

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Bernie Hilbers (Applicant)
AND Bollocks Bar & Brasserie Limited (Respondent)
REPRESENTATIVES Brian Tutton, for Applicant
Christine Pidduck, for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 3 February 2006
SUBMISSIONS RECEIVED 13 February 2006 from Respondent
20 February 2006 from Applicant
DATE OF DETERMINATION 6 April 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Bernie Hilbers says he was unjustifiably dismissed on 27 June 2005 when Mr Steven Loader, Managing Director of Bollocks Bar and Brassiere Ltd (“BBB”) dismissed him for serious misconduct. Mr Hilbers seeks compensation for lost earnings and hurt and humiliation.

[2] Mr Loader denies Mr Hilbers was dismissed unjustifiably.

Justification for the dismissal

[3] The Authority is required to test the justification of the dismissal pursuant to section 103A of the Employment Relations Act. The key issue for this determination is whether, in all the circumstances the actions of BBB and how BBB acted was what a fair and reasonable employer would have done. The emphasis provided by s.103A is on the employer. I have considered the test for justification under the following headings:

- The circumstances known at the time the decision to dismiss was made;
- The process followed by BBB;

- The decision to dismiss.

The circumstances

[4] Mr Hilbers and his partner Ms Amanda Dugan were both employed by BBB from 7 December 2004. The agreed terms and conditions of employment were set out in a proposed written individual employment agreement. The agreement has never been executed. There are some verbal terms agreed between the parties which have not been included in the written document and for the purposes of clarification I have set them out below:

Hours of work: Approximately 20-35 hours per week worked on Tuesday to Saturday inclusive. Mr Hilbers hours were flexible but usual hours of work saw him starting at about 2.30pm or 3.00pm when the restaurant was busy or 5.00pm when the restaurant was quiet, and working through until about 9.00pm or 10.00pm each night.

Rate of pay: \$19.00 per hour paid fortnightly.

[5] It was common ground at the investigation meeting that Mr Hilbers had experienced difficulties in undertaking his duties and that he became frustrated and angry and demonstrated this anger by having tantrums. The behaviours exhibited during these tantrums included Mr Hilbers swearing at staff, in particular the Restaurant Manager, and referring to staff in a most derogatory and insulting manner. During the course of the investigation meeting Mr Hilbers conceded that his behaviour, at times, had been unacceptable. The evidence showed that after each episode Mr Hilbers would apologise to the affected staff member.

[6] It was also common ground that Mr Hilbers was told by his employer to pull his head in and not to confront the restaurant manager, Ms Aimee Loader. In the later stages of Mr Hilbers employment, Ms Loader became ill and had to take time off work to recuperate. The reasons for the illness are not clear. Mr Hilbers told me Ms Loader was ill with several viruses which were affecting several people in the Cambridge area at the time. Mr Loader did confirm that a virus was one of the problems Ms Loader had suffered from. Other witnesses from BBB attempted to persuade me that Ms Loader's illness was entirely as a direct result of Mr Hilbers behaviour. I do not consider that was the case.

[7] Ms Loader was employed as the restaurant manager with no previous experience. I have formed the view, after hearing the evidence of the parties including Ms Loader, that she struggled with the management side of her role, in particular the staff management functions. At the investigation meeting Ms Loader told me she is quite an emotional person and takes things

personally. She says she found Mr Hilbers to be very intimidating and he would yell and swear at her. Ms Loader says that this was part of the problem she had with managing him.

[8] Mr Hilbers demonstrated at the investigation meeting his propensity for becoming loud, and although he was not abusive, he certainly demonstrated his frustration from time to time. I accept that Ms Loader would have found Mr Hilbers to be intimidating and difficult to approach. Ms Loader is a petite woman, while Mr Hilder is a tall well built man which would serve to exacerbate the problems being experienced by Ms Loader.

[9] Mr Loader, met with Mr Hilbers on several occasions throughout 2005 and discussed his inappropriate behaviours. Mr Loader says that at a meeting on 20 April 2005 he warned Mr Hilbers that his job would be in jeopardy if his inappropriate behaviours continued. Mr Hilbers denies being told his job was in jeopardy. I do not consider the meeting on 20 April 2005 to constitute a formal warning putting Mr Hilbers job in jeopardy. In setting up and holding the meeting there was a complete absence of any procedural fairness. Mr Hilbers was not warned that the meeting could result in a warning, he was not advised to have a representative with him, neither was he given any information of what the meeting was to be about.

[10] At the beginning of the employment relationship both Mr Hilbers and Ms Dugan had discussed with Mr Loader, a proposal to purchase shares in the restaurant business. By May 2005 these discussions were continuing. On 15 June 2005 Mr Loader, Mr Hilbers and Ms Dugan sat down to discuss a firm proposal. At that meeting Mr Loader raised with Mr Hilbers his understanding that he [Mr Hilbers] was moving to another business in town. Mr Hilbers admitted he had been approached but that nothing was certain.

[11] On Thursday, 23 June 2005 Mr Loader advised Mr Hilbers that they would have a meeting on 28 June 2005 to continue their discussions about the share purchase. At the same time he advised that the restaurant would be closed until 3.00pm the following day for a stock-take.

[12] On Monday, 27 June 2005, Mr Hilbers and Ms Dugan attended work at about 9.30am on their usual rostered day off, in order to prepare a buffet lunch for 45 guests. At about 10.15am Ms Loader approached Mr Hilbers and advised him that they had 8 additional guests upstairs and enquired as to whether she should give them the lunch menu. Mr Hilbers became upset and responded by swearing and throwing a peeled potato onto the bench. The eight guests were referred to another restaurant for lunch.

The process

[13] It is well known and standard practice that an employer must tell an employee who is summonsed to a disciplinary meeting that he is in peril of dismissal, if that is the case (*Morris v Christchurch Airport Limited* (unreported) Goddard CJ, 24 June 2004 CC13/04).

[14] The Court in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR set out what the minimum requirements of procedural fairness to be applied by an employer in an investigation into serious misconduct:

- notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

[15] As Mr Hilbers and Ms Dugan were leaving for the day, Mr Loader requested them to attend a meeting with him then and there. During this meeting Mr Loader enquired as to why Mr Hilbers hadn't provided lunch for the 8 guests. Mr Hilbers advised that he had made other arrangements and indicated that he wanted to get away from work. There was also discussion at that meeting about Mr Hilbers inappropriate behaviour of swearing at Ms Loader and throwing things in the kitchen.

[16] Mr Loader dismissed Mr Hilbers for serious misconduct and gave him two weeks notice with a final day of work of 11 July 2005.

[17] Mr Hilbers attended work as usual on Tuesday, 28 June 2005. As he was leaving that evening Mr Hilbers was advised he would not be required to do breakfast the following day.

[18] In answer to questions at the investigation meeting, Mr Loader accepted that he had not proceeded with the dismissal in a procedurally fair manner as set out in the *Unilever* decision.

[19] On Wednesday 29 June 2005, Mr Hilbers received a letter from BBB dated 27 June 2005. The letter confirms Mr Hilbers dismissal. In justifying the dismissal Mr Loader raises other matters which he considered also constituted serious misconduct, but which were never put to Mr Hilbers for his response at the meeting on 27 June 2005. Mr Loader advised Mr Hilbers in the letter that as Mr Hilbers had been having discussions with another restaurant he was not to attend work for the duration of his notice period.

The decision to dismiss

[20] The Authority must have regard to the nature and degree of the alleged misbehaviour and its significance in relation to the position held by the employee and the business of the employer. What is required, if the response of dismissal is warranted, is that the misbehaviour must go to the heart or root of the contract between them or be such that it constitutes a serious breach of the employment agreement (*North Island Wholesale Groceries Ltd v Hewin* [1992] 2 NZILR 176).

[21] Mr Hilbers was dismissed for his behaviour when he became angry at Ms Loader for requesting lunch for 8 additional guests. According to the letter of dismissal he was also dismissed for abusing the manageress, and making coffees and meals without authorisation. The latter issues were, as already stated in this determination not put to Mr Hilbers for his response before being dismissed. As already outlined in this determination the dismissal occurred in circumstances devoid of any procedural fairness.

I find the dismissal to be unjustified.

Remedies

[22] For the reasons outlined above I have found that Mr Hilbers was unjustifiably dismissed by his employer. In normal circumstances Mr Hilbers would be entitled to remedies.

[23] However, section 124 of the Employment Relations Act requires the Authority to take into account the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if the actions so require, for the remedies to be reduced accordingly.

[24] I consider that Mr Hilbers has contributed significantly to the actions giving rise to his dismissal. Mr Hilbers was in charge of the kitchen for the Restaurant and he was in negotiations with his employer to purchase shares in the company. As a manager and potential owner of the business his behaviour was appalling. No reasonable employer could be expected to put up with the derogatory and insulting remarks levelled at Ms Loader and other staff members. While it was common ground that Mr Hilbers would apologise after each episode, his behaviours generally remained unchanged. Mr Hilbers has admitted his behaviour was unacceptable.

[25] I am satisfied that it is just to reduce the remedies available as a result of Mr Hilbers conduct. Mr Hilbers is entitled to an award for contribution to his costs but no other remedy. This will acknowledge that Mr Hilbers has established to my satisfaction a personal grievance based on a

claim that he was dismissed unjustifiably without rewarding him for significant blameworthy conduct.

Costs

[1] Costs are reserved. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority