

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 36/10
5285523

BETWEEN RICKY JOHN SCHULTZ
 Applicant

AND WILLOWS TAVERN
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
 Alyn Higgins, Advocate for Respondent

Investigation Meeting: 15 February 2010 at Christchurch

Determination: 19 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Schultz), an Australian national, alleges that he is owed wages and reimbursement of costs in respect of a short term employment relationship with the Willows Tavern in Arrowtown which he says he was to manage for the period from January 2009 to January 2010.

[2] Willows Tavern says that Mr Schultz travelled to New Zealand to work not because of an agreement for there to be a short term management contract, but as a consequence of an agreement that Mr Schultz would buy into the business. Willows Tavern denies dismissing Mr Schultz and says that he resigned his employment after indicating he wished to return home to Australia.

[3] It is common ground that Mr Schultz was introduced to Willows Tavern by Kerry Walker. Mr Walker is the son of Celia Walker who is now, together with her husband, effectively the proprietor of Willows Tavern. Kerry Walker was a friend of Mr Schultz and apparently lived with Mr Schultz at his home in Australia for a period.

Kerry Walker was originally the licensee of Willows Tavern but lost his ability to work in the licensing industry and left New Zealand for Australia.

[4] It appears that the effect of Kerry Walker's departure was to force his parents to take over the running of Willows Tavern despite their active involvement in several other businesses. Because the Walkers Snr sought to limit their own involvement in the Willows Tavern business, they were interested in the notion that an outside party would buy in.

[5] There were discussions between the Walkers Snr and Mr Schultz during 2008 which included, amongst other things, the provision by Celia Walker of a written proposal dated 2 March 2008 which identifies a purchase price for a 50% shareholding and sets out some general observations about the performance of the Willows Tavern both in the immediate past and in the short future. I am satisfied that document (although it does not say so directly), was generated specifically for the purpose of providing information to Mr Schultz and that it was provided to Mr Schultz.

[6] The short point is that at the end of calendar 2008, the parties agreed to an employment relationship being created with Mr Schultz being employed by Willows Tavern as manager. An offer was forwarded to Mr Schultz by email from Willows Tavern dated 18 December 2008 and according to Kerry Walker was accepted by Mr Schultz. However, the email is not available to the Authority and the terms of the understanding between the parties are in dispute.

[7] Mr Schultz maintains that he was offered and accepted a salary of \$1,000 per week net of tax (about which there seems to be common ground), but that in addition, Mr Schultz was to be provided with accommodation and a vehicle for his own personal use. Those last two mentioned items are disputed by Willows Tavern as being part of the contract of employment.

[8] Mr Schultz told me that he accepted the position at Willows Tavern because of his friendship with Kerry Walker and because it seemed that Willows Tavern needed some urgent managerial assistance. He indicated in his evidence that he was only ever planning to stay for 12 months. Conversely, Ms Walker indicated that Mr Schultz was coming out to New Zealand to work in the business with a view to buying into it. There had been the prospect that Mr Schultz would arrive in New

Zealand in 2008 but domestic upheavals in Australia made that impossible, Ms Walker told me.

[9] Whatever the intention of each party, the central focus of the Authority's investigation is the termination of the employment relationship which happened on 25 and 26 October 2009. Ms Walker says that Mr Schultz gave her notice earlier that month that he was returning to Australia at the end of the 12 month contract period, that is January 2010, but that there was subsequent agreement between the parties that Mr Schultz would continue until the end of the summer which was agreed to be the end of March 2010. Then on 25 October 2009 (about two weeks after Mr Schultz notified his intention to return to Australia), there was an altercation between Ms Walker and Mr Schultz as a consequence of a staff member failing to turn up for duty. Mr Schultz, as manager, did the rosters and when a staff member failed to turn up for work on that day, Ms Walker contacted Mr Schultz at home about the missing staff member. Ms Walker says that Mr Schultz was unpleasant and not much interested and sent his partner down to help.

[10] Later on that afternoon, Mr Schultz himself appeared at Willows Tavern and, according to Ms Walker, was truculent, aggressive and unpleasant. Amongst other things, she recalls him standing in the middle of the restaurant *shouting the odds*, and effectively telling her what to do with her job.

[11] Ms Walker says that she was frightened of Mr Schultz in this sort of mood and decided to call the Police. Mr Schultz said that he would wait for the Police to arrive, according to Ms Walker, but in the result he departed before the Police arrived. Mr and Mrs Walker decided to protect themselves by getting a trespass notice prepared and this was served on Mr Schultz by the Police. The Trespass Act notice is dated the following day, 26 October 2009. Ms Walker says that she did not wish to have any further confrontations with Mr Schultz by herself as her husband was at the relevant time not always able to be with her at Willows Tavern because of other family responsibilities.

[12] Mr Schultz remembers these events differently, but does agree that on 25 October 2009 he had a series of exchanges with Ms Walker, the effect of which was that the employment relationship was certainly placed under strain. Mr Schultz denies wrongdoing and asserts that he did not resign on this day but was dismissed by

Ms Walker. Mr Schultz is adamant that he did nothing to justify Ms Walker's calling of the Police or her issuing of a Trespass Act notice against him.

[13] In any event, there was further contact between the parties by telephone and on 30 October 2009, a document was drafted in the following terms:

Willows Tavern Limited 30 October 2009

Dear Rick,

In regards to our discussions that your contract with us has ended we now write to advise you that we owe you your final week's pay and your holiday pay at 8% of your gross earnings.

As per your request we are prepared to pay you this a net payment of [\$3,075] in cash.

Please note that this payment is in full and final settlement of all employment related matters between yourself and the Willows Tavern Limited and we both agree that except for enforcement purposes, neither of us may seek to bring any further action in relation to the employment.

Would you please indicate your acceptance of this by signing two copies of this letter keeping once [sic] copy for your own records so that payment can be made.

Yours sincerely,

*Cis Walker
General Manager*

I understand and accept the terms and conditions as outlined in this matter, including that this is in full and final settlement of all matters arising out of the employment. I also acknowledge that I had a full opportunity to take advice on this agreement before signing.

*Signed
Date*

[14] The signature at the bottom of this document is that of Rachael Lodge and the date is 31 October 2009, the day after the document is dated. Rachael Lodge is Mr Schultz's partner and she attended to the execution of the document having consulted Mr Schultz because the Trespass Act notice precluded Mr Schultz from personally appearing at Willows Tavern. Willows Tavern produced an email to the Authority from Mr Schultz to Willows Tavern contemporaneously dated to this agreement which disclosed that Mr Schultz was seeking legal advice on the agreement prior to agreeing to it being signed.

[15] Immediately after the execution of this agreement, solicitors acting for Willows Tavern arranged to obtain bank details for Mr Schultz in order that the payment contemplated by the agreement could be made to him. Mr Schultz says that he signed the agreement under duress and was told that if he did not agree to the terms of the agreement he would get nothing. That allegation is hotly denied by Willows Tavern.

[16] Mr Schultz maintains that the payment contemplated by the agreement short changes him by failing to pay him all of the money he is entitled to from his period of service with Willows Tavern and particularly fails to reimburse him for stock (alcohol) introduced into the business. Mr Schultz said that he brought over from Australia a quantity of alcohol to introduce into Willows Tavern which he values at \$1,000 and a further \$2,000 he claimed for promotional hats and shirts which he also introduced into the business.

[17] Mr Schultz filed his statement of problem in the Authority on 3 November 2009 and the matter has proceeded from there in the usual way. Because Mr Schultz returned to his home in Australia at the end of the employment relationship, I considered it unreasonable to direct the parties to mediation and elected to bring the matter on for hearing in the Authority without the usual referral to mediation.

Issues

[18] The first question for the Authority is whether the agreement prepared on 30 October 2009 by Willows Tavern and signed on Mr Schultz's behalf the following day does in fact constitute a full and final settlement of all matters. A subsequent question, assuming that the agreement just referred to is found not to bind the parties, is the question of whether Mr Schultz is owed any further moneys by Willows Tavern. Finally the Authority needs to decide if Mr Schultz was unjustifiably dismissed.

Is the agreement a full and final settlement?

