

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

Under the Employment Relations Act 2000

BETWEEN Matthew McAlpine (Applicant)
AND Courtney Establishment Limited (Respondent)
Member of Authority: P R Stapp
Representatives: Geoff O'Sullivan for the Applicant
Tanya Kennedy for the Respondent
Investigation Meeting: Wellington, 27 April 2007
Submissions 30 April 2007
Determination: 7 May 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant claims he has been unlawfully suspended without pay. He would like the problem resolved as a personal grievance or a breach of his terms and conditions of employment or recovery of wages. He says that is entitled to be paid and is owed wages and statutory holidays. He is claiming lost wages and compensation/damages.

[2] The employer denied the claims and said the personal grievance had not been raised in 90 days.

Issues

[3] Was the employer entitled to suspend the applicant without pay? Was a personal grievance raised in 90 days as required under the Employment Relations Act? Does the applicant have a personal grievance? Is Mr McAlpine owed any wages, including statutory holidays? If so, how much is Mr McAlpine owed? How should the matter be resolved?

[4] There are some factual matters and I will deal with those as I have to in due course.

The facts

[5] Matthew McAlpine was employed as a restaurant manager at the Establishment Hotel, licensed premises in Wellington and he commenced work on 24 October 2006. His employer was Courtney Establishment Limited.

[6] An employment agreement was signed off but has been lost by the Respondent and not found. The applicant produced a copy of another agreement for the Authority. There is an argument about the hours of work in that agreement. In addition the Respondent says that the House Rules were attached to the agreement at the time it was signed. Mr McAlpine denied that.

[7] It is common ground that Mr McAlpine worked as the full time restaurant manager and was paid \$55,000 per annum. Mr McAlpine reported to the managing director, Andrew Gibson.

[8] Mr McAlpine says that no induction was provided and there was a lack of training, except that it was provided on the job. Mr McAlpine acknowledged that he watched the induction of other employees on one occasion.

[9] Mr McAlpine was not paid on 31 December 2006 and 7 January 2007. He was paid on 7 January for his actual hours worked until 4 January 2007. He says before he was suspended he approached Nicole Evans the assistant manager on 4 January about his pay for the week ending 31 December 2006 and requested his timesheets and employment agreement that she went to look for in the office. Ms Evans says there was a different sequence of events when he requested the timesheets and employment agreement after he was suspended. She accepted that Mr McAlpine asked about what was happening with his pay. It is common ground that Ms Evans telephoned Mr Gibson for advice and she told Mr McAlpine that he was not to follow her into the office. Mr McAlpine was informed that the missed payment and deduction were made because he had taken sick leave.

[10] Ms Evans says she reported to Mr Gibson on 4 January that she had seen Mr McAlpine drinking on duty that day. She says she spoke with Mr McAlpine about his drinking previously. Mr Gibson decided to suspend Mr McAlpine because he says he had also spoken to Mr McAlpine

about drinking previously and he believed Ms Evans. Mr McAlpine denied being spoken to previously by them in any disciplinary context and says he clearly understood what was required and that he had outlined the rules to other employees on different occasions.

[11] Mr Gibson says that he instructed Ms Evans and Mr Stuart Webb, the general manager to meet and suspend Mr McAlpine. Mr Webb suspended Mr McAlpine on 4 January 2007, while Ms Evans acted as a witness, pending an investigation on the issue that he had been drinking while on duty. Ms Evans says it was then that Mr McAlpine requested his timesheets and employment agreement.

[12] Mr McAlpine was paid \$395 for his hours worked in the week ending 7 January 2007.

[13] Mr McAlpine says that he was “*escorted*” from the premises. He says he took off his apron and he was followed by Ms Evans and Mr Webb from where the discussion took place and off the premises in public. Ms Evans and Mr Webb denied that. They say they stayed in the area and he left of his own accord after going to his desk, taking off his apron and collecting his case.

[14] Mr McAlpine obtained legal advice after waiting for Mr Gibson to contact him. On 18 January 2007 Mr McAlpine’s lawyer wrote to Mr Gibson outlining Mr McAlpine’s concerns about the suspension, the non payment of his salary and detailed his concerns about the employment relationship. A personal grievance was raised. Mr Gibson’s reply outlined a number of other matters he had started to investigate about Mr McAlpine’s conduct during Mr McAlpine’s time at the Establishment. Mr Gibson also refused to pay Mr McAlpine anything and threatened Mr McAlpine with the Police for alleged theft.

