

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 131
5344851

BETWEEN

KAYNE KINGI KAKE
Applicant

AND

BACCHID BENEVOLENCY
LIMITED T/A ABSOLUTE
CATERING
Respondent

Member of Authority: Robin Arthur
Representatives: Frank Tamati for Applicant
Tom O'Connor for Respondent
Investigation Meeting: 22 November 2011
Determination: 16 April 2012

DETERMINATION OF THE AUTHORITY

- A. Absolute Catering ended its employment of Kayne Kake in a manner that was not justified.**
- B. To settle Mr Kake's personal grievance Absolute Catering must pay him:**
- (i) \$4309 in reimbursement of wages lost as a result of the grievance; and**
 - (ii) \$3600 in compensation for humiliation and injury to his feelings.**
- C. Those remedies have been reduced by ten per cent due to Mr Kake's contribution to the situation giving rise to his grievance.**
- D. There is no award of costs.**

Employment relationship problem

[1] Kayne Kake alleged his employer, Bacchid Benevolency Limited (which trades as Absolute Catering), dismissed him from his position as front of house manager at the Howick Club on 27 April 2011. Absolute Catering denied Mr Kake was dismissed. Rather it alleged he abandoned the job after a disciplinary meeting held with him on 29 April.

[2] At that time Mr Kake had worked at the club for around seven months – six months as a restaurant manager for its previous catering contractor and then, from 6 April 2011, for Absolute Catering.

[3] Absolute Catering began providing catering services at the club's restaurants and functions from 28 March 2011 but Mr Kake did not start working for it until nine days later. In the meantime he had been on holiday using leave entitlements he had accrued while employed by the previous caterer.

[4] On his first day of work for Absolute Catering Mr Kake was given a written employment agreement during a break between the lunch and dinner shifts. Absolute Catering's executive chef Mike Kawana gave him the agreement. Mr Kake had previously met Mr Kawana about one month earlier at a "meet-and-greet" gathering for the club's catering staff organised by his previous employer and Absolute Catering. Absolute Catering's support services manager Keith Williams attended that meeting and told workers there that his company would maintain their positions once it took over the catering contract at the club.

[5] When Mr Kawana handed the written employment agreement to Mr Kake on 6 April he pointed out that it included a clause which referred to a "*three month trial period*". Mr Kake took the agreement home to read but had not signed and returned it before he had a further conversation with Mr Kawana on 10 April. During that discussion Mr Kawana proposed Mr Kake take an expanded role as front of house manager and share with Mr Kawana the workload of managing the restaurants and functions held at the club. Mr Kake recalled Mr Kawana talked about the new role having a new pay rate but said that were "*no specifics that night*".

[6] On the following Wednesday (13 April) Mr Kake brought the first agreement he had been given back to work because he understood it needed to be changed to include a new pay rate and title. Later that week he and Mr Kawana talked again and agreed on a salary of \$41,500 for the revised role.

[7] Soon afterwards Mr Kawana gave Mr Kake a new version of the agreement. However Mr Kake did not sign it as it still included his pay as an hourly rate rather than as a salary. Instead Mr Kawana wrote the words "*please amend*" on the agreement and said he would return it to Absolute Catering's head office for correction.

[8] At the end of the working day on 27 April Mr Kawana asked Mr Kake to come and talk with him in the restaurant. There were no customers there. Mr Kawana asked the chef, Dwayne Wilson, to come from the kitchen and sit at a table with them.

[9] There are differing accounts of the conversation which followed. Mr Kake alleged Mr Kawana told him he was to be dismissed under the 90-day trial period provisions or he could "*be a man*" and leave with two weeks notice. Mr Kake said that when he did not agree to that option Mr Kawana gave him a prepared letter calling him to a disciplinary meeting scheduled for 29 April.

[10] Mr Kawana denied he suggested Mr Kake leave with two weeks' notice and said it was Mr Kake, not him, who referred to a 90-day trial period. Mr Kawana said he only talked about invoking the disciplinary procedure and gave Mr Kake the letter.

