

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Arthur Carl Brian Cust (Applicant)
AND Manchester Irish Limited t/as
Sullivans (Respondent)
REPRESENTATIVES Arthur Carl Brian Cust In person
Penny Shaw, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 20 April 2006
DATE OF DETERMINATION 23 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Cust) was employed by the respondent (Sullivans Bar) as a duty manager/ doorman. He was dismissed on 31 December 2004 and alleges that his dismissal was unjustified. Sullivans Bar resists Mr Cust's claim.

[2] Mr Cust had worked for Sullivans Bar for approximately seven years and at the time of his dismissal was serving as a duty manager. Mr Sullivan, for Sullivans Bar, described this role as *a senior and responsible* one and said that Mr Cust *was expected to behave in keeping with this senior position and set appropriate examples of behaviour for other staff*. Mr Sullivan said that Mr Cust was one of only two full-time employees at the time of his dismissal.

[3] Mr Sullivan gave evidence that the employment relationship was happy and stable until December of 2004 when he became anxious about some issues with Mr Cust's performance.

[4] There was a meeting between Mr Sullivan and Mr Cust on 15 December 2004 at which, according to Mr Sullivan's evidence, he raised with Mr Cust specific examples of his concerns and the areas in which he would like to see improvement. Immediately after that meeting, Mr Sullivan said that he made notes of that discussion and those notes were produced at my investigation meeting.

[5] Mr Cust denies there was a meeting on 15 December. He agrees that he and Mr Sullivan met but he regarded it as a minor discussion in which Mr Sullivan *complained about various things*. He said that *a meeting is where I can call in a representative*. I find that there was a meeting between the parties on 15 December and I accept the record made by Mr Sullivan as a reasonably accurate note of what transpired at that meeting.

[6] Mr Sullivan says that after the meeting on 15 December, Mr Cust's attitude to him changed and whereas previous to the meeting, Mr Sullivan would have regarded Mr Cust as a friend as well as an employee, the relationship seemed to cool significantly after the meeting. He described Mr Cust as being *very upset* after the meeting and said *his attitude towards me changed significantly*.

[7] On 21 December, Mr Sullivan received a text message from Mr Cust to indicate that Mr Cust would be off work sick for a week. There was then an exchange between Mr Sullivan and Mr Cust about the provision of a medical certificate given that Mr Cust was going to be away for more than the three days that the employment agreement contemplated before a medical certificate had to be produced.

[8] This request produced a request from Mr Cust that Mr Sullivan pay for the medical certificate and Mr Sullivan, sensing that the relationship was in fact starting to deteriorate, sought advice from the Employment Relations info-line which, amongst other things, confirmed to him that the employer could withhold payment of remuneration due to the employee if a medical certificate had been requested and not provided.

[9] On 27 December 2004, having not received the medical certificate from Mr Cust, Mr Sullivan left another message on Mr Cust's cellphone, again asking for the medical certificate. Mr Sullivan was prompted to make this call because he was about to pay wages and, in the absence of the medical certificate from Mr Cust, he intended to follow the advice given to him by the Employment Relations info-line person to the effect that he could withhold payment in those circumstances.

[10] Mr Sullivan's evidence was that Mr Cust did not return his message and accordingly Mr Sullivan decided not to pay Mr Cust until the matter of the medical certificate was resolved.

[11] Mr Cust, in his evidence, seemed genuinely hurt that Mr Sullivan did not believe that he was ill. He said that Mr Sullivan had *chosen to disbelieve me* in relation to his illness. He accused Mr Sullivan of acting without good faith to an employee who had been in his employ for seven years.

[12] However, Mr Cust readily conceded that the employment agreement entitled Mr Sullivan to ask for a medical certificate, given that Mr Cust was away for more than three consecutive days.

[13] The medical certificate was eventually provided when Mr Cust returned to work on 29 December 2004. Mr Sullivan asked Mr Cust to sit down and talk about how he was *feeling about his workplace*. Mr Cust was clearly put out by the fact that he had not been paid for the previous week and Mr Sullivan explained why that was. The discussion then deteriorated with Mr Cust acknowledging that he was *upset* by not being paid the previous week.

[14] Mr Sullivan says that Mr Cust was abusive and *very aggressive*. Mr Cust totally denies that he was abusive. He says he was completely unable to yell and shout because of the throat infection which had kept him away from the workplace the previous week. However, Mr Cust agrees that he swore at Mr Sullivan but he claims that Mr Sullivan swore back at him.

