IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 44/10
5277699

	BETWEEN	DAVID HANNAH Applicant
	AND	VBASE LIMITED First Respondent
		SPOTLESS SERVICES (NZ) LIMITED Second Respondent

Member of Authority:	James Crichton
Representatives:	Peter Cranney, Counsel for Applicant Andrew Shaw, Counsel for First Respondent Paul McBride, Counsel for Second Respondent
Investigation Meeting:	15 December 2009 at Christchurch
Determination:	4 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Hannah) began working for the first respondent (Vbase) in 1985 as a cleaner at the Christchurch Town Hall. He was a member of the Service & Food Workers' Union (the Union) and a delegate of the Union as well. A collective employment agreement (the agreement) covered the terms and conditions of Mr Hannah's employment.

[2] Mr Hannah worked in an occupation covered by Schedule 1A of the Employment Relations Act 2000 and on 14 May 2008, Vbase told Mr Hannah it was restructuring its operations by contracting out the cleaning operation to the second respondent (Spotless). Mr Hannah was given the opportunity to transfer his

employment from Vbase to Spotless in terms of the procedure set out in the Employment Relations Act 2000 (the Act) and he chose to do so. With effect from 8 June 2008, Spotless employed Mr Hannah and became a party to the agreement.

[3] There is a contract between Vbase and Spotless covering the restructuring arrangements (the restructuring contract) which, amongst other things, provides that Spotless will continue to employ Mr Hannah on the same terms and conditions of employment as applied when he was employed by Vbase for a term of at least two years from the date of his employment by Spotless. That particular provision is said to be inserted for Mr Hannah's benefit (amongst other employees) in terms of the Contracts (Privity) Act 1982.

[4] On 24 June 2009, acting in his capacity as a delegate of the Union, Mr Hannah arranged a union meeting for members at the Christchurch Town Hall. The meeting was timed for 11pm apparently to meet the needs of both union members and the exigencies of the business. Mr Simon des Baux presided at the union meeting as the Union's organiser for the site. He gained access to the Town Hall with Mr Hannah's assistance. At that time of night, the Town Hall had just completed hosting a function for clients of Vbase and the building was in the course of being locked up for the night.

[5] Immediately after the meeting, Spotless undertook an investigation into the circumstances surrounding this union meeting and initiated disciplinary proceedings against Mr Hannah. There was a meeting between Mr Hannah and Spotless on 3 July 2009 and on 7 July 2009 Spotless issued Mr Hannah with a verbal warning in relation to his involvement in the union meeting.

[6] The very next day, on 8 July 2009, Vbase wrote to Spotless to indicate it would no longer allow Mr Hannah on site because of Mr Hannah's involvement with the organising of the union meeting. On 9 July 2009, Spotless removed Mr Hannah from the site and found alternative work for him but at a lesser rate of pay.

[7] Mr Hannah complains generally about this course of action and, amongst other things, alleges that:

(a) Vbase has breached its obligation to him;

(b) Vbase has incited a breach of contract by Spotless against him;

(c) Vbase has breached s.11 of the Act;

(d) He has a claim under the Contracts (Privity) Act 1982 against both Vbase and Spotless;

(e) He has been disadvantaged by unjustifiable actions of either Vbase or Spotless or both; and/or

(f) He has been unjustifiably dismissed from his employment in that he has been deprived of the opportunity to continue to work at the Christchurch Town Hall.

[8] Mr Hannah seeks reinstatement to his role at the Christchurch Town Hall with a return to the pay rate that he enjoyed therein, compensation under s.123(1)(c)(i) of the Act for hurt, humiliation and injury to feelings, a contribution to lost wages from 9 July 2009, damages and specific performance under s.8 of the Contracts (Privity) Act 1982 together with penalties under ss.11(2) s.124(2) of the Act.

[9] Vbase denies any responsibility for the employment related claims of Mr Hannah because it was not, at the relevant time, Mr Hannah's employer. It also denies any incitement of Spotless to take any action in respect of disciplining Mr Hannah and says simply that it has the contractual power to exclude a particular individual from its site and that in view of its assessment of Mr Hannah's culpability in breaching the security of its Christchurch Town Hall site, it was within its rights to direct Spotless not to allow Mr Hannah to return to the site.

[10] Spotless acknowledges that it was Mr Hannah's employer from 8 June 2008, acknowledges that Mr Hannah was removed from the Christchurch Town Hall at the direction of Vbase, contends that its actions subsequent to Vbase's decision were the actions of a fair and reasonable employer and therefore denies wrongdoing of any kind.

