

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 108/07
5081813

BETWEEN SARAH PATTERSON
Applicant

AND AVALON LIMITED T/A
ROSEBANK WINERY
Respondent

Member of Authority: Philip Cheyne

Representatives: Jeff Goldstein, Counsel for applicant
Respondent not present

Investigation Meeting: Friday 31 August 2007 at Christchurch

Determination: Friday 31 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sarah Patterson worked for Avalon Limited from late 1999 until March 2007. Avalon Limited operated a business called Rosebank Estate Winery and Ms Patterson worked there in the kitchen. There are two aspects to Ms Patterson's employment relationship problem. First, she says that the circumstances of the termination of her employment amount to an unjustified dismissal. The dismissal was preceded by a suspension also said to give rise to a personal grievance. The second aspect of the problem is her claim for arrears of wages being holiday pay.

No appearance by the respondent

[2] The respondent lodged a statement in reply but shortly before the directions conference counsel advised that he was no longer instructed to act following the death of one of the company's principals (Bryan Allison), the closure of the business and steps being taken to wind up the company's affairs. Mark Allison participated in the

directions conference for the respondent during which he indicated that the affairs of the business were such that the respondent might not appear or be represented at the investigation meeting scheduled during the conference.

[3] As foreshadowed, there was no appearance for the respondent at the investigation meeting. While its business is apparently no longer open, the company is not in liquidation or receivership. I am satisfied that the notice of meeting was properly served on the respondent. There being no good cause shown for the respondent's failure to appear, I decided to continue with the investigation.

Personal grievance

[4] I heard evidence on oath from Ms Patterson.

[5] On or about 6 March 2007 Ms Patterson was at work. She used the work telephone having sought permission from the sous chef. That resulted in her being criticised by Mrs Allison who said that the staff, mostly Ms Patterson, were using the phone a lot, that other staff were complaining about her and that Mrs Allison was getting sick of it. Ms Patterson became upset but left the workplace since her shift had finished.

[6] Later, Ms Patterson contacted the chef who told her she was suspended. This message was apparently also given to Ms Patterson's partner who was also told that Ms Patterson was not wanted back at work by Mr & Mrs Allison.

[7] Ms Patterson's solicitor wrote to Mr Allison on 8 March 2007 within a day or so of these events raising grievances about the suspension and apparent dismissal as well as holiday pay issues and requesting time and wage records. On or about 16 March 2007 a response was received with a payroll report for the entire duration of Ms Patterson's employment and the comment *I welcome a hearing at the "Disputes Tribunal" to discuss the so called allegations*. There was no attempt to say that Ms Patterson had not been dismissed.

[8] Later, there were attempts to have the issues resolved through mediation but several scheduled meetings had to be abandoned apparently due to various intervening events affecting the respondent. These proceedings were then lodged. Later, the respondent sent Ms Patterson a cheque partly resolving her holiday pay claims. I should note that during the directions conference I determined that a direction to

mediation would not contribute constructively to resolving the matter so the investigation meeting was scheduled.

[9] I find that the circumstances of the suspension, the other communications from the chef and the respondent's failure to take any steps to have Ms Patterson resume work amount to a sending away of Ms Patterson at the respondent's initiative. That dismissal is without any justification so Ms Patterson has a personal grievance. It is not necessary to deal separately with the claimed grievance arising from the suspension but that too could hardly be justified.

[10] There is a claim for \$20,000.00 compensation for distress arising from the grievance. Ms Patterson worked for more than 6 years for the respondent. She was upset by Mrs Allison's attitude to her use of the phone but devastated at the time by the unwarranted suspension, the accompanying message that Mr & Mrs Allison had wanted for some time to be rid of her and the dismissal. Ms Patterson still feels strongly about these events and attributes a worsening of a long term health problem to the stress and upset caused by the dismissal. The last point is not established by expert evidence but I accept that Ms Patterson probably has been more affected by these events than others might be because of her pre-existing health problem. Accordingly, I order the respondent to pay her compensation of \$10,000.00.

[11] There is a claim for lost remuneration limited to the period from the dismissal to when Ms Patterson commenced alternative employment in late April 2007. The subsequent employment was very brief but counsel accepted that there is not sufficient evidence to attribute to the grievance the loss arising after the subsequent employment. I order the respondent to pay compensation for lost remuneration of \$1,460.85. That is based on Ms Patterson's average weekly wage during the preceding year which is a fair measure of what she would have earned but for the dismissal.

[12] Ms Patterson did not contribute to the circumstances giving rise to the grievance.

Arrears of holiday pay

[13] Ms Patterson never had a written employment agreement. She worked briefly in December 1999 but regularly from October 2000. On reflection these should be treated as discontinuous period of employment. The obligation to pay holiday pay in

respect of this work arose when the employment ended in December 1999. Recovery proceedings had to be initiated within 6 years of December 1999 but these proceedings were lodged in June 2007. It follows that there can be no claim for any unpaid holiday pay for the December 1999 work.

[14] The work from October 2000 to March 2007 was continuous during which Ms Patterson worked in accordance with the respondent's roster. She was never paid any holiday pay and was not granted any paid holidays during this period. As mentioned above the respondent has paid her \$1927.20 since these proceedings were initiated, apparently for holiday pay. There is an admission in the statement in reply that holiday pay of \$ 2,418.00 was then owing so the difference is presumably PAYE tax. I will therefore treat the respondent as having paid \$2,418.00 in holiday pay.

[15] The gross earned from October 2000 until the dismissal was \$55,978.81 so holiday pay should have been \$3,358.73. That leaves \$940.73 in holiday pay still owing.

[16] The entitlement to this holiday pay has accrued from October 2000. However, because holidays were not granted, Ms Patterson had an entitlement to be paid all her holiday pay when her employment was terminated in March 2007: see sections 24 and 25 of the Holidays Act 2003.

[17] There is a claim for payments related to work on statutory holidays during the employment. The Holidays Act 2003 provides for employees to be paid at least half time extra for work on any statutory holiday on or after 1 April 2004. Ms Patterson worked on Easter Monday and Anzac Day in 2004; 3 January, Anzac Day and Boxing Day in 2005; and January 2 & 3 in 2006. That is a total of 41½ hours for which she was only paid at ordinary time rates. Ms Patterson was entitled to half time extra under the Holidays Act 2003 for her work on those days, a total of \$238.63.

[18] Under the Holidays Act 2003 (as with the Holidays Act 1981) employees are entitled to a lieu day or paid alternative holiday if they work on a statutory holiday. I accept that there are a total of 84¾ hours worked by Ms Patterson on such statutory holidays since October 2000. Accordingly, at the termination of her employment Ms Patterson should have been paid \$974.63 for the lieu days or alternative holidays that were not taken during the employment.

Orders

[19] Pursuant to section 123 (1) (c) (i) of the Employment Relations Act 2000, Avalon Limited is to pay Ms Patterson \$10,000.00 in compensation.

[20] Pursuant to section 123 (1) (b) the Employment Relations Act 2000, Avalon Limited is to pay Ms Patterson \$1,460.85 in compensation.

[21] Pursuant to section 131 of the Employment Relations Act 2000, Avalon Limited is to pay Ms Patterson \$2,153.99 in arrears of holiday pay.

[22] The holiday pay should have been paid when the employment was terminated and Ms Patterson is now entitled to interest on the sum owing at the rate of 10% commencing on 8 March 2007 until the holiday pay is paid in full.

[23] Costs were sought. I order Avalon Limited to pay costs of \$750.00.

P Cheyne
Member of the Employment Relations Authority