[19] I am satisfied the agreement is a full and final settlement of all issues save in one particular which I will deal with first. It became clear during the course of the investigation meeting that the payment made to Mr Schultz pursuant to the agreement did not include payment for statutory holidays that he had worked during his period of employment with Willows Tavern. I am satisfied from the evidence before me that five statutory holidays are affected by this omission and on this basis Mr Schultz

ought to have received an additional payment of \$1,000 gross being the payment for those missing days. I am absolutely satisfied that the law precludes contracting out of statutory entitlements of this kind. It follows that the agreement between the parties cannot operate so as to deny Mr Schultz a payment he would be entitled to as of right.

[20] However, in all other respects, I am satisfied that the agreement is, in truth, in full and final settlement of all the employment issues between the parties. Mr Schultz had indicated earlier in October that he wished to return home and there was agreement that he would work on until March but after the altercation on 25 October, the employment relationship clearly came to an end and I am satisfied that the evidence discloses the parties negotiated in good faith (and over more than a 24 hour period) to resolve the issues between them. The agreement quite clearly sets out that it is to be in full and final settlement of all issues and the evidence before the Authority confirms that Mr Schultz told Willows Tavern that he was intending to get legal advice on the agreement before he allowed his partner to sign on his behalf. Mr Schultz told me that his partner went through the agreement with him and, based on his behaviour at the investigation meeting and the email exchanges between himself and Willows Tavern, I am satisfied that he was perfectly able to understand the nature and extent of the words used and thus when he authorised his partner to sign on his behalf, he was, in truth, binding himself to the terms of the agreement.

[21] It follows that it is not necessary for me to consider any further issues such as the claim for reimbursement for the liquor or the promotional material because those matters have been closed by the effect of the agreement. However, the question of whether the relationship ended by resignation or dismissal still needs to be addressed.

Was Mr Schultz unjustifiably dismissed?

[22] I am satisfied Mr Schultz was not unjustifiably dismissed. On his own evidence, he resigned his position two weeks before the altercation that brought the relationship to an end. Mr Schultz wanted me to accept that Ms Walker had grossly over-reacted on 25 October in calling the Police and, the following day, arranging the Trespass Act notice. Also, he wanted me to accept that the Trespass Act notice was evidence of his dismissal.

[23] I must say I prefer Ms Walker's evidence. I accept her view that she was frightened of Mr Schultz and that her reaction in involving the Police was a function

of that, not evidence she had dismissed Mr Schultz. Ms Walker's view of Mr Schultz is supported by the decision of the Liquor Licensing Authority of 4 December 2009 concerning Mr Schultz's application for a General Managers Certificate. That Liquor Licensing Authority was presided over by Judge Unwin. In its oral decision the Liquor Licensing Authority made a number of findings about Mr Schultz's suitability to hold a General Managers Certificate and found him wanting. Of particular relevance for present purposes, were the findings that Mr Schultz "*acted quite aggressively*" and that he demonstrated an "*inability to listen or take advice*". In a meeting involving both the Liquor Licensing Authority and the Walkers Snr, Mr Schultz was said to have "*treated the proprietors with contempt and disrespect*". In summary, the Liquor Licensing Authority concluded that "*Mr Schultz's reputation shows a number of serious flaws.....*", and the fact that Mr Schultz "*is no longer employed in a position of responsibility*" (in the liquor industry) "*is a matter of considerable relief*".

[24] Ms Walker was clear that Mr Schultz had effectively told her what to do with her job when the two parties confronted each other on 25 October 2009. Mr Schultz's evidence that his house would not be available to him and his family until later on does not satisfy me he did not resign. He subsequently authorised his partner to sign a "*full and final*" settlement agreement which would be an odd thing to do if he had been dismissed and felt aggrieved about it. The very fact that he alleges that he was dismissed but only claims unpaid monies suggests to me his contention of having been dismissed, is mistaken.

Determination

[25] Mr Schultz has made out his claim for unpaid statutory holidays and is entitled to a gross payment of \$1,000 in that regard. In all other respects, Mr Schultz's claim fails.

Costs

[26] In the particular circumstances of this case, I direct that costs (if any) are to lie where they fall.

James Crichton
Member of the Employment Relations Authority