[11] Mr Wilson had since left Absolute Catering's employment and was reluctant to give evidence about what he remembered being said by Mr Kake and Mr Kawana at the restaurant table on 27 April. He said he had not followed the conversation closely and he could recall only parts of it. He remembered Mr Kawana telling Mr Kake that he was concerned about his attitude and his work and that Mr Kake asked who had made complaints. He recalled Mr Kawana gave Mr Kake a letter and there was "*conversation going back and forward about the 90 day period*". He said Mr Kake had asked about the 90 day period and that Mr Kawana had not made any

statement about Mr Kake taking two weeks notice and leaving. He recalled Mr Kawana saying he was “*obligated by law*” to give Mr Kake a letter about the disciplinary meeting.

[12] Mr Williams had prepared the letter on Mr Kawana’s behalf. They had talked about its contents after Mr Kawana sent Mr Williams an email on 19 April. In that email Mr Kawana said he had received complaints from “*a number of the floor staff*” about how Mr Kake worked when Mr Kawana was not at the club and that on 16 April Mr Kake and a waitress “*went out of their way to sabotage the new way I want things done around here*”. The letter called Mr Kake to a meeting on 29 April. It described the meeting as “*the first stage of the disciplinary procedure*” and gave this reason for it (punctuation unchanged):

We have for some time had concerns about your ability to undertake the duties and responsibilities as described in the Position Description. Despite the time taken in explaining your duties and responsibilities to you and your agreement to undertake them as described, we have still noted a lack of commitment and drive and an absence of any leadership qualities so essential in undertaking your role effectively. We have looked to you to take the lead in setting and maintaining standards front of house and have expected you to lead by example. This has not happened in fact we have some difficulty in getting other team members to work with you. Howick Club is a very busy operation with great potential to develop further and your lack of commitment is not conducive to our business objectives and is at variance to the Clients expectations.

[13] Mr Kake went straight home after the 27 April discussion and talked about it with his flatmate Frank Tamati. Mr Tamati later accompanied Mr Kake to the 29 April meeting and acted as his representative at it. Mr Tamati had been Mr Kake’s supervisor in a previous job and said he had some experience in dealing with staff employment matters.

[14] Throughout the meeting Mr Tamati and Mr Kake repeatedly expressed the view that Mr Kake had already been “*fired*”. In response to a question at the Authority investigation meeting as to whether he was told in the 29 April meeting that his employment was terminated, Mr Kake said: “*No, we told them*”. He recalled Mr Williams asking him about how he saw his future with the company and Mr Tamati replying on his behalf that he had “*already been fired so he doesn’t have a future with*

the company".

[15] Mr Williams' evidence was that he attempted to get 'feedback' from Mr Kake about the problems at work but Mr Tamati rather than Mr Kake answered his questions. Mr Williams then said: "*It's pointless continuing because we're not achieving anything*". He asked whether Mr Kawana could arrange for Mr Kake's shifts to be covered and Mr Kawana asked for Mr Kake to return his keys. Mr Kake then went to his locker and emptied it before leaving the premises.

[16] By letter on 5 May 2011 Mr Kake raised a personal grievance for what he described as "*unjustified dismissal and constructive dismissal*". He said that prior to the letter calling him to the 29 April disciplinary meeting no performance issues had been raised with him and his "*work ethic and abilities as a manager have not once been questioned*".

[17] The parties attended mediation in July 2011 without resolving the matter. Mr Kake then lodged his statement of problem in the Authority. He stated that he was "*wrongfully fired from my employment and am claiming constructive dismissal*".

[18] By its statement in reply Absolute Catering said Mr Kake was called to a disciplinary meeting because of "*his reluctance to sign his employment agreement and his lack of willingness to work with the new management*". It stated that at the disciplinary meeting Mr Kake had refused to answer questions or explain his actions and referred all questions to his representative. It said Mr Kake then abandoned his employment because he did not return to work after the disciplinary meeting and it did not hear from him again until he raised his personal grievance six days later.

