

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Graham Murray Perry (Applicant)
AND The Combined Services Club Twizel (Inc) (Respondent)
REPRESENTATIVES Quentin Hix, Counsel for Applicant
Richard Smith, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 14 February 2006
15 February 2006
DATE OF DETERMINATION 9 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Graham Perry was employed as the manager of the Combined Services Club Twizel Incorporated from August 2004 until his employment ended on 19 November 2004. Mr Perry says that he was actually or constructively dismissed as a result of two brief exchanges between himself and the Club's President and Vice-President on that day. The Club says that Mr Perry resigned, he was then asked to finish up later that day and was paid in lieu of the notice period. Only Mr Perry, Bob Robson (Club President) and Ian Graham (Club Vice-President) could have heard their exchange and their recollections differ. It will be necessary to resolve that difference.

[2] There was considerable evidence about what others believed was said by the three participants. I do not intend to canvass all that evidence. By and large, the different views are strongly influenced by where the holders stand in relation to a broader dispute between Club members. There was also evidence about that dispute but that too need not be canvassed. What can be said is that Mr Perry did not take, nor was he accused of taking, sides in the dispute that arose within the Club before his appointment.

[3] It will be helpful to an understand of what was said and done on 19 November 2004 to briefly describe some background matters, including relevant terms of the employment.

Mr Perry's employment

[4] The previous manager's employment ended in disputed circumstances although I do not need to be concerned with those details. However, the Club suffered a loss of patronage, faced financial difficulties and endured changes in the Executive positions. The Club sought a replacement

manager with the experience and ability to turn that situation around and found that person in Mr Perry. An employment agreement was entered into effective from 2 August 2004. Under the agreement, Mr Perry reported to the Club President rather than the whole of the Executive. It provided for its termination by four weeks' notice in writing. The salary was \$39,000 per year and the hours of work were ... *such hours as are required to maintain the smooth function of the Club*. Both parties acknowledged the need for flexibility in the hours to be worked and agreed that the employee's hours may be varied. In practice, the position was a hands-on management role that included bar service and customer interaction, stock ordering and control, staff management, gaming machine monitoring, reporting to trustees as required and general management.

[5] Both Mr Perry and Mr Robson enjoyed a positive working relationship. In evidence there was some criticism about Mr Robson's allegedly sporadic and informal attention to Mr Perry's work and the management of the Club, but I do not accept this was an issue during Mr Perry's employment or that it contributed to its termination. However, one issue did arise that must be canvassed in more detail.

Mr Perry's hours of work

[6] Mr Perry did the rostering and had to ensure that there were sufficient staff rostered to provide service at busy times but that the wages bill overall remained within budget. As part of the rostering, Mr Perry marked himself at several busy times as on the *floor*. That was time which he included in his working week, socialising in the bar with Club members but helping out the rostered bar staff if necessary by clearing glasses and ashtrays, tending to the gaming machines or serving.

[7] There is a dispute about the circumstances in which Mr Robson learned of this practice and what he did about it. Mr Perry says that he was told by a Club member (John Wells) that Mr Robson had gone behind the bar, picked up the roster, taken it back to a table in the bar and had a conversation with others about the *floor hours* indicating that Mr Perry would get a serious reprimand. John Mackay was a full-time barman at the Club and is now its manager. He told me that Mr Robson asked for a copy of the roster on a Wednesday, a week or two before 19 November 2004. Mr Robson took the roster away and Mr Mackay did not hear or see Mr Robson talking with others about it. There is no reason to doubt Mr Mackay's evidence. Mr Robson said that he heard Karen Perry (Mr Perry's wife) saying that her husband was working up to 70 hours per week so he went to the Club and asked Mr Mackay to give him a copy of the roster which he took away. That accords with Mr Mackay's evidence and I see no reason to doubt Mr Robson's evidence on this point.

[8] At the time, Bruce White was a Club member assisting the Club Executive on employment relationship matters and was on the Club's Disputes Committee. Mr Perry told him on 15 November 2004 that he wanted to have a discussion with him, which they had on Wednesday 17 November at Mr Perry's home. There, Mr Perry told Mr White that Mr Robson was picking on him over the *floor hours* issue. Mr Perry said there were some other matters about the Club that he was not happy with and if they were not sorted out, he would be resigning from his position as Manager. Mr White's advice was to arrange a meeting with Mr Robson to talk about these matters. Mr Perry does not entirely agree with Mr White's evidence. He denies saying that Mr Robson was picking on him, but agrees that Mr White told him that resigning would not fix anything and that he told Mr White that he would not hurt the Club by taking a claim against it. That was a reference to the previous manager. Mr Perry says he told Mr White that he would look at resigning, not that he would actually resign. On that last point, Mr Perry's evidence mirrors his evidence about his later exchange with Mr Robson. However, I prefer the evidence of Mr White over Mr Perry on the point. The other differences between them are insignificant.

[9] On Thursday, 18 November, Mr White told Mr Robson about this conversation. In return, Mr Robson said that there were some issues that he had about the management of the Club and he showed Mr White a draft letter setting out those issues. Earlier, on Tuesday 16 November, Mr Robson had consulted Marty Gerken about these various issues and Mr Gerken had prepared the draft letter. Mr Gerken was a Club member who had been assisting the Executive on financial issues. The letter itself was printed onto Club letterhead by the Secretary/Treasurer (Julie Lousley) and circulated to the three trustees to sign. That version is dated 16 November 2004. It was not delivered to Mr Perry because the following events of Friday 19 November occurred before Mr Robson could do so. Mr Perry knew nothing of the letter until later.

Friday, 19 November 2004

[10] Mr Perry went to work as usual. About 10.30am Mr Robson and Mr Graham (Vice President) arrived at the Club. Mr Robson had been talking to the Police about an unrelated Club matter and he and Mr Perry had a brief non-contentious discussion on that point. Mr Perry then seized the opportunity to speak about his concern over the *floor hours* issue. By this time, the three men were in the office and no one else overheard the exchange. However, there is only one significant difference in the evidence. Mr Perry said something like *I believe you are not happy with my hours that are being worked*. Mr Robson confirmed that and Mr Perry asked him why. Mr Robson said they were not going to pay for the *floor hours*. Mr Perry asked *you mean you are not going to pay me for the floor hours?* Mr Robson confirmed that by saying *definitely not* or something similar. Mr Perry's evidence is that he said *I'll have to look at resigning*. Mr Robson's and Mr Graham's evidence is that he said *in that case I resign and give you one month's notice* or something similar. They both say that Mr Robson accepted the resignation and they left. Mr Perry says that they left without any acknowledgment of his comment about looking at resigning.

[11] Mr Perry rang his wife almost immediately. Phone records show that the call was made at 10.31am. Shortly after that call ended, Mr Perry rang to speak with Mr Gerken but had to leave a message. Phone records show that call at 10.38am. Maureen Coudret was the Club cleaner. She was at the Club on Friday morning and her evidence is that Mr Perry came out of the office first, said to her *I've been sacked* and appeared upset. She says that she left the Club about 11am.

[12] Mrs Coudret's evidence must be wrong. Mr Perry does not claim to have been dismissed during the 10.30am discussion. His claim is that he said he would have to consider resigning. Nor is there any suggestion that Mr Perry told Mrs Perry of a dismissal during their phone call at 10.31am. There is also evidence from Ida Cade who says that Mr Perry told her at about 11am or just after of his dismissal. Her evidence must also be wrong for the same reasons.

[13] After the 10.30am exchange, Mr Robson and Mr Graham went to see Mr White. They told him that Mr Perry had given notice of resignation and he told them that normal business practice was to have Mr Perry finish work that day but to pay him for the duration of the notice period. Mr Robson and Mr Graham then went to Mrs Lousley's house to ask her to have the pay made up. They told Mrs Lousley that Mr Perry had resigned. Mr Robson and Mr Graham then returned to the Club where they had a second exchange with Mr Perry.

[14] There is no significant dispute about what was said during the second exchange. Mr Robson told Mr Perry that they wanted him to finish work that evening and would pay him for the duration of the notice period. Mr Robson asked Mr Perry to put his resignation in writing and Mr Perry agreed to do so. Mr Perry accepts that he agreed to do this and that he did not then dispute the suggestion that he had resigned during the 10.30am exchange. There was also a brief discussion where Mr Perry asked about his final pay and Mr Robson confirmed that the payment would be

made. Mr Robson and Mr Graham left and Mr Perry then phoned Mrs Perry for a second time. That call was made at 11.23am.

[15] In general, Mrs Perry's evidence about what was said by Mr Perry during the two phone calls supports Mr Perry's account of events. However, it is not very helpful in resolving the dispute about the 10.30am discussion because her account is hearsay and she and Mr Perry will naturally have spoken frequently with one another about these events since they occurred. However, I do accept Mrs Perry's evidence that Ida Cade arrived at her house about 10 minutes after the 11.23am call. That means that Ida Cade was spoken to by Mr Perry shortly after the second discussion with Mr Robson and Mr Graham. The same might also be true of Maureen Coudret although her evidence more emphatically places her discussion with Mr Perry immediately after the 10.30am exchange. However, neither Maureen Coudret or Ida Cade claim to have actually overheard the disputed 10.30am exchange.

[16] Mrs Lousley arrived at the Club at about 1pm to attend to the wages. She too asked Mr Perry to provide his resignation in writing and I accept her evidence that Mr Perry agreed to do this. Mr Perry accepted there was no reason for her to be untruthful, she made the request independently of Mr Robson and Mr Graham and it is likely that he gave her the same answer as he had given them about 1½ hours earlier. Mrs Lousley wrote out a cheque for Mr Perry's final pay based on the figures supplied by him and she later deposited it into his account in accordance with his request. At about 1.30pm, Mrs Lousley phoned Mr Gerken to ask him to get a tax table booklet from the IRD in Timaru, Mr Perry saying that the booklet at the Club was his and he would be taking it with him at the end of the day. Mrs Lousley told Mr Gerken that Mr Perry had resigned. Mr Gerken then spoke directly to Mr Perry in response to the message left earlier in the morning by Mr Perry. The discussion between the two men was on the basis that there had been a resignation. By the time of this discussion, Mr Perry had already spoken to John Wells who later told other Club members that Mr Perry had been dismissed, a claim that must derive from Mr Wells' discussion with Mr Perry. However, Mr Perry did not suggest in evidence that he made the dismissal claim to Mr Gerken in their 1.30pm discussion.