[15] In questions from me, Mr Sullivan was adamant that whatever Mr Cust's physical limitations at the time, he was aggressive and abusive. Mr Sullivan also denies swearing at Mr Cust although he admits that he does swear in some circumstances. Mr Sullivan says he was upset by Mr Cust's behaviour and said that he had never been spoken to by anyone else in this manner during his time as an employer.

[16] Again, Mr Sullivan took written notes of the discussion and reduced them to electronic form on his computer and a copy of that record was produced at the investigation meeting. I prefer Mr Sullivan's recollection of this meeting to Mr Cust's.

[17] This meeting ended, intemperately, with Mr Cust saying to Mr Sullivan that unless Mr Sullivan gave him his wages immediately, he would *take the money out of the till*. Mr Sullivan gave Mr Cust a cheque for the outstanding amount. Mr Sullivan told Mr Cust to take the cheque, cash it and then go home because he was not satisfied with his attitude and did not think he was in a fit state to be in the workplace. Mr Sullivan made clear to Mr Cust that he would be paid for this day off and that he wanted him to return to the workplace the following day.

[18] When the parties spoke again on 30 December, Mr Sullivan indicated to Mr Cust that Mr Cust would receive a verbal warning for Mr Cust's behaviour the previous day. Mr Cust, according to Mr Sullivan, immediately became abusive again.

[19] Mr Sullivan then says that he told Mr Cust that if he did not cease the abuse, he would get a written warning. As, according to Mr Sullivan, the abuse did not cease, Mr Sullivan upgraded the warning to a written warning.

[20] Mr Sullivan then suspended Mr Cust on full pay to *research ... my situation as best I can*.

[21] On 31 December 2004, in the morning, Mr Sullivan prepared a letter proposing further meeting dates. Later that day, Mr Sullivan spoke to Mr Cust, advised him about the contents of the letter and indicated to him that he had the right to have the representation of his own choice. Mr Cust said that he did not think he could obtain representation until the second week of January at the earliest.

[22] Mr Sullivan then sought to obtain back from Mr Cust the keys to the business and there was an argument about whether Mr Cust was going to bring them in or whether Mr Sullivan would pick them up.

[23] Mr Cust then relented and said he would bring them in and Mr Sullivan's evidence is that he told Mr Cust that he was to collect a copy of the written warning together with a copy of the letter proposing a further meeting in the New Year and that, given that Mr Cust was no longer on active duty, he was not to enter the office of the business premises.

[24] Mr Cust remembers being told in this telephone conversation to collect the documents (although as a matter of fact he refused to collect them when he turned up at the workplace later), but he has no recollection of being told not to go into the office and he accepted in his evidence before the Authority that he should not have gone into the office.

[25] During the course of that afternoon, Mr Cust came into the workplace, deposited the keys as requested, refused to collect the correspondence which Mr Sullivan had left with a work colleague (Mr Sullivan being absent at the time) and entered the office apparently despite the work colleague suggesting to him that entering the office was inappropriate.

[26] When Mr Sullivan attempted to confront Mr Cust with the allegation that he had failed to collect the documents and entered the office despite being told not to, the response from Mr Cust was that he would not engage again with Mr Sullivan without a representative present.

[27] Mr Sullivan said that the response from Mr Cust had accused him (Mr Sullivan) of harassing Mr Cust.

[28] In evidence, Mr Cust said that he did ask Mr Sullivan to leave him alone and that he had told Mr Sullivan on a number of occasions that he would not meet him without a representative. He said that Mr Sullivan's behaviour was starting to make him uneasy. Mr Sullivan denied in evidence that Mr Cust had ever made a stipulation about having a representative except during the telephone discussion that the two men had on 31 December.

[29] Mr Sullivan reached the conclusion that afternoon to dismiss Mr Cust based on the two episodes of abuse (one on 15 December and one on 29 December), and the failure to obey the instruction not to enter the office. Mr Sullivan then sent Mr Cust a text message saying that he was dismissed effective Friday, 31 December, and he followed that up with a letter of dismissal dated the same day.

[30] The nub of Mr Cust's grievance is that Mr Sullivan dismissed him while he was still on suspension and without having heard him on the reasons for the dismissal.

Issues

[31] The issues for the Authority can be simply stated as follows:

- (a) What is the relevant law?
- (b) Applying the relevant law, is the dismissal justified?
- (c) Are there moneys owed to Mr Cust?