[19] From the claims made, responses given and evidence heard, the following matters required determination:

- (i) Whether Mr Kake's employment by Absolute Catering was subject to a trial period – either on the basis of a "*three month trial period*" referred to in the employment agreement given to him or on the basis

of the statutory 90 day period¹ – or had transferred from his previous employer to Absolute Catering and continued on the same terms and conditions (without a trial period of any length); and

- (ii) How the employment ended – by dismissal or abandonment; and
- (iii) If Mr Kake was dismissed, was that dismissal justified (including whether performance issues had been properly raised and dealt with); and
- (iv) If the employment ended by way of unjustified dismissal, direct or constructive, what remedies should be awarded; and
- (v) Should any remedies awarded be reduced for blameworthy conduct by Mr Kake contributing to the situation giving rise to his grievance; and
- (vi) Should either party be awarded costs?

The Authority's investigation

[20] For the purposes of the Authority's investigation Mr Kake, Mr Williams, Mr Kawana and Mr Wilson provided written witness statements. At the investigation meeting – under oath or affirmation – each man confirmed his written statement and answered questions asked by me and the representatives. Mr Tamati also gave sworn oral evidence in answer to questions from me and Mr O'Connor. The representatives both gave oral closing submissions on the facts and issues.

[21] This matter has been determined on the basis of the written and oral evidence of the five witnesses, relevant documents supplied by the parties, and the representatives' written and oral submissions at the investigation meeting. As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination has not set out all evidence and submissions received but has stated the Authority's findings of facts and law and its conclusions on matters requiring determination. Those findings were made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened.

¹ Section 67A of the Employment Relations Act 2000.

The terms of employment

[22] Mr Kake's employment by Absolute Catering, as at 6 April when he began work at the club after a holiday break, was on the same terms and conditions he had with the previous catering contractor. Mr Williams confirmed in his oral evidence that Absolute Catering accepted its employment of Mr Kake was continuous from the previous contractor.

[23] Mr Williams also accepted, on the same basis, that the statutory provision for a 90-day trial period for new employees did not apply to Mr Kake. Mr Williams said that around late April Absolute Catering gave its staff at the club a notice confirming no trial period applied to those whose employment had transferred from the previous contractor. The term in the employment agreements given to them after the transfer was in a template used to draft those agreement and was inadvertently left in.

[24] In any event no 90-day trial period could have applied to Mr Kake as such a term had not been set out in a written employment agreement and agreed to by him before he began work for Absolute Catering. He had already worked for several hours on 6 April before Mr Kawana gave him an employment agreement to look at.²

[25] The term referring to a trial period included in the employment agreement given to Mr Kake could not have been the 90-day period allowed, in certain circumstances, under the Act because that written term referred to "*three months*". Any 'three month' period would almost always be longer than the permitted ninety days due to the number of months with 31 days and where they fall in the calendar (with the sole exception being a three-month period that referred only to the specific dates of 1 February to 30 April).

[26] While no written employment agreement had been completed and signed by both parties, Mr Kake's terms of employment were varied, I find, by verbal agreement with Mr Kawana in mid-April. Those variations comprised a new role – that was

² *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111 at [85]-[90].

changing from being solely a restaurant manager to being front of house manager with some shared responsibility for restaurants and functions – and a new salary of \$41,500. Mr Kake later asked for the amended version of his employment agreement to include a salary of \$41,600 instead but, by the time his employment ended, Absolute Catering has not agreed to that proposal.

How the employment ended

[27] There was some confusion caused by Mr Kake's personal grievance letter alleging his employment ended by "*constructive dismissal*" but also referring to what he said was his dismissal by Mr Kawana "*under the 90-day clause*".

[28] Constructive dismissal is a phrase with a specific legal meaning. It usually refers to a situation where a worker says his or her resignation from a job was not freely given but was forced by some conduct of the employer that breached the worker's terms of employment.

[29] In this case I have to take into account that Mr Kake and Mr Tamati had no legal training or advice. They used the phrase 'constructive dismissal' incorrectly. However I consider the evidence of Mr Williams and Mr Kawana confirmed that at the 29 April meeting they both understood Mr Kake and Mr Tamati to firmly believe – even if incorrectly – that Absolute Catering had already made and communicated a decision to end Mr Kake's employment.

[30] Mr Kake did turn up to work on 28 and 29 April but that is not inconsistent, I find, with his professed belief that he was then working under two weeks' notice.