[17] In the way of these things, word got around quickly about the termination of Mr Perry's employment. Mr Perry finished his duty at about 4pm and went home. At Mrs Perry's insistence, she and Mr Perry went to the Club that evening for a drink. Even by that time, plenty of Club members had heard second or third hand about events. Discussions between various people culminated in a meeting on Saturday morning and a demand supported by 28 members calling for a special Club meeting to obtain ... *a vote of no confidence in the current Committee because of the inept handling of Mr Perry's position.*

[18] As it happened, there was a regular meeting of the Club Executive on Sunday, 21 November 2004. An Executive member presented a petition to the meeting. Mr Perry had confirmed to the Saturday meeting that he was prepared to be reinstated if the no confidence vote was carried and that was said to the Executive. However, the Executive or the trustees did not call a special meeting. Whether that refusal is consistent with Club rules is not material for present purposes. During the Executive meeting, Mr Robson read out the 16 November letter referred to above. Any report on this to Mr Perry would have been the first he knew about the trustees' intention to raise with him the various issues mentioned in the letter with the exception of the *floor hours* issue.

Resignation or dismissal?

[19] I am satisfied that the account of the 10.30am exchange given by Mr Robson and Mr Graham is substantially correct. If Mr Perry had just indicated an intention to consider resigning, as now claimed, he could easily have said that during their second exchange less than an hour later.

Alternatively, he could have said that to Mr Gerken early in the afternoon during their phone conversation or to Mrs Lousley. Mr Perry's admitted actions are not consistent with his version of the 10.30am exchange which I reject. On the other hand Mr Robson's and Mr Graham's actions are consistent with their version of the disputed exchange.

[20] It is necessary to consider whether the resignation amounts to a constructive dismissal. The three most common types of constructive dismissal are where the employee is given a choice between resigning and being dismissed; where the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or where a breach of duty by the employer leads the employee to resign: see *Auckland ETC Shop Employees Etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963. There is no suggestion in the present case that Mr Perry was told to resign or be fired. That leaves the remaining categories to consider.

[21] I am satisfied that the Club did not embark on any course of conduct to procure a resignation. The 16 November letter is evidence about the Club's intentions at the time. It must be remembered that Mr Robson, Mr Graham and Mr Perry were all relatively new to their respective roles. The letter deals with a number of points about their working relationship and invites a discussion. The tenor of the letter was essentially forward-looking, setting a framework for a closer working relationship between Mr Perry and the Executive. The text and tone of the letter establishes that Mr Robson and Mr Graham intended the employment relationship to continue rather than end.

[22] That leaves the breach of duty category. The argument for Mr Perry is that Mr Robson should have dealt with the *floor hours* issue more carefully since he knew it was an important issue for Mr Perry. Mr Robson intended to raise the matter as one of the issues for discussion in the letter which reads:

We consider the 'floor' hours you show on the roster are not valid working hours and do not constitute part of your working week. While socialising (including drinking) is important it cannot be done whilst under paid employment. The ramifications under the Occupational Health and Safety, Employment and Licensing Acts would be very severe for both the Club and yourself. When setting future rosters we request you remove the 'floor' hours from your paid working week.

That does not support the claim of breach of duty. However, the actual exchange on the point was driven by Mr Perry. In response to Mr Perry, Mr Robson made it clear that the Club did not intend to pay Mr Perry for time spent socialising. That was not a threat to cut Mr Perry's pay and Mr Perry knew that his salary could not be changed without his agreement. It was simply a statement from the Club's perspective that time spent socialising could not be counted as part of Mr Perry's working week. Neither Mr Robson's approach nor the Club's view amount to a breach of any obligation owed to Mr Perry. Mr Robson and the Club were acting within the terms of the employment agreement. Accordingly, there was no constructive dismissal.

[23] I was referred to *Boobyer v Good Health Wanganui Ltd*, unreported, Goddard CJ, 24 February 1994, WEC3/94. The present case falls squarely within the first category mentioned in *Boobyer*. Mr Perry's resignation was unequivocal. It was argued that Mr Perry's words formed part of an emotional reaction and that Mr Robson should have given him a chance to cool off and reconsider. However, Mr Perry had that opportunity between the 10.30am exchange and the second exchange. Nor do I accept that Mr Perry promptly made it clear that he wished to resile from his unequivocal resignation. The possibility of reinstatement became tangled up in the push for a no confidence vote. The Club cannot be criticised for not dealing directly with Mr Perry about the possibility of reinstatement. The issue then took a different tack when the Club received a letter dated 24 November 2004 from Mr Perry's lawyer setting out a grievance claim and seeking remedy by way of compensation not reinstatement.

Conclusion

[24] Mr Perry resigned and was not constructively dismissed. He has no sustainable personal grievance.

[25] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority