

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 105/09
5115489

BETWEEN STEPHEN PATERSON
 Applicant

AND ALAN ROBERTS t/a
 ROBBIE'S CRANFORD
 Respondent

Member of Authority: Paul Montgomery

Representatives: Robert Thompson, Advocate for Applicant
 Alan Roberts in person

Investigation Meeting: 4 February 2009 at Christchurch

Submissions received: 25 February 2009 from Applicant
 4 March 2009 from Respondent

Determination: 17 July 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Paterson, prior to accepting employment with the respondent, had been employed at a Robbie's franchised bar and bistro in another suburb of Christchurch. He says he began working at Robbie's Bar in Cranford Street, a business owned by Mr Roberts and his wife, Neroli, on or about 3 November 2007. Mr Paterson says he was unjustifiably dismissed from his role of Site Manager on 7 January 2008.

[2] He seeks lost wages, compensation for hurt and humiliation in the sum of \$15,000 and costs.

[3] Mr and Mrs Roberts deny the dismissal was unjustified and further, that Mr Paterson agreed to leave his position and agreed to the terms offered to him at the time. Accordingly, the respondent declines to grant the remedies the applicant seeks.

Background facts

[4] Mr Paterson had worked at Robbie's Lancaster for a considerable time as a chef when he was approached by Mr Roberts who was searching for a Site Manager for his Cranford Street operation. The two men met for an interview and, as a result, Mr Paterson was hired for the role. He started as a chef on a part time basis on 3 November 2007 as he worked out his notice at Robbie's Lancaster. He began his full time Site Manager role on Monday, 26 November 2007.

[5] As the role of Site Manager was quite different from Mr Paterson's chef duties and kitchen management experience, Mr Roberts had Ms Suzanne Grose, the Site Manager at Robbie's Barrington, to come to Cranford Street to train the applicant in the role. Mr Reon Hoare, who was the Franchise Manager for the Robbie's Group and General Manager of three operations, one of which was Cranford, was also available to assist in training.

[6] Ms Grose was to spend a week full time on Mr Paterson's training. However, at the end of that week, Ms Grose reported to Mr Roberts that the applicant was unlikely to make the grade as he seemed slow to grasp procedures and she needed to go over the same things with him a number of times. Of concern to her was Mr Paterson's apparent inability to follow instructions accurately. Mr Roberts asked her to persist for a further week. In fact she remained on the Cranford site for four weeks. Ms Grose told the Authority after that time recurring mistakes were still common.

[7] Mr Paterson accepts he made some errors. However, he says he was confident he would succeed in the role. His view is that Ms Grose was *not a helpful trainer*.

[8] Prior to Christmas, Mr and Mrs Roberts discussed the situation which they saw as unsatisfactory, but deferred a decision until the New Year. Mrs Roberts said *as Christmas was looming I agreed to take no action until after Christmas/New Year 2007/2008. This decision cost me dearly with loss of regular bar trade.*

[9] The parties agree a meeting was arranged and took place on 7 January 2008. Mr Roberts says it was *an amicable discussion for over an hour which in summary I explained a mistake had been made over his employment as a manager but that he could work on with the company as a chef. Mr Paterson declined this so I said I would like to work out an agreement with him to terminate his employment.*

[10] Mr Paterson said the meeting was *about 10 minutes*. He also said he had no knowledge of what the meeting was about prior to it being convened. He also told the Authority that after discussing what would be paid, Mr Roberts asked the applicant to get a pad from the kitchen. Mr Paterson did so and on it the pair recorded the various payments agreed between them. This included 100 hours Mr Paterson had worked in excess of his regular hours, 18 hours to be paid in Bartercard dollars, one week's wages through until 9 January 2008 and finally one week in lieu of notice through to 16 January 2008. Both Mr Roberts and Mr Paterson signed this.

[11] Mr Roberts put before the Authority a note sent to the payroll person which set out the above details and also lists the holiday pay due to Mr Paterson since he joined the business at Robbie's Cranford. Owing to a miscalculation, the sum paid into Mr Paterson's account was short. Having received notice of the payment, Mr Paterson wrote to Mr and Mrs Roberts. The letter says:

Dear Alan/Neroli,

My wages for period ending 10 1 08 were short approx 16 hours. Could you please credit my bank account this Thursday. The deal was 100 hours owing, one 40 hr week ending 9 1 08 and one 40 hr week ending 16 1 08.

*Thank you.
Steve Paterson*

[12] The shortfall was rectified promptly once it had been pointed out to the respondent.

The issues

[13] To resolve this employment matter, the Authority needs to make findings on the following issues:

- Was the applicant's employment subject to a trial period; and
- What was the basis on which the dismissal took place; and
- Was the applicant unjustifiably dismissed; and
- If so, what remedies are due to him; and

- Did the applicant contribute to the circumstances giving rise to his dismissal?

The test

[14] The test of justification is set out in s.103A of the Employment Relations Act 2000 and its amendments.

The question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The investigation meeting

[15] At the investigation meeting, the Authority was assisted by evidence heard from the applicant. For the respondent, evidence was presented by Mr and Mrs Roberts, Mr Hoare and Ms Grose. All witnesses were open and direct in their response to questions from the Authority and from each representative and I appreciate the manner in which all concerned conducted themselves.

Discussion and analysis

Trial period

[16] There is a conflict between the parties as to whether Mr Paterson's employment was governed by a trial period. Although Mr Paterson said nothing about this in his written statement of evidence, the matter was raised at the investigation meeting. When I asked him a number of questions in respect of the agreement, the applicant told me he could not recall a trial period in the discussions he had had with Mr Roberts, and there was no discussion about it at the time the agreement was signed. Mr Roberts pointed the Authority to clause 8 which is headed *Trial Period*. The sections relevant are set out below:

- 8.1 *The employee shall be employed on a trial basis, normally for a period of no longer than two months. At the discretion of the employer, after discussion with the employee, this period may be extended.*
- 8.2 *Where the conduct or performance of the employee on the trial period is jeopardising their continued employment, the employer shall advise the employee specifying the area of dissatisfaction, the improvement required, and the period of*

time by which that improvement is to be achieved. If the desired improvement is not forthcoming, the matter should be dealt with in terms of clause 8.3.

8.3 *In all cases the right of the employer to dismiss an employee for serious misconduct shall remain.*

[17] I think it fair to say that while Mr Paterson may not have recalled any discussion on the matter of the trial period, the document he signed, the standard Robbie's Bar and Bistro individual employment agreement, satisfies me that the employment was governed by a trial period clause.

[18] However, it would appear that the respondent has failed in its obligations to the applicant in respect of the process set out in clause 8.2. While the link between clause 8.2 and its reference to clause 8.3 appears somewhat enigmatic, I am satisfied that clause 8.2 establishes a process which the employer was bound to follow prior to considering dismissal.

Reason for the dismissal

[19] In his written statement of evidence, Mr Paterson says:

I was not aware that this was some form of settlement. I was only aware that this was a termination of my employment. There was no discussion of redundancy or that I was being made redundant.

[20] I am unsure whether the concept of redundancy has arisen because, on the face of the evidence before the Authority and even that of Mr Paterson himself at para.4 of his statement of evidence, it is abundantly clear that it was his failure to measure up to the role as Site Manager which was the ground on which the termination of employment occurred. Mr Paterson says:

The respondent made it clear that I was not seen as a capable manager, and that my position was being terminated because of my performance. I felt I had no alternative other than to write down what the respondent was saying. It was clear to me that I had no say in my leaving and this was my best chance of receiving some money. I felt if I refused or got upset that I would be left without any money or a job.

Accord and satisfaction?

[21] The respondent's position is clearly that the meeting and the discussion with Mr Paterson on 7 January 2008 was, in its mind, to terminate the employment on agreed terms. Mr Roberts told the Authority the 100 hours offered to Mr Paterson

were hours for which he was not entitled to payment as he was a salaried not a waged employee. From this I take it Mr Roberts saw the offer to pay the applicant for overtime worked in spite of Mr Paterson's lack of entitlement, constituting a component in the settlement arrangement. The sum involved was \$2,163 gross or the equivalent of 2½ weeks work.

[22] In his letter to Mr and Mrs Roberts, Mr Paterson referred to *the deal*, referring to the document he and Mr Roberts had signed off on the day of the discussion. In his evidence, he says, *I was not aware that this was some form of settlement. I was only aware this was a termination of my employment.*

[23] From the evidence in front of the Authority, it appears Mr Paterson did not protest the respondent's curtailing of his employment in the role of Site Manager. It is clear he declined to accept work as a chef but neither party refers to any debate between the two regarding the termination itself. The applicant's position that he had no say in his leaving and that this was his best chance of receiving some money, is not particularly convincing. I found Mr and Mrs Roberts to be open and honest when outlining what they did and how the situation was handled. Again on the evidence, I think it is more probable than not that, for the reasons Mr Paterson outlined in his evidence, he accepted *the deal* because *I felt if I refused or got upset that I would be left without any money or a job.*

[24] Further, I am of the view that Mr Paterson's letter to Mr and Mrs Roberts pointing out a shortfall of some 16 hours was a courteous one and without any reference to unfairness on behalf of his former employer. It was simply drawing to the respondent's attention that part of *the deal* had not been met and asking for this to be addressed. It was addressed, and promptly.

[25] I think, on the balance of probabilities, Mr Paterson accepted *the deal* as the best that could have been managed in the situation and consequently signed off the document.

The determination

[26] Returning to the issues set out above in this determination, I find:

- The applicant's employment was subject to a trial period; and

- The ground for the dismissal was for lack of performance in the role of Site Manager; and
- The respondent failed to meet its obligations as set out in clause 8.2 of the employment agreement. This failure and the failure to advise the applicant of the purpose of the meeting on 7 January 2008 deprived him of the opportunity to prepare adequately or to be on notice his job was at risk and why; and
- There was accord and satisfaction between the parties at the time. However, the procedural deficiency needs to be addressed in a remedies setting; and
- The applicant did not contribute to the procedural difficulties; and
- It was virtually inevitable the employment of the applicant as Site Manager would end given the respondent's considered view of his performance in that role.

Remedies

Lost remuneration

[27] As I have found the dismissal unjustified on procedural grounds but substantively justified, the applicant's claim for lost remuneration becomes a little complex. The Court of Appeal in *Waitakari City Council v. Ioane* [2004] 2 ERNZ 200 addressed this issue in the decision of Young J (as he then was) expressing the position in this way:

[22] *I agree with the judgment of Anderson P but wish to add comments about the approach which should be adopted for the assessment of compensation in cases where a dismissal is held to have been unjustifiable on procedural grounds.*

[23] *It is likely, to say the least, that a fair process would have resulted in Mr Ioane's justifiable dismissal ...*

[24] *If a fair process would unquestionably have resulted in Mr Ioane's justifiable dismissal, the Council's "unfair" process was not causative of any significant loss of remuneration.*

[25] *If such an outcome (i.e. unjustifiable dismissal) was likely but not inevitable some conceptual difficulty arises.*

[26] *I favour a loss of chance approach in this situation. This would recognise the possibility or probability of justifiable dismissal among the contingencies which would have affected Mr Ioane's likely future employment had he not been unjustifiably dismissed.*

[28] Complicating the matter in the instant case is the genuine offer made to Mr Paterson by the respondent of a position as chef for which the applicant was eminently well qualified. As noted above, the applicant declined this offer.

[29] Standing back and viewing this aspect of the case, I am of the view, even had the respondent fulfilled its procedural obligations, and in the light of the applicant declining alternative employment with the respondent, the probability of termination was exceptionally high. In view of these particular circumstances, I decline the applicant's claim for remuneration lost as a result of the grievance. In doing so I have given weight to the 100 hours paid to the applicant as a gratuity to which he was not contractually entitled.

Compensation

[30] In spite of hearing no corroborative evidence from other witnesses, the Authority accepts Mr Paterson suffered considerable upset at the dismissal. That however, needs to be balanced by the fact that he knew or ought to have known his retaining of the role of Site Manager was contingent on him performing to an adequate standard in the course of the trial period. Further, Mr Paterson declined the opportunity of ongoing employment in a different role with the respondent which would have mitigated his loss to a considerable extent.

[31] Weighing the evidence in the case-specific context, and in the light of Mr Paterson's loss of opportunity to prepare and argue a case for his retention in the role of Site Manager, I award the applicant the compensatory sum of \$1,000 without deduction.

Costs

[32] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority