. There must be a causal link between the employer's conduct and the tendering of the resignation³ and the possibility of resignation in response to that conduct should be foreseeable.⁴

[32] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Mr Shand to establish, *prima facie*, there was such a breach.

[33] Mr Shand's evidence is clear. He resigned as a result of Vietnew's failure to make any attempt to address what he saw as serious concerns. He states he was committed to the job but

² (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

³ *Z v A* [1993] 2 ERNZ 469

⁴ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

felt both the e-mail of 8 December and his own feeling of being overworked and stressed meant there were issues that had to be discussed and resolved so as to make ongoing employment viable. He states Vietnew's failure to respond deprived him of the right to sit down with his employer and work through the issues thus negating the possibility of an ongoing, and productive, relationship.

[34] The simple fact is a refusal to attend mediation does not, of itself, constitute grounds upon which to base a claim of constructive dismissal. While mediation is an integral part of the employment dispute resolution process and strongly encouraged under the Employment Relations Act 2000 there is nothing that renders it compulsory.

[35] That said, and as submitted on Mr Shand's behalf, the question is whether or not Vietnew's response went further and crossed a line which meant its behaviour amounted to a constructive dismissal.

[36] Having considered the evidence and submissions I conclude the answer is yes.

[37] Section 4 of the Act imposes upon the parties a duty to deal with each other in good faith. Included in that duty is a requirement the parties "*be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*"

[38] In this instance the obligation to deal in good faith is reiterated by repetition in Mr Shand's employment agreement.⁵

[39] It is clear Ms Shand raised various concerns. Irrespective of whether or not they were ultimately found to have some substance, and the evidence suggest one of them concerning an alleged reduction of hours probably wouldn't, this placed Vietnew under both a statutory and contractual obligation to respond in a constructive and communicative manner. It didn't and that is a breach.

[40] The evidence clearly shows this was a breach that led Mr Shand to conclude he could not address his issues in a way that allowed the employment relationship to continue satisfactorily and that resulted in his resignation. That the resignation might have been foreseeable is also clear. Aside from the fact Vietnew was put on clear prior notice of the

⁵ The duty is imposed on the employer by clause 3.1(b) and Mr Shand by clause 3.2(d) of the agreement

possibility it is entirely foreseeable a resignation would be possible given Vietnew's refusal to do anything to address Mr Shand's growing concerns. I also note its approach was contrary to its comment in the e-mail of 8 December that the parties had to work together to realise Mr Shand's potential.

[41] If anything, Vietnew aggravated the situation by relying upon a patently false position to justify its failure to respond meaningfully. Mentioned more than once as precluding a substantive response was Mr Shand's purported failure to provide detail or evidence about the alleged wage arrears. A reading of the letter of 21 December shows that to be a fraught position. The letter cites 16 instances upon which he considered the pay insufficient noting in respect to each the day, the hours worked with specific start and finish times and the duties performed that day. I conclude it is obvious what was being alleged and to say otherwise is, in my view, a nonsense.

[42] This was, I conclude, a constructive dismissal.

[43] With Mr Shand having established he was constructively dismissed it now falls to Vietnew to justify its actions. To do so Vietnew must establish it has complied with the requirements of s103A(3) of the Act which, as a minimum, oblige it to put its concerns to the employee, allow an opportunity to reply and consider the response with an open mind. It is clear Vietnew is incapable of doing this. Firstly there was no substantive response to Mr Shand's concerns. Second there is Mr Do's admission that with the exception of the meeting in October nothing was done or said about its now purported concerns and there was definitely no formal action prior to 8 December and after which Mr Shand did not return to the workplace.

[44] The failure to comply with the requirements of s103A mean the dismissal must be found to be unjustified which raises the question of remedies.

[45] Mr Shand seeks wages lost as a result of the grievance and an unspecified amount as compensation under s123(1)(i) of the Act.

[46] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser, though Mr Shand seeks slightly more and the Authority has discretion to make such an order. The actual amount sought, given Mr Shand obtained another job starting on 5 March 2021 is \$13,500 being lost wages for the period of 13 weeks and 6 days between 8 December 2020 and 5 March 2021.

[47] I do not consider an award for the period 8 December 2020 to 21 January 2021 appropriate. That is because during that period Mr Shand was certified as being on sick leave and had not yet been dismissed so that loss cannot be said to have arisen as a result of the grievance as found. Payment can only therefore be made for the period 21 January to 5 March which is six weeks and one day and less than three months.

[48] Turning to compensation which, as already said, was unquantified. Mr Shand gave strong evidence of the injury he suffered which included feelings of dismay, anger, stress and depression exacerbated by financial repercussions and consequential impacts on personal relationships. Having considered the evidence and recent awards I consider \$12,000 to be appropriate.