[31] The arrangements made at the close of the 29 April meeting for Mr Kake to hand over his keys to the premises and to clear his locker were consistent with his understanding of a dismissal and, I find, Mr Williams and Mr Kawana could not reasonably have understood his actions to be a resignation. According to Mr Williams' written witness statement, Mr Tamati said as he left the meeting: "*You will be hearing from us. You can't do this*". They were not words of resignation but rather an expression of the belief there had been a dismissal. In that light it was not

surprising that Mr Kake did not return to work the next day but instead sent a personal grievance letter six days later.

[32] However I consider the balance of the evidence does not support a conclusion that Mr Kawana did, in fact, dismiss Mr Kake on the evening of 27 April.

[33] Mr Kake described himself as “*confused and angry*” by the end of the discussion that night. It is highly likely that the account of it he gave Mr Tamati soon after was not accurate. However Mr Kawana was, from my observation of him and his demeanour in giving evidence at the Authority investigation meeting, impatient about matters of process and procedure and I consider it quite likely that he did express a view about the probable outcome of the disciplinary procedure and whether a better result would be for Mr Kake to leave on notice. That would, of itself, not necessarily amount to a dismissal even though it would suggest a predetermined view.

[34] My conclusion on this point is not entirely consistent with what Mr Wilson said about the conversation between Mr Kawana and Mr Kake on 27 April. However Mr Wilson, in giving his evidence, emphasised that he had not taken much account of the conversation at the time and, some seven months later, could not recall much of what he heard.

[35] The real difficulty for Absolute Catering is what then happened in the meeting with Mr Kake and Mr Tamati on 29 April – and particularly what was said, or rather not said, by Mr Williams and Mr Kawana.

[36] Even accepting that Mr Kake was operating under a mistaken belief that he had been dismissed on 27 April, there was no direct evidence that either Mr Williams or Mr Kawana did or said anything in the 29 April meeting to disabuse him of that misconception. Mr Tamati’s evidence was that there was no denial from Mr Williams that Mr Kake had been dismissed. Mr Williams and Mr Kawana gave no evidence to suggest they had in fact made it clear that a dismissal had not already taken place or been decided. If they had done so, the difficulty Mr Williams had in getting Mr Kake to talk about his future with the company may well have been avoided.

[37] Instead Mr Williams and Mr Kawana appeared to confirm a ‘sending away’ of Mr Kake by initiating the discussion about covering his shifts, getting his keys and clearing his locker. If Mr Kake went away with a misconception about what had occurred it was one which Absolute Catering’s representatives could have rectified at the time by simply saying he had not been dismissed. Their omission to do so, I hold, amounted to a sending away of Mr Kake from his place of work and was a dismissal.³

Was the dismissal justified?

[38] Absolute Catering’s actions in letting Mr Kake’s employment end in that way were permissible if, reviewed objectively, they met the statutory test of justification in s103A of the Act:

(2) The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer’s concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee’s explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[39] However I have found Absolute Catering’s actions were less than what a fair

³ *Actors IUOW v Auckland Theatre Trust Inc* (1989) ERNZ Sel Cas 247, 251 (CA).

and reasonable employer could have done in all the circumstances at the time of holding its disciplinary meeting with him on 29 April 2011. I did so because of how it dealt with performance concerns expressed by Mr Kawana.

[40] The 27 April letter advising Mr Kake of the 29 April disciplinary meeting said Mr Kawana had concerns “*for some time now*” about Mr Kake’s abilities and how he was carrying out his duties. Mr Kawana reached that view when Mr Kake’s employment by Absolute Catering (but not actual work days) totalled only 21 days. During that period Mr Kawana had sufficient confidence in Mr Kake to offer him an expanded role as a manager. Although Mr Kawana said he had talked with Mr Kake about how he carried out his duties, Mr Kawana’s evidence did not show he had told Mr Kake of specific concerns about inadequate performance of his duties, had set measurable goals and expectations to remedy those inadequacies, had put in place any training or support needed to do so, and had allowed time to review progress.⁴

[41] Even by the time of the Authority investigation meeting Mr Kawana’s account of those concerns lacked the detail necessary for Mr Kake to fairly be able to respond to them. Mr Kawana identified three matters of concern:

- (i) That Mr Kake had not paid sufficient attention to his duty to order supplies – with just one instance given (being a day when the restaurant had run out of paper napkins); and
- (ii) A report from some unnamed service staff that they did not like working with Mr Kake and thought he was lazy; and
- (iii) An allegation that Mr Kake had conspired with a waitress to “*go slow*” at work on one Sunday in order to show more staff were needed (and which was said to have occurred shortly after Mr Kawana had told Mr Kake to reduce the number of staff rostered to work on Sundays).

