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## O'Kelly-Barnes v Tillermans (2003) Ltd CA 2/07 (Christchurch) [2007] NZERA 489 (11 January 2007)

Last Updated: 15 November 2021

Determination Number: CA 2/07 File Number: CEA 36/06

Under the [Employment Relations Act 2000](#)

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE**

**BETWEEN** Terrance Wayne O'Kelly-Barnes (Applicant)

**AND** Tillermans (2003) Limited (Respondent)

**REPRESENTATIVES** Craig Smith, Counsel for Applicant

Rex Chapman and Simon Barr, Counsel for Respondent

**MEMBER OF AUTHORITY** Helen Doyle

**INVESTIGATION MEETING** 15 November 2006

**DATE OF DETERMINATION** 11 January 2007

DETERMINATION OF THE AUTHORITY

### Identity of the respondent

[1] The name of the respondent is amended by consent of the parties from Matthew Smellie to Tillermans (2003) Limited.

### The employment relationship problem

[2] Mr O'Kelly-Barnes was employed as head chef at Vinnie's Pizza Pasta Restaurant and Bar in Invercargill from early December 2004.

[3] Vinnie's Pizza Pasta Restaurant and Bar is owned and operated by Tillermans (2003) Limited ("Tillermans") which is a duly incorporated company.

[4] Mr O'Kelly-Barnes said he advised the restaurant owner, Matthew Smellie, at the time he was employed that he was planning to do his level 4 cookery course at the Southern Institute of Technology during 2005. Successful completion of the course would have seen him with full qualifications in professional cookery.

[5] Mr Smellie said that he was unaware until 15 February 2005 that it was Mr O'Kelly-Barnes's intention to complete his cookery qualifications in 2005.

[6] Mr O'Kelly-Barnes arranged a meeting with Mr Smellie on 15 February 2005. At that meeting, he advised Mr

Smellie that he was going to be undertaking full-time study at the Southern Institute of Technology and there would need to be a skilled worker employed by Tillermans to cover lunches for Tuesdays and Wednesdays when he would be studying. Mr Smellie was not of the view that full-time studying and retaining the position of head chef was sustainable, based on the

previous experience he had had with another head chef. Mr O'Kelly-Barnes made it clear that he felt undertaking study and the head chef role was quite manageable.

[7] Mr O'Kelly-Barnes did not feel that the meeting went well. He recalls Mr Smellie did not seem happy. He said he was confused by this and went back to work and continued to prepare for the evening service. He said that he did not understand from the meeting that it was the end of his employment.

[8] Mr Smellie said that he pointed out to Mr O'Kelly-Barnes that he was effectively seeking to change the terms and conditions that he was employed on. He said that he advised Mr O'Kelly-Barnes that as he was intent on pursuing his full-time study Tillermans could not continue to hold open the head chef position to him. Mr Smellie said that he told Mr O'Kelly-Barnes the only practical option would be to offer him part-time work and that Mr O'Kelly-Barnes agreed to this. Mr Smellie's brother, Timothy Smellie, was sitting at his desk in the same room when this conversation took place. He confirmed the conversation was about attempting to negotiate an outcome that was practical and would work for both parties.

[9] The day after the meeting on 15 February 2005, Mr O'Kelly-Barnes was handed two letters by Mr Smellie. The first letter was dated 15 February 2005 and provided:

*Dear Terrance*

*Following our meeting today I understand you have decided to undertake full time culinary study at the Southern Institute of Technology from 7th March 2005.*

*Because of these study commitments, you will no longer be available to work your regular shifts and carry out your current Head Chef duties and responsibilities as they are now.*

*As you realise, this change in your employment circumstances will result in a change to the terms and conditions that you were originally employed under.*

*It is therefore with reluctance that we will be unable to continue to offer you the position of Head Chef effective 6th March 2005.*

*We will be looking to advertise the position of Head Chef on Saturday 19th February.*

*You have been a valued member of staff and I am hopeful that we can come to an arrangement, once a new Head Chef is appointed, for you to continue in our employment on a part time basis.*

*Yours Sincerely Matt Smellie*

[10] When Mr Smellie handed the letter to Mr O'Kelly-Barnes, he advised him that he had employed a new head chef, Mrs West.

[11] The other letter handed to Mr O'Kelly-Barnes on 16 February 2005 was a list of topics and tasks for effective and productive management of the kitchen.

[12] Mr O'Kelly-Barnes attempted to get Mr Smellie to reconsider his position because he believed he was able to study and fulfil his responsibilities to the restaurant. Mr Smellie confirmed that he did not accept studying and working as a head chef at Tillermans was sustainable.

[13] Mr O'Kelly-Barnes then handed a letter of resignation to the manager at the restaurant, Stephen Grieve. He said in the letter that he was resigning on 28 February 2005.

[14] Some further discussions took place before Mr O'Kelly-Barnes left his employment on 28 February 2005.

[15] The following issues require determination in this case:

- What were Mr O'Kelly-Barnes's terms and conditions of employment?
- What was discussed and understood as a result of the meeting of 15 February 2005?
- How did Mr O'Kelly-Barnes' employment end?

- If Mr O’Kelly-Barnes was dismissed, was the dismissal unjustified?
- If Mr O’Kelly-Barnes was unjustifiably dismissed, what remedies is he entitled to?

### **What were Mr O’Kelly-Barnes’s terms and conditions of employment?**

[16] There was no written employment agreement entered into between Mr O’Kelly-Barnes and Tillermans.

[17] After a short trial period in early December 2004, Mr O’Kelly-Barnes was formally interviewed for the position of head chef by Mr Smellie and Erin Tuhura who was, at that time, the restaurant and bar manager. During the interview, Mr O’Kelly-Barnes discussed his previous training and the qualifications he had gained at the Southern Institute of Technology in 2004. He talked about his previous employment as a sous chef and said that he wanted to be paid \$17 per hour.

[18] Mr Smellie and Mr O’Kelly-Barnes agreed that the hourly rate was the major issue between them in negotiating terms and conditions of employment. Mr Smellie advised Mr O’Kelly-Barnes that he was concerned about the high wage bill and the low turnover in the restaurant. He said that he would have to further consider and discuss with his business partner the hourly rate for the head chef position. About a week or so after the interview, Mr Smellie formally offered the position of head chef to Mr O’Kelly-Barnes at an hourly rate of \$15. Mr O’Kelly-Barnes accepted the position on that basis.

[19] The restaurant was open for the period of Mr O’Kelly-Barnes’ employment for 4½ days a week from Tuesday to Saturday. There was a dispute about whether the restaurant was open for lunch on a Saturday as well as in the evening. Having heard the evidence from several witnesses, including Matthew Woodhouse who was employed on a part-time basis as a second chef at the restaurant in December 2004, I am satisfied that the restaurant was open for a trial period for lunch. It did not continue to be open for lunch on a Saturday, as I understand the evidence, after Mr O’Kelly-Barnes’ was appointed to the position of head chef. It was agreed that Mr O’Kelly-Barnes would work from Tuesday to Saturday each week.

[20] There are two disputes requiring resolution about what was discussed during the initial interview for the head chef position. Mr Smellie and Ms Tuhura could not recall any mention by Mr O’Kelly-Barnes that he was planning on doing his level 4 cookery course in 2005. Further, they did not accept Mr O’Kelly-Barnes’ evidence that he told Mr Smellie that he would not be able to work on Saturdays during the day because he was required to perform community service. Mr Smellie said that he only became aware of the fact that Mr O’Kelly-Barnes had to perform community service when the restaurant was not opened for lunch on the first Saturday Mr O’Kelly-Barnes worked.

[21] I find it more probable than not that Mr O’Kelly-Barnes did not clearly articulate to Mr Smellie at the initial interview that he intended to complete his cookery course in 2005. I am strengthened in that view by Mr Smellie’s surprised reaction at the meeting on 15 February 2005 when advised about the full-time study.

[22] Even if I am wrong in that conclusion, Mr O’Kelly-Barnes’ own evidence about what was said is insufficient to support that there was a concluded and binding agreement that he would be entitled to study in 2005 and continue on with his head chef role. Mr O’Kelly-Barnes said that there was no detailed discussion about what the study may entail in terms of time commitments. There was no meeting of the minds about the matter for me to conclude that agreement was reached and insufficient certainty about the terms of any agreement.

[23] I find in terms of the community service that it was initially intended the restaurant continued to be open for lunches on a Saturday. I think it unlikely, had that not been the case, that Mr O’Kelly-Barnes would have felt the need to make any mention of the community service.

[24] Regardless of how Mr Smellie became aware that Mr O’Kelly-Barnes would not be available on Saturdays, I am satisfied there was an accommodation made after his appointment as head chef and the restaurant opened for evening service only on a Saturday.

### *Conclusion*

[25] Mr O’Kelly-Barnes was employed as a full time head chef at Tillermans restaurant from Tuesday to Saturday each week at an hourly rate of \$15. There was no agreement reached that Mr O’Kelly-Barnes could study in 2005 and continue to undertake the head chef role.