Issues

[11] It will be necessary for the Authority to investigate the following aspects of this employment relationship problem:

(a) What did Mr Hannah do?;

(b) What did Spotless do?;

(c) What did Vbase do?

What did Mr Hannah do?

[12] It is plain on the evidence before the Authority that Mr Hannah organised the meeting for Mr des Baux, the Union organiser, set the appointed time so as to coincide with the work requirements of the staff who were to attend the meeting (they were to start work at midnight), but that he failed absolutely to tell either Spotless or Vbase about the meeting. Vbase says that Mr Hannah knew or ought to have known that its requirements include notification and permission being sought for such meetings. Mr Hannah, on the other hand, was adamant that there had been union meetings on an *exactly similar* basis in the past for which there had been no notification.

[13] Further, neither Vbase nor Spotless could direct me to any clear directives about the requirement to notify and/or seek permission for such meetings, save on one occasion which dated from nine years before. On that occasion, Mr Hannah had had to apologise for organising a union meeting without getting the appropriate sanction.

[14] Furthermore, Mr Hannah was equally clear that he was unaware that he was not allowed on the site unless he was working.

[15] It seems clear then that the evidence discloses that this union meeting was indeed organised by Mr Hannah, that he sought no permission either from Vbase or from Spotless, but I am satisfied on what I heard that Mr Hannah did not know that he was prohibited from being on the site unless he was working and also did not know (because he had not been contemporaneously advised) that he had to seek permission before organising union meetings of this type. I accept without reservation that Vbase has an absolute entitlement to the normal proprietary rights that a building occupier has. This includes the ability to determine who comes in to a site and who does not, but equally, in terms of persons who work on other persons' sites, a building occupier has an obligation to ensure that the workers so employed understand any rules that the building owner has.

[16] In the particular circumstances of this case, I am not persuaded Mr Hannah knew what was required of him; I accept his evidence that he had arranged other

union meetings in other circumstances at other times without going through any formality at all and had not been remonstrated with as a consequence. Neither respondent could draw my attention to any contemporaneous advice that would have drawn Mr Hannah's attention to the fact that he was either:

(a) Not allowed on site if he was not working; or

(b) Not allowed to organise union meetings without the permission of the employer and the site owner.

[17] It follows from the foregoing analysis that Mr Hannah was not culpable in the action that he took. He says (and I accept) that he did precisely what he had done in the past without consequence; this time, the same action had the gravest consequences for him.

[18] Moreover, having found as a fact that Mr Hannah did not know he should not be on site when not working and had to seek permission for any Union meetings, the question that flows from such a finding is whose responsibility it is to ensure Mr Hannah knows his obligations? I am satisfied those obligations, being part of the normal incidents of employment, must fall on the employer and not on the third party, Vbase. Thus, if there are failings in relation to Mr Hannah's obligations, it is Spotless (as employer) that must bear the brunt of those failings.

What did Spotless do?

[19] Spotless is the employer and, as a consequence, it has obligations to treat its employees fairly and reasonably and in any particular circumstances, to do what a good and fair employer would do in those particular circumstances. In this particular case, the evidence is plain that in the main Spotless took reasonable steps to deal appropriately with Mr Hannah but also to deal appropriately with Vbase.

[20] As to Mr Hannah, once Spotless became aware that a meeting had taken place after hours in the Town Hall which Mr Hannah had had an involvement in, it conducted what, on the face of it, seems to have been a fair and transparent inquiry and then issued Mr Hannah with a verbal warning. In all the circumstances of the case, I am satisfied that was a fair and appropriate action for the employer to take, given it was unable to demonstrate clear and explicit policies and procedures which would have made it plain to Mr Hannah that, in organising a union meeting of the sort

which I accept he had done on many occasions in the past, he was standing into danger. If that had been an end of the matter then in my judgement, there could have been no complaint. Mr Hannah would have known his obligations and, being an honourable man, would have ensured he fulfilled them in the future.

[21] However, Vbase then advised Spotless that it (Vbase) was unhappy with Mr Hannah's behaviour and was intent upon removing him from the site. The evidence is very clear that Spotless took reasonable steps to try to persuade Vbase from taking such a draconian stance. I was impressed with the evidence of Ms Mulqueen for Spotless which was absolutely plain that she, as Spotless' relevant supervisor, did everything that she thought she could to prevent or discourage Vbase from responding in the way that it did.

[22] Further and finally, when Spotless was unsuccessful in dissuading Vbase from excluding Mr Hannah, it then used its best endeavours to find Mr Hannah alternative work at another site, albeit at a lesser rate of pay.

[23] I am satisfied on the evidence before the Authority that Spotless did everything that it reasonably could to treat Mr Hannah fairly and reasonably, **having regard to Spotless' view of its own contractual obligations to Vbase**. In the end, Spotless thought it was hamstrung in its relationship with Mr Hannah by the impost placed on it by Vbase and the contractual obligations that flowed between Vbase and Spotless.

What did Vbase do?

[24] The evidence supports the conclusion that Vbase relied on the restructuring contract it had with Spotless to exclude Mr Hannah from the Town Hall premises for which Vbase was responsible. There is no doubt that Vbase has the ability to request the exclusion of a person from the Town Hall in terms of that agreement. The documentary evidence before the Authority, including the agreement, amply demonstrates this. The key provision allows Vbase to *request* that a person employed by Spotless be replaced or re-deployed if Vbase *is at any time dissatisfied on reasonable grounds with the performance or behaviour … of that person.*

[25] In the particular circumstances of this case, the evidence deposes that Vbase formed that jaundiced view of Mr Hannah as a consequence of its perception that his behaviour fundamentally compromised the security of the building for which it was

responsible. Of particular concern to Vbase was the fact that Mr Hannah entered into the premises after *lock down* had commenced and caused other persons to enter into the premises at a time when the building occupier (Vbase) was unaware that such persons would be there.

[26] Vbase, in its evidence before the Authority, made it very clear that security and safety were not just words to it but were obligations that it took very seriously indeed. In particular, Vbase pointed out through its witnesses that the fact that Mr Hannah had caused people to be present in the building when they were not there for work purposes, could potentially have created a tragedy in that the occupier of the building would have been unaware of their presence if there was a major fire or other catastrophic event.

[27] I was interested to explore whether there was any sense in which the space being occupied by Mr Hannah, the Union official Mr des Baux and the other work colleagues of Mr Hannah was legally *public* space. I am satisfied after inquiry that while it may be true that the foyer of the Christchurch Town Hall is *public* space during the normal business day, because it is effectively a thoroughfare that people use to transit through from Kilmore Street to Victoria Square, at eleven o'clock at night on a winter's evening, in no sense could that area, or indeed any other part of the facility, be public space once the building had gone *off hire* for the night.

[28] It follows from the foregoing that Vbase contend that its decision to seek to have Mr Hannah removed from the site was a reasonable one in all the circumstances. It is clear that Vbase tried to get a commitment from the Union that it (the Union) would comply with Vbase's requirements in future but the Union declined to give such an undertaking on the basis that it was entitled to enter the premises to meet its members in accordance with the provisions of the Employment Relations Act 2000. The law is that a Union official is entitled, as a general principle, to enter a workplace to transact Union business. That is the effect of s.20 of the Act.

[29] However, that general right is limited by the qualifying provisions in s.21 and also in subsequent sections although those other sections do not concern us here. Section 21 requires a Union official to only enter a workplace *at reasonable times* and *in a reasonable way* and *to comply with any reasonable procedures and requirements applying in respect of the workplace that relate to – (i) safety or health; or (ii) security.* Vbase says with some justification that s.21 is exactly on point and that the

Union's refusal to give it the assurance it sought was cavalier. I agree. In my opinion, the Union has materially contributed to Mr Hannah's difficulty by failing to respond appropriately to a reasonable request from Vbase and on any construction of the matter, it is difficulty to escape the conclusion that the Union meeting in question was in breach of s.21 of the Act.

[30] The evidence strongly suggests that Vbase concluded that, because the Union would not give the requisite undertaking about notifying future meetings, Vbase felt it had no other course of action other than to seek to exclude Mr Hannah. Ms Legeay-Fisher, Vbase's General Manager Hosting told me *we wanted the Union to reassure us that they would follow the proper process in the future but they wouldn't. If they had, I would have seriously reconsidered the "banning order"*.

Determination

[31] The real question for determination is whether it is fair and just for the consequences of the Union's failure to be visited in its entirety on Mr Hannah. For that is indeed what has happened in the present case. It is clear to me on the evidence that had Vbase been given the undertaking which it sought from the Union (and which I hold it was entitled to obtain from the Union), then there would have been no decision to exclude Mr Hannah from the site.

[32] In my opinion, it is neither fair nor just that Mr Hannah should bear the brunt of the Union's failure. In my view, in the particular circumstances of this case, it was not reasonable for Vbase to request the removal of Mr Hannah because the mischief was perpetrated by the Union and because Mr Hannah was not culpable by reason of not understanding his obligations.

[33] Nor am I satisfied that Spotless, in the particular circumstances of this case, acted properly and fairly in agreeing to remove Mr Hannah from Vbase's site. I do not accept Ms Macqueen's evidence which was expressed to me in the following way:

> *I believe they Vbase can give a request that could be a requirement and this happened in this case. We* [Spotless] *have always complied with these requests. My interpretation is that we would have to comply.*

[34] It may well be the case that these requests are, in the main, reasonable, but in the particular circumstances of this case, I do not accept that the request is reasonable

at all for the reasons I have outlined and, in my view, Spotless ought to have refused the request.

[35] It is clear to me on the evidence that the real nub of Vbase's complaint was the prospect that further breaches of security would be inevitable, in the absence of the undertaking from the Union. Vbase conceded that, had they got the undertaking they sought, they would have *seriously reconsidered the banning order*.

[36] As my colleague Member Arthur observed in his decision in *Charles and Waitakere City Council and Anor* (19 November 2007, AA 362/07), it is necessary to consider whether the commercial arrangements between principal and contractor had the effect of diminishing the statutory rights of the employee. As the Authority rightly observed in that case, the risk of a provision which enables a principal to require a contractor to remove an employee is that such a course of action may remove the employer's obligation to justify the decision. In effect, the employer may be able to shelter behind its contractual relationship and not justify its behaviour.

[37] Despite the apparent difficulties for employers in these *triangular employment* cases, it remains the law that the employer is still bound to treat its employee fairly and equitably and in that regard, it cannot be right than an employer may change an employee's terms and conditions of employment to the employee's detriment (as happened to Mr Hannah) simply in reliance on its contractual obligation, without being prepared to justify its behaviour against the usual tenets of employment law.

[38] In the instant case, I conclude that Spotless had options which it chose not to exercise. First, unlike the situation in *Charles* there was no requirement by Vbase, only a request. Spotless could have denied the request and sought to facilitate an understanding with the Union about future Union meetings, so as to obviate Vbase's legitimate concern. Second, Spotless could have redeployed Mr Hannah to another site, but maintain his rate of pay. Vbase observe, tellingly, that they continued to pay Spotless at the higher rate, in the contractual sum, so there would seem to be no loss to Spotless.

[39] In the end my fundamental conclusion is that Spotless, in reducing Mr Hannah's rate of pay without his consent, did not act as a fair and just employer would, having regard to the circumstances at the time and that, at the very least, their obligation was to retain Mr Hannah in a like role, at the same rate of pay. As Chief

Judge Goddard remarked in *G & H Trade Training v Crewther* [2002] 1 ERNZ 513 at para 42:

> *There is almost always a choice. The third party can be made to understand that employees have statutory rights and employers have liabilities to employees and cannot simply bow to demands.*

[40] In relation to Mr Hannah's various claims before the Authority I conclude as follows:

(a) Mr Hannah has not satisfied me he has any justiciable claim against Vbase;

(b) The Contracts (Privity) Act claim against both respondents has no merit; but

(c) Mr Hannah has a personal grievance because he has suffered disadvantage by way of the unjustified actions of his employer, Spotless, for the reasons I have enunciated; and

(d) Mr Hannah does not have a personal grievance for unjustified dismissal because the employment relationship enures although its nature and extend has been unilaterally changed by Spotless.

[41] Having established a personal grievance I must consider whether, pursuant to s.124 of the Act, Mr Hannah has contributed in any way to the circumstances giving rise to the grievance. I consider Mr Hannah has contributed to the circumstances giving rise to the grievance by not using his best endeavours to persuade the Union of its failure and because of that failure, I decline to award any compensation.

[42] Bearing that in mind, to remedy the personal grievance my investigation has established, I direct that:

(i) Spotless is to immediately reinstate Mr Hannah to his original rate of pay that applied at the Christchurch Town Hall.

(ii) Spotless is to arrange back pay for Mr Hannah from the date of his pay reduction down to the date his original rate of pay is restored such that Mr Hannah has restored to him the difference between the rate of pay he now

receives and the rate of pay he previously received at the Christchurch Town Hall.

(iii) The Authority suggests that Spotless might engage with Vbase and the Union with the purpose of facilitating agreement between the Union and Vbase such that Mr Hannah could return to duty at the Christchurch Town Hall, if that were practicable.

Costs

[43] Costs are reserved.

James Crichton
Member of the Employment Relations Authority