Determination

[15] The employer has not been able to find Mr McAlpine’s employment agreement. Mr McAlpine accepted that he would be required to work 50-60 hours per week. He could not recall this in his employment agreement when the copy of the agreement he produced only referred to working at least 40 hours per week. Mr Gibson says he offered Mr McAlpine the job with a requirement to work at least 50-60 hours. Mr McAlpine says he accepted that. The timesheets and wages record show that Mr McAlpine was paid \$1057.69 per week for whatever hours he worked on salary. The timesheets show that he worked on Boxing Day 26 December 2006, New Years Day

and 2 January 2007 and he has not been paid. The hours he worked on those statutory holidays have been accepted.

[16] The suspension is clearly unjustified. First it was predetermined, ie Mr Gibson made the decision, believing Ms Evans, and not giving Mr McAlpine any opportunity for any input and comment whatsoever. Secondly, there was no notice of any possibility of Mr McAlpine being suspended and being provided with an opportunity to comment and have some input on that before the decision was made. Thirdly, the suspension was without pay without any express authority to cease paying him until it was reinstated on 24 March 2007.

[17] I am further supported in my decision that the suspension was unjustified because there was no specific term not to pay him on suspension in the template employment agreement. Mr McAlpine's agreement has not been found to indicate any different arrangement being permitted. (*Hardy v Scoopy's Ice Cream Parlour (Whangarei) Ltd* (AA36/07) and *Ruffell v Womens' Refuge Sexual Assault Resource Centre Marlborough Inc* [2002] 1ERNZ 409) and *Tawhiwhirangi v Attorney General* [2003] 2 ERNZ).

[18] Mr Gibson believed what Ms Evans told him. He says this was because they had spoken to Mr McAlpine about drinking on duty previously. That might be so, but a fair and reasonable employer would follow a proper enquiry, including giving Mr McAlpine the opportunity to comment and have some input. He explained to the Authority he was drinking while he was on a break and it was during the previous day. Also, he told the Authority that Ms Evans told him she saw him drinking the previous day when he was on a break and that she and Mr Webb witnessed him drinking without either of them saying anything at the time. He denied Ms Evans's allegation that she said at the time he was drinking on the same day she made her allegation. Those differences have still not been enquired into by Mr Gibson. But what Mr McAlpine's explanation supports is that there was another side to the story and that Mr Gibson should not have decided to suspend him without giving him the opportunity to be heard before doing so. Thus, the credibility issue means that Mr Gibson's action was wholly unjustified (*Tawhiwhirangi v Attorney General* [2003] 2 ERNZ applied).

[19] Mr Gibson says Ms Evans's report was serious enough to suspend him. He added that she further alleged Mr McAlpine had not paid for the drink. The latter was never put to Mr McAlpine at the time and only was stated after the suspension. That makes it an attempt to justify the suspension after the decision. That is unjustified.

[20] Mr McAlpine's employment has been clearly affected to his disadvantage in the circumstances. A fair and reasonable employer would not have suspended Mr McAlpine without pay and would have provided him with an opportunity to comment and have some input on the allegation before the decision was made, even if the allegation was serious and it was within the employer's discretion to suspend.

[21] I do not have to make any determination on the culture of drinking in the workplace because of my finding that the suspension was wholly unjustified.

[22] I conclude that the parties' employment relationship continued because of the evidence that the employer then embarked on investigating further allegations, had not paid any accrued holiday pay and has recently reinstated the pay. Indeed Mr McAlpine has chosen not to repudiate the employment due to the respondent's actions, which he could have done. Mr McAlpine is entitled to be paid his balance of wages due on 7 January and wages from the week ending 14 January 2007 until the week ending 17 March 2007 during his suspension.

[23] It now emerges for the first time that the reason for the non-payment has been because of a disagreement over quantum, which was conceded in the making of submissions before the Authority. I find this surprising considering Mr Gibson's previous attitude over not making any payment much earlier. If there was a problem it was more than reasonable to have expected that to be addressed much earlier.

[24] Mr McAlpine is also entitled to be paid his hours he worked on Boxing Day 26 December 2006, New Years Day 1 January and 2 January 2007. He is also entitled to three days in lieu for working on these three public holidays.

[25] Mr McAlpine was not paid for the week ending 31 December 2006, including Christmas Day. He is entitled to the public holiday because it was a day he would otherwise have worked. He produced a sick leave certificate for his sick leave days. He was off work sick on 20-24 December 2006, days for which he was paid. He says he reasonably believed that since he was paid for them his employer was giving him the benefit for the long hours that he had worked at other times. This does not seem to be the case. Mr Gibson denied that, although he had previously paid Mr McAlpine once for time he took off when Mr McAlpine's wife was sick. Also, Mr Gibson says that Mr McAlpine was not eligible for sick leave since he had not worked for six months. He is right

and in the absence of any agreement he does not have to pay sick leave. Moreover I conclude that Mr McAlpine was presumptuous in his conclusion about offsetting long hours and sick leave because he had not discussed it with Mr Gibson. Nevertheless I would have expected a fair employer to have at least discussed the situation before deciding not to pay the appropriate week's wages on 31 December 2006 because of the impact it would have. I cannot take that matter any further.

[26] Mr McAlpine is owed the balance of his wages for the week ending 7 January. He is entitled to a balance of \$28.08. I have calculated it as 2/5ths of \$1057.69 weekly wages (\$423.08) (to account for New Years Day and 2 January 2007 which are paid separately only on the hours worked-see [22] and [25] and order below), less the \$395 paid.

[27] I now turn to compensation to remedy the personal grievance of unjustified suspension and disadvantage in employment. Mr McAlpine is entitled to compensation for humiliation, loss of dignity and injury to feelings. Mr McAlpine gave evidence about how he felt being required to leave the premises and the financial impact due to the cessation of his pay. He has also given evidence about how being suspended and trying to get it reinstated had an impact on him. Also, I accept that his feelings were affected by the impact of the suspension without any prior notice and no opportunity to have any input and comment. There is no contribution because Mr McAlpine had no time to provide his explanation (which differs from what Ms Evans has alleged) and at the time no details of the allegation were given to him. He says his suspension was shameful, and I agree it was. A fair and reasonable employer would have given him the opportunity to challenge it especially since he says he was able to explain his version of the allegation and that a credibility issue was likely to arise. In terms of process it certainly falls short of an acceptable standard. Furthermore the employer has embarked on an investigation of other allegations unrelated to the suspension. It is entitled to do that, but the time it has taken for the investigation has been far too long even although the parties have been in disagreement over the suspension and Mr McAlpine's entitlement to be paid; including outstanding wages and pay for public holidays due prior to the suspension. The employer's actions since the suspension have exacerbated the situation. Mr Gibson's reply dated 18 January supports that conclusion.

Orders

[28] Mr McAlpine has a personal grievance. He was unjustifiably suspended. His employment was affected to his disadvantage because he was suspended wrongly without pay and the decision to suspend him was entirely made, where the decision maker believed another person, without any opportunity for Mr McAlpine to have an input and comment that he was entitled to.

[29] Courtney Establishment Limited is to pay Matthew McAlpine the balance of wages for the week ending 7 January 2007 of \$28.08 wages.

[30] Courtney Establishment Limited is to pay Matthew McAlpine wages from the week ending 14 January until 17 March 2007. The parties are to quantify the amount. In each of the weeks it should be his standard pay of \$1057.69. There were 9 (nine) weeks and the sum is likely to be \$9,519.21.

[31] Courtney Establishment Limited is to pay Matthew McAlpine his pay for Christmas Day 25 January 2006. The parties are to quantify the sum under the Holidays Act.

[32] Courtney Establishment Limited is to record Mr McAlpine's entitlement to three days in lieu for working on Boxing Day 26 December 2006, New Years Day 1 January 2006 and 2 January 2007.

[33] Courtney Establishment Limited is to pay Mr McAlpine for the hours he worked on Boxing Day 26 December 2006, New Years Day 1 January 2006 and 2 January 2007. The parties are to quantify the sum under the holidays Act at time and a half for the actual hours worked.

[34] If there is any disagreement on quantifying the amounts above leave is granted to return to the Authority for a determination.

[35] Courtney Establishment Limited is to pay Mr McAlpine \$10,000 compensation for humiliation, loss of dignity and injury to feelings.

Costs

[36] Costs are reserved at the request of the parties.

P R Stapp
Member of the Authority