## **What was discussed and understood as a result of the meeting of 15 February 2005?**

[26] Mr O’Kelly-Barnes advised Mr Smellie at this meeting of his study commitments for 2005. He told Mr Smellie that he would be undertaking full-time study and would not be able to work from 9am to 4.30pm on Tuesdays and Wednesdays. He advised Mr Smellie that a skilled worker would be required to cover the lunch time shifts for those days.

[27] Mr O’Kelly-Barnes would usually commence work during the week between 8 and 9.30am and put the ovens on. He would then work through until about 2.30pm when he would have some time off until 5pm when he would work the evening service until close. Two block courses were also required as part of the cookery course. Mr O’Kelly-Barnes told Mr Smellie that he could apply for recognised prior learning which he believed would count toward those courses.

[28] Mr O’Kelly-Barnes advised Mr Smellie that the course commenced on 7 March 2005.

### *Conclusion*

[29] There was agreement that the meeting on 15 February 2005 was about 20 minutes long.

[30] Mr Smellie told Mr O’Kelly-Barnes that combining study with the head chef role was not practicable. He advised him why he was of that view. It was clear from the evidence that Mr O’Kelly-Barnes was considered professional and competent in his head chef role.

[31] I think it likely that there was some discussion about part-time work but the evidence in my view does not go as far as to support that Mr O’Kelly-Barnes left the meeting agreeing to undertake a part-time role. If that had been the situation, then the letter handed to Mr O’Kelly-Barnes on 16 February 2005 would have been worded differently in terms of the option of part-time work.

[32] I accept that Mr Smellie genuinely believed that he had made it clear to Mr O’Kelly-Barnes that as the situation was unworkable, his employment as a full-time head chef would have to come to an end before his study commenced. On that basis, Mr Smellie decided to move quickly after the meeting on 15 February 2005 to obtain a replacement head chef. His brother, Timothy, suggested Mrs West with whom he had been having discussions about another position at Tillermans.

[33] Mr O’Kelly-Barnes was adamant that he could both study and perform his role. He knew that Mr Smellie was not happy with the proposal of combined study and the head chef role. The evidence does not support that he understood or agreed with Mr Smellie that his employment would have to be terminated following the meeting on 15 February 2005. I am not satisfied that Mr O’Kelly-Barnes left the meeting understanding that his employment as head chef would come to an end or indeed agreeing with Mr Smellie to termination of his employment.

## **How did Mr O’Kelly-Barnes’ employment end?**

[34] Mr O’Kelly-Barnes maintains that he was dismissed by virtue of the letter of 15 February 2005 handed to him on 16 February 2005. He says that the dismissal was unjustified because he was not told that he had a choice between study or work or that he was to be dismissed. He says that the process adopted was not that of a fair and reasonable employer in terms of [s.103A](#) of the [Employment Relations Act 2000](#).

[35] Tillermans say that Mr O’Kelly-Barnes’ employment was terminated by mutual agreement following the meeting on 15 February 2005 or by Mr O’Kelly-Barnes’ resignation effective from 28 February 2005.

### *Conclusion*

[36] I am not satisfied that the evidence supports a mutual agreement to terminate the relationship on 15 February 2005. Had there been such an agreement then I would not have expected Mr O’Kelly-Barnes to attempt to persuade Mr Smellie that work and study was possible when Mr Smellie handed him the letter of 15 February 2005 the following day.

[37] I find that the letter of 15 February 2005 effectively dismissed Mr O'Kelly-Barnes. Mr O'Kelly-Barnes then resigned before the expiration of the notice period. Notwithstanding this resignation, which Mr O'Kelly-Barnes explained was so he could find alternative employment, I find that Mr O'Kelly-Barnes' employment terminated at the initiative of Tillermans. I find that the resignation within the notice period on 28 February 2005 was in the nature of a constructive dismissal rather than a resignation.

### **Was Mr O'Kelly-Barnes' dismissal unjustified?**

[38] I am required to determine whether the dismissal was justifiable on an objective basis in terms of the test for justification set out in [s.103A](#) of the [Employment Relations Act 2000](#). This requires an objective assessment of what a fair and reasonable employer faced with a proposal by an employee to combine study and work would have done in the circumstances that existed for Tillermans at that time.

[39] A fair and open-minded employer would have considered the employee's proposal carefully in terms of the potential benefit to the employee and the business that further study brings. There would have also needed to be consideration of the needs of the business and the ability to

accommodate such study leave. A fair and reasonable employer would have given some consideration to other options.

