

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 32
5317315

BETWEEN CATHERINE MARY SIMONS
Applicant

A N D HALSWELL TAVERN &
RETAIL LIQUOR LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Fiona McMillan, Counsel for Respondent

Investigation Meeting: 24 January 2011 at Christchurch

Date of Determination: 21 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Simons) was employed as a part time bartender by the respondent (Halswell Tavern) from 23 March 2008 until her dismissal with effect from 14 April 2010.

[2] On 30 January 2010, when she was not working, Ms Simons was involved in an incident at the Halswell Tavern which led to her dismissal. In essence, the Halswell Tavern maintains that Ms Simons' behaviour, the language that she used and the references that she made to fellow workers were inappropriate and she was asked to leave the premises.

[3] Halswell Tavern initiated an inquiry and there was a meeting between Ms Simons and Mr Richard Norris, the manager of the Halswell Tavern, on 3 February 2010. Ms Simons maintains that that meeting resolved all matters and that, as a consequence, she was to apologise to one of her co-workers and thereafter return to duties. Mr Norris maintained that the matter was not concluded and that he

never gave that intimation. He emphasised in his evidence to the Authority that, at the time of the 3 February meeting, he had received only one of two relevant statements from staff about the incident. Mr Norris said he made that clear to Ms Simons.

[4] Once Mr Norris received the second and more detailed statement from a staff member working on the night in question, his evidence is that he became more rather than less concerned about Ms Simons' behaviour and sought to talk to her again. In addition, Halswell Tavern forwarded a separate letter to Ms Simons instructing her not to enter the tavern premises until such time as the matter had been resolved. Ms Simons subsequently entered the tavern premises and, according to the duty manager at the time, again behaved badly. That behaviour was the subject of a further letter complaining about Ms Simons' use of language to the duty manager on 7 February 2010.

[5] Ms Simons contacted Mr Norris on 11 February 2010 to indicate the dates when she would be available for a meeting to discuss the outstanding issues. Mr Norris' evidence is that Ms Simons was supposed to ring Halswell Tavern's lawyers with those dates that she was available while Ms Simons maintains that it was Mr Norris who was to arrange the meeting with the lawyers, based on the dates she had given him.

[6] There was then a succession of letters forwarded to Ms Simons from Halswell Tavern seeking to firm up on a meeting date. At my investigation meeting, Ms Simons showed me evidence that one of those letters, the one dated 24 February 2010, had not arrived. By letter dated 2 March 2010, Halswell Tavern advised Ms Simons that it had reached a finding of serious misconduct against her, having got tired of waiting for her to respond. On 10 March 2010, Ms Simons provided Halswell Tavern with a statement giving her version of events on 30 January 2010 supported by a statement from her friend, Michael Stoddart. In addition to responding to the allegations against her, Ms Simons also made a claim of sexual harassment against John Nielsen, a duty manager at Halswell Tavern with whom she had worked from time to time.

[7] Halswell Tavern took the sexual harassment allegation seriously and asked its solicitors, Lane Neave, to undertake an investigation. The result of that investigation was a conclusion that there was no sexual harassment. A provisional decision was subsequently confirmed together with confirmation that the disciplinary issues

remained unresolved and would now be dealt with. Again an opportunity was provided for Ms Simons to participate in the process. It is common ground that, on her behalf, Ms Simons' sister, Ms Sharon Hindson, forwarded an email to Lane Neave confirming that Ms Simons would be in touch *next week*.

[8] The letter requesting engagement from Ms Simons was dated 7 April 2010 and the letter of dismissal confirming the process was at an end was dated exactly a week later. A personal grievance was raised on 13 May 2010. Ms Simons alleges that she was unjustifiably dismissed from her employment by the Halswell Tavern, that the investigation into her claim of sexual harassment was unsatisfactory and that the alleged serious misconduct had been resolved at the meeting with Mr Norris on 3 February 2010. Ms Simons seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings. Those claims are resisted by Halswell Tavern.

Issues

[9] It will be convenient for the Authority to deal separately with the sexual harassment investigation and then consider whether the decision to dismiss Ms Simons for serious misconduct was the decision that a fair and reasonable employer would make.

Was the investigation into sexual harassment unsatisfactory?

[10] I am not satisfied that the investigation into the alleged sexual harassment was unsatisfactory at all. Given the paucity of information provided to Halswell Tavern by Ms Simons (no dates or times and little, if any, supporting evidence), it was, I think, inevitable that Halswell Tavern would reach the conclusion that, on balance, Mr Nielsen's actions did not amount to sexual harassment. If Ms Simons had provided more detail about her allegations and especially provided dates and times and identified supporting witnesses, it may have been possible for Halswell Tavern to reach a different conclusion.

[11] However, the reality was that, with one exception that I will come to shortly, there was no supporting evidence for Ms Simons' allegations and there was simply no detail about when and where the various offences were supposed to have occurred. In the absence of corroboration and more detailed recollection of dates and times, and

faced with a flat denial from the alleged perpetrator, Halswell Tavern's conclusion is hardly remarkable.