The relevant law

[32] Mr Cust was dismissed from his employment on 31 December 2004. It follows that his dismissal must be considered in terms of the new test for justification enacted by the passage into law of the Employment Relations Amendment Act (No 2) 2004 which came into effect on 1 December 2004.

[33] It is appropriate to set out s.103A in its entirety:

103A Test of justification

For the purposes of s 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[34] The first Employment Court decision on the interpretation of s103A has now issued: *Air New Zealand Ltd v. Hudson* AC30/06, 30 May 2006. In this decision, Her Honour Judge Shaw carefully analyses the effect of the new statutory enactment.

[35] The first principle that can be distilled from the Court's judgment is that the test requires an objective assessment of the employer's actions of the kind that might be contemplated by a neutral observer.

[36] Indeed, Judge Shaw observes that the test requires a judgment to be made about the employer's conduct by the standards of *an objective community ideal*.

[37] Her Honour reaches the conclusion that the use of the word *would* means something different from the use of the word *could* as that latter word was used in the decision of the Court of Appeal in *W&H Newspapers v. Oram* [2000] 2 ERNZ 448. In Judge Shaw's view, while a range of options may still be possible for an employer's action, the option chosen by the employer must be evaluated against a specified objective standard. That standard in simple terms is the posing of the question, is this what a fair and reasonable employer would have done?

[38] Her Honour goes on to say that the use of the word *would* in the statutory test effectively represents a legislative curb on the range of responses an employer can justifiably take.

[39] Judge Shaw formulates the test for the Court and the Authority as follows:

A particular employer, having followed a proper process of investigation, is justified in dismissing an employee for misconduct where the tribunal finds a fair and reasonable employer would have dismissed in those circumstances.

Is the dismissal justified?

[40] Mr Sullivan says that he dismissed Mr Cust for insubordination. He says that he became concerned at Mr Cust's performance, attempted to agree a process with Mr Cust for dealing with that, was abused for his trouble, responded to that abuse by issuing first a verbal warning and then a written warning, and then dismissed Mr Cust after he says Mr Cust disobeyed a specific instruction to not enter the office of the employer.

[41] Mr Cust says that he *reacted badly* and made *mistakes* because Mr Sullivan was guilty of *manipulation* and *Mr Sullivan launched a campaign to fast track my dismissal*.

[42] Importantly, Mr Cust says that it was his *lack of access to legal advice* which was responsible for his failure to engage appropriately with Mr Sullivan to resolve the employment relationship problem. He says that he told Mr Sullivan that that was the basis of his reluctance to meet with Mr Sullivan (which of course Mr Sullivan denies), but notwithstanding that message, Mr Sullivan continued to *harass* Mr Cust with a view to getting a meeting organised.

[43] The short point really is that the only basis on which Mr Sullivan can hang the decision to summarily dismiss Mr Cust is Mr Cust's entry into the office of the workplace, allegedly having been told not to. This is the only new allegation that has not otherwise been dealt with. The allegation of abuse by Mr Cust of Mr Sullivan was dealt with by the warnings. Before the dismissal (indeed on the very day of the dismissal) Mr Sullivan wrote a letter to Mr Cust requesting meetings early in the New Year after a telephone conversation the same day in which Mr Cust said that he would not meet Mr Sullivan without a representative present.

[44] Having written that letter and by his own testimony sent it off to Mr Cust, within a matter of some two hours and without giving Mr Cust an opportunity to be heard, Mr Sullivan has clearly lost patience with Mr Cust after discovering that Mr Cust has entered the workplace office without authority and accordingly has dismissed him by a text message to Mr Cust's personal cellphone.

[45] I have little difficulty in finding that Mr Sullivan's action in dismissing Mr Cust for alleged misconduct is not the action that a fair and reasonable employer would have taken.

[46] I have reached this conclusion primarily because, as Mr Cust himself says, whatever his sins of omission or commission, he has not been heard on the live issue. Certainly it is true that he had discussions with Mr Sullivan in respect of the abuse issues, and Mr Sullivan had responded to those by issuing warnings. But even if those warnings issued are, as it were, building blocks for the eventual dismissal on an unrelated matter, the fact that there are already warnings on Mr Cust's file

does not excuse Mr Sullivan his obligation to meet with Mr Cust and give him an opportunity to be heard.