[42] Mr Williams did not put any of those specific allegations to Mr Kake in the meeting on 29 April. Instead he asked Mr Kake general questions about how he saw his future with the company. While he felt continuing the meeting was “*pointless*”

⁴ *Trotter v Telecom* [1993] 2 ERNZ 659, 681.

because of the responses given by Mr Tamati, he could have arranged to put the concerns in writing and scheduled a further meeting. Absolute Catering had the resources to do so – Mr Williams was there to give advice to Mr Kawana and had drafted the initial disciplinary letter. He could have set out the specific details of the allegations (particularly the two allegations involving work with other staff members) in order to give Mr Kake a reasonable opportunity to respond to those concerns. Had he done so Mr Kake may have been disabused of the notion that a decision to dismiss him had already been made and then provided explanations which could have satisfied Mr Kawana sufficiently for the employment to continue. The failure of Mr Williams and Mr Kawana to do more – in the circumstance of what their evidence suggested was a misconception by Mr Kake and Mr Tamati about whether a dismissal had already occurred – was not a minor defect in procedure and did result in Mr Kake being treated unfairly. His employment ended as a result of criticisms by Mr Kawana to which Mr Kake did not have a full and fair opportunity to respond.

Remedies

Lost wages

[43] After the end of his employment with Absolute Catering Mr Kake did not work again until mid-July when he got a commission-based sales role. I accept his evidence that he made some real endeavours to mitigate his loss in those weeks by seeking new employment in the restaurant and hotel industry, but without success. However that evidence lacked sufficient details about the applications made to be able to fairly award lost remuneration for the full eleven weeks before he found other work. For that reason the award for lost remuneration is limited to six weeks. Calculated on the basis of his agreed salary at the time that his employment by Absolute Catering ended, the sum of that award is \$4788.

Compensation for hurt and humiliation

[44] Mr Kake gave evidence of feeling undermined by Absolute Catering's criticism of his work ethic. He believed this undermined his confidence in seeking new employment. He had also recently moved house to be closer to his job at the

Howick Club and was embarrassed that he was short of funds to pay his rent. As a result he suffered humiliation, loss of dignity and injury to his feelings that should be compensated by an award of \$4000 under s123(1)(c)(i) of the Act.

Reduction of remedies for contribution

[45] Remedies awarded may be reduced if the Authority determines blameworthy conduct by an employee contributed towards the situation giving rise to his or her personal grievance: s124 of the Act.

[46] In the present circumstances a reduction is not required in relation to the allegations Absolute Catering made about Mr Kake's performance of his duties. The evidence of Mr Kawana and Mr William was not sufficient to confirm Mr Kake's performance was so inadequate as to be blameworthy.

[47] Some reduction was, I find, warranted for Mr Kake's participation in the disciplinary process.

[48] While Absolute Catering's actions have been found wanting under the s103A test of justification, I was not convinced Mr Kake was entitled to conclude Mr Kawana had already dismissed him on 27 April. He could have done more in the 29 April meeting – either directly or through Mr Tamati acting as his representative – to clarify the concerns being raised and then provide some explanation in response to them. Had he done so, he may well have avoided the end of his employment in the manner that it occurred. His failure in that regard was blameworthy and has been marked by a ten per cent reduction of the remedies awarded.

Orders

[49] To settle Mr Kake's personal grievance, and after making the ten per cent reduction of remedies due to his contribution to the situation giving rise to that grievance, Absolute Catering must pay him:

- (i) \$4309 in reimbursement of wages lost as a result of the grievance (under s123(1)(b) of the Act); and

- (ii) \$3600 in compensation for humiliation and injury to feelings (under s123(1)(c)(i) of the Act).

Costs

[50] Mr Kake did not incur the costs of legal representation in bringing his personal grievance. No award of costs is required.

Robin Arthur
Member of the Employment Relations Authority