[49] Finally the conclusion Mr Shand has a grievance and remedies accrue means I must consider whether or not those remedies should be reduced by reasons of contributory conduct.⁶ The respondent's defence that there was no dismissal but a resignation means there is, on the face of it, nothing to suggest Mr Shand did anything which would justify such a reduction.

[50] I say on the face of it as the thrust of Vietnew's present approach is, despite that defence, that Ms Shand was guilty of multiple transgressions. The problem with this approach, which was clearly cobbled together after the event is Mr Do's admission he did nothing means there is no evidence of formal action warranting a reduction as perceived by s 124 of the Act.

Wage arrears

[51] Turning to the arrears. As already said the claim was, despite Vietnews' contrary assertions, clearly outlined with one exception which does not, in my view, detract from its veracity. That is that no figure has been applied.

[52] In support of the claim Mr Shand offered considerable evidence of what he was doing, when and why. To that I add the fact that in the absence of compliant time and wage records s 132 of the Act allows me to accept the claim unless the respondent can disprove it. Here there are no such records with this being attributed to the fact Mr Shand was paid a salary and while Vietnew suggests the claim is unfounded it could offer no evidence to support that contention.

⁶ Section 124 of the Employment Relations Act 2000

[53] For these reasons the claim is accepted but, as already said, I have insufficient information to apply an actual figure. I therefore leave it to the parties to calculate the amount using as their reference the hours Mr Shand claims to have worked on the 16 days in question. Should they be unable to resolve the issue leave is reserved for a return to the Authority.

[54] Finally and for the sake of completeness, I note there is, in Mr Shand's closing submissions, a claim for a penalty for the breaches of good faith. For two reasons this will not occur.

[55] The first is there was no such claim in the original statement of problem and by the time it was raised more than a year had passed since the breach occurred. The claim is therefore precluded by statute.⁷

[56] The second is that had that not been the case I have already found that Mr Shand has a personal grievance in that he was constructively dismissed and I have awarded remedies for that. The grievance claims success was almost wholly attributable to Vietnew's failure to comply with the duty of good faith.

[57] In my view it is not appropriate to then award penalties in respect of the same conduct noting the court has found this type of "doubling up" may be unusual, if not wrong in principle, where a remedy has already been sought and granted in respect of a personal grievance.⁸

Vietnew's counter claims

[58] As already said Vietnew raised a number of counter claims in its statement in reply. These sought recompense for contracts Mr Shand is alleged to have entered into with both Employsure and Alsco contrary to instruction he not do so along with reimbursement for a printer and a cashback paid in respect to it.

[59] For the following reasons all of these claims will fail.

[60] The arguments and evidence concerning whether or not the Employsure contract was either authorised or appropriate are ultimately irrelevant. That is because the remedy sought is

⁷ Section 135(5) of the Employment Relations Act 2000

⁸ See the discussion at paragraph [124] of *Salt v Fell*, [2006] NZEmpC 49.

reimbursement of the costs there-of and there was no cost. It is Phil's evidence Vietnew managed to cancel the contract on or about 17 December 2020 and nothing was paid.

[61] Similarly the claim regarding the Alsco contract also fails as, for no other reason, there was no evidence about it and nothing that would have supported a finding Mr Shand inappropriately entered into a contract in a way that warranted censure. All of the evidence tendered in support of the counterclaims related to the Employsure contract and the printer.

[62] The claim the cost of the printer be reimbursed also fails. Firstly I have a preference for Mr Shand's evidence its purchase was both justified and approved but in any event that is irrelevant given Mr Do's evidence it was returned and is now in Vietnew's possession. There is no loss.

[63] That leaves the cashback which Mr Shand says was reimbursed. Vietnew, through Mr Do, says he doesn't believe there is evidence to support that but is unable to offer any evidence to contradict Mr Shand's assertion. It is Vietnew bringing the claim. It therefore falls to it to establish the debt and it cannot do so. Reliance on Mr Do's "*belief*" which he mentioned more than once is inadequate.

Conclusion and Orders

[64] For the above reasons I conclude Mr Shand has a personal grievance in that he was unjustifiably dismissed. I also accept he is due unpaid wages.

[65] As a result I order the respondent, Vietnew Corporation Limited, pay Jason Shand:

- (a) \$6,200.00 (six thousand, two hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
- (b) A further \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and.
- (c) A further as yet unquantified amount to recompense any payment less than the minimum wage for the 16 days he cited in his claim. This is left for the parties to calculate but leave is reserved for a return to the Authority should they be unable to do so.

[66] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Mr Shand may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date Vietnew will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.⁹

Michael Loftus
Member of the Employment Relations Authority

⁹ www.era.govt.nz/assets/Uploads/practice-note-2.pdf