[47] The basic requirements of procedural fairness, set out by the Labour Court in *New Zealand Food Processing etc IUOW v. Unilever New Zealand Ltd* [1990] 1 NZILR 35, require:

- (a) Notice to the worker of the specific allegations of misconduct that the worker has to answer and the likely consequences if those answers are unsatisfactory;
- (b) A real opportunity for the worker to be heard;
- (c) An unbiased consideration of the worker's explanation.

[48] In looking at the matter in the round, I do not consider that Mr Sullivan has met any of his obligations in a procedural sense. I think the facts support the conclusion that Mr Sullivan lost patience suddenly with Mr Cust, having discovered that Mr Cust had allegedly breached a specific instruction not to enter the workplace office, and that Mr Sullivan made the decision to dismiss Mr Cust within a very short period of time after establishing from another employee that Mr Cust had entered the workplace office.

[49] The decision to dismiss was not only made within a short timeframe of Mr Sullivan discovering Mr Cust had entered the workplace office, but it was made within a matter of hours of Mr Sullivan having carefully written to Mr Cust and proposed two potential meeting dates when the two of them could have a meeting with Mr Cust's legal representative present to discuss their differences.

[50] Further and finally, Mr Sullivan simply notified Mr Cust of the decision that he had taken by a text message to Mr Cust's cellphone. No opportunity whatever was given to Mr Cust to comment on the matters that Mr Sullivan was concerned about, to offer an explanation, to offer any mitigation at all of Mr Cust's alleged misconduct.

[51] In all these circumstances, I have no hesitation whatever in reaching the conclusion that the dismissal of Mr Cust by Mr Sullivan is not the decision that a fair and reasonable employer would have made.

Determination

[52] It follows from the foregoing analysis that I hold that the decision to dismiss is unsafe and therefore I find that Mr Cust does have a personal grievance on the grounds of an unjustified dismissal of him by his employer, Sullivans Bar.

[53] Having reached that conclusion, it follows that I need to consider the question of contribution. I need to make clear that, despite my finding of legal fault against Sullivans Bar, I do not think that Mr Sullivan was activated by malice and I absolutely reject Mr Cust's suggestion that Mr Sullivan *launched a campaign to fast track my dismissal*. I do not think the evidence supports that contention for a moment. I thought Mr Sullivan was an honest and trustworthy witness who had done his best in trying and difficult circumstances to meet his obligations as a good employer.

[54] In particular, I accept Mr Sullivan's evidence that Mr Cust did not emphasise (as Mr Cust claims) that the reason he was unwilling to meet Mr Sullivan to discuss matters was a function of his inability to obtain legal advice. I accept Mr Sullivan's evidence that the only occasion when that position was clear was in the telephone discussion that the two men had at about 12.15pm on 31 December 2004 which was in fact, as it turned out, the last day of Mr Cust's employment.

[55] I also think that, despite the fact that I have already found that Mr Sullivan had dealt with the complaints about abuse and aggressive behaviour from Mr Cust directed at Mr Sullivan, Mr Cust's own evidence and submissions on his own behalf acknowledge that he was difficult and he attributes all of that to what he regarded as a straightforward case of sick leave. Mr Cust accuses Mr Sullivan of *manipulating* the sick leave issue. Again, I do not accept that the evidence supports such a contention.

[56] Mr Cust acknowledged in his oral evidence that Sullivans Bar was entitled to a medical certificate because of the length of his sick leave absence.

[57] Mr Cust acknowledges making *mistakes*, although he claims that he never gave Mr Sullivan any reason to mistrust him.

[58] I am satisfied that Mr Cust was thrown by the sick leave issue and that the relationship between the parties steadily deteriorated from that point. I am also satisfied that Mr Cust's response to the sick leave issue was unfair and unreasonable and that Mr Sullivan did nothing wrong.

[59] Further, I am satisfied that Mr Cust indulged in a sustained period of abuse of Mr Sullivan and notwithstanding the fact that that was responded to by the employer, the very short timeframe between those meetings where the abuse happened and the termination date, entitles me to consider the effect of that abuse as part of Mr Cust's contribution to his own misfortune.

[60] Put shortly, if Mr Cust had behaved honourably and decently, instead of badly, then Mr Sullivan might not have lost his patience with Mr Cust and terminated his employment.

[61] Accordingly, while I find that Mr Cust has been unjustifiably dismissed, I consider that his contribution to that dismissal is 100% and accordingly I decline to award any remedies.

Costs

[62] Costs are to lie where they fall.

James Crichton
Member of Employment Relations Authority