[40] Mr O'Kelly-Barnes was a capable head chef. At the end of the year of study in 2005 he would have completed his professional cooking qualification. Mr Smellie wanted a head chef to be on the job full-time for cooking, organisation and managing all aspects of the kitchen, including stock takes and ordering produce. The study leave would mean that Mr O'Kelly-Barnes would not be available for Tuesday and Wednesday lunches and possibly for periods when he completed block courses, if he could not obtain exemptions from the courses. It was a change to the original terms and conditions of his engagement. Tillermans had had an unsatisfactory situation with a previous chef combining study and work. The proposal would require Tillermans to hire another skilled worker to cover two shifts.

### **Determination**

[41] I find that a fair and reasonable employer in the circumstances of Tillermans would conclude that it required a head chef to be available to work 4½ days which included Tuesdays and Wednesdays. Mr O'Kelly-Barnes was proposing a variation to the terms and conditions of his employment. Tillermans turned its mind to the logical option of part-time work for Mr O'Kelly-Barnes. This was ultimately not acceptable to Mr O'Kelly-Barnes. I am of the view that the dismissal was substantively justified.

[42] In terms of procedural fairness I find when objectively assessed, a fair and reasonable employer would have considered separately the request or proposal for study leave and then turned to the consequences if that proposal was not accepted. In my view, there is a difference between consideration of a proposal and the consequences that may then flow if that proposal is unsuccessful.

[43] Mr O'Kelly-Barnes put his proposal to combine study and work to Mr Smellie. That proposal was not accepted. Fairness required Mr O'Kelly-Barnes to be clear that his employment was in jeopardy if he undertook the study leave. I have not found it was clear to Mr O'Kelly-Barnes on 15 February 2005 that his employment would be terminated. He was then handed a letter on 16 February 2005 and was advised Mrs West was to be the new head chef. That was procedurally unfair.

[44] On this basis, I find that Mr O'Kelly-Barnes' dismissal was unjustified. Mr O'Kelly-Barnes has a personal grievance that he was unjustifiably constructively dismissed.

### **Remedies**

#### *Contribution*

[45] I have considered the issue of contribution as I am obliged to do under [s.124](#) of the [Employment Relations Act 2000](#). I do not find in this case that Mr O'Kelly-Barnes contributed towards the procedural failure by Tillermans that I have found.

## *Loss of remuneration*

[46] Mr O’Kelly-Barnes claims lost remuneration for a 13 week period less earnings in the sum of \$6,627.

[47] Mr O’Kelly-Barnes is entitled to reimbursement of this sum equal to the whole or any part of the wages or other money lost by him as a result of his grievance. I have found his dismissal was unjustified on a procedural basis but in my view his employment as full-time head chef would have inevitably terminated in any event when he commenced studying on 7 March 2005. Mr O’Kelly- Barnes could have continued working at Tillermans until that date.

[48] In these circumstances, I make no order for reimbursement of lost wages claimed.

## *Compensation*

[49] Mr O’Kelly-Barnes gave evidence of the hurt he felt when he was dismissed and the financial difficulties he found himself in. He seeks \$10,000 under [s.123\(i\)\(c\)\(1\)](#) of the [Employment Relations Act 2000](#).

[50] Mr O’Kelly-Barnes takes his career very seriously and felt he had a senior role at Tillermans which gave him credibility in the industry. Much of the evidence about hurt and humiliation was with respect to Tillermans not accommodating him by enabling him to study full time and retain his full time head chef role. I have found that was a justified decision that Tillermans could make. The procedural unfairness I have found is the failure of Tillermans to advise Mr O’Kelly-Barnes clearly that his employment was in jeopardy before he was dismissed.

[51] I am of the view that Mr O’Kelly-Barnes is entitled to an award for that procedural unfairness as he was upset about the contents of the letter and surprised about his replacement appointment. It should be a moderate award in the circumstances of this case.

[52] I order Tillermans (2003) Limited to pay to Terrance O’Kelly-Barnes the sum of \$1,000 compensation without deduction under [s.123\(i\)\(c\)\(1\)](#) of the [Employment Relations Act 2000](#).

## **Costs**

[53] I reserve the issue of costs. I would encourage the parties to reach agreement with respect to costs. If agreement is unable to be reached, then the applicant has 21 days from the date of this determination to lodge and serve submissions as to costs and the respondent has a further 21 days to lodge and serve submissions in reply.

Helen Doyle

Member of Employment Relations Authority