[12] The only blemish really in its conclusion appears to be its failure to take account of the evidence of Ms Simons' sister, Sharon Hindson, who, amongst other things, gave evidence to the Halswell Tavern inquiry into the sexual harassment allegation and claims to have witnessed some of the alleged offending. So far as I can tell from the material available to the Authority, that evidence has not been commented on specifically nor was there any evidence that it was discounted or, conversely, considered and accepted. On the face of it, Ms Hindson claims to have witnessed sexual harassment of her sister by a male member of the management staff. Although the employer's conclusion is in this particular respect, I consider, deficient, it is relevant to note (and this may have been a balancing factor for Halswell Tavern) that the male staff member accused of improper conduct had not worked with Ms Simons since Queen's Birthday weekend 2009, that is to say, fully nine months before the sexual harassment investigation. It must follow that any allegation of sexual harassment is, at best, historical in nature.

[13] The sexual harassment allegation appears to have first been raised by Ms Simons at an interview she had with Mr Norris before Christmas 2009 in which there appears to have been some discussion about the subject, albeit in a very general way, and Mr Norris is clear that he indicated at the time that in order for there to be any investigation, Ms Simons would have to provide detail of her allegations.

[14] Nothing more seems to have happened until the discussion between Mr Norris and Ms Simons on 3 February 2010 which of course was primarily concerned with the disciplinary issue. What is plain is that, during the 3 February meeting, Mr Norris gave Ms Simons a copy of the Halswell Tavern's sexual harassment policy. She says that she does not understand why he did that because she had not raised sexual harassment in that discussion. But she clearly raised it by common consent in the previous discussion two months earlier and Mr Norris' evidence was that he was simply trying to be helpful and give her a document which set out what needed to happen if there was a sexual harassment claim.

[15] Ms Simons took no steps at all in the matter until 5 March 2010 at which point the disciplinary investigation was well under way. On that date, she forwarded to Halswell Tavern a statement refuting some of its allegations in respect of the

disciplinary matter, but more importantly for present purposes, making sexual harassment allegations against a particular duty manager. It was that statement which resulted in Halswell Tavern commissioning its lawyers, Lane Neave, to undertake the necessary inquiry.

[16] Although, as I have noted, Halswell Tavern appears to have discounted the evidence put before it by Ms Simons' sister, it did seek comment from all of its female staff, none of whom supported the tenor of the sexual harassment claim, had any concerns about the particular duty manager themselves, or had seen anything unacceptable in that duty manager's behaviour. That does not mean that sexual harassment has not happened, but it does tend to support the employer's conclusion that the allegation by a single staff member against another staff member, without any corroboration by any other staff member, ought to be doubted.

Was Ms Simons unjustifiably dismissed from her employment?

[17] I am satisfied, on the evidence before the Authority, that Ms Simons was not unjustifiably dismissed from her employment by Halswell Tavern. The circumstances giving rise to the decision to dismiss have already been touched on. Ms Simons was a patron at the Halswell Tavern on 30 January 2010 when the tavern received complaints about her behaviour and asked her to leave the premises. In that regard, Ms Simons was treated no differently from any patron who has become difficult or offensive. However, because Ms Simons was also an employee of Halswell Tavern, it was appropriate that Halswell Tavern consider whether Ms Simons' obligations in terms of the employment relationship had been breached, or not, by her behaviour in the tavern on 30 January 2010. Before considering the employment consequences of Ms Simons' behaviour, I want to comment briefly on the allegation made by both Ms Simons and her partner, Mr Michael Stoddart, that the way in which the Halswell Tavern removed her from the premises on the evening in question was brutal and unnecessarily public.

[18] The reality is that such events are never likely to be conducted especially smoothly and I think, on the evidence before the Authority, Halswell Tavern did its best to limit any unpleasantness. First, when the decision was taken to ask Ms Simons to leave the premises, she was spoken to in that regard outside the bar rather than within the licensed area itself. She protests that this discussion ought to have happened around the back of the tavern because where she was spoken to by the duty

manager, although it was indeed outside, was in full view of the other patrons because of the glass frontage between the bar and the outside area.

[19] Halswell Tavern rejected the suggestion that it ought to have spoken to her around the back of the tavern; its view was that the matter needed to be dealt with smoothly and as promptly as possible and seeking to have a patron repair around the back of the tavern at night time would itself have created difficulties. In all the circumstances, I think the approach taken by Halswell Tavern was reasonable and was the sort of approach that it might be expected to take in relation to any patron who had become difficult or offensive.

[20] Complaints about Ms Simons' behaviour were received from two female co-workers, both of whom were employed on the night in question and both of whom independently complained to Halswell Tavern about Ms Simons' behaviour. She sought to imply that there was some sort of collaboration between the two complainants, but the nature of their complaints are somewhat different and, having considered their evidence and observed them giving their evidence, I am not persuaded there was anything improper in their complaints. They simply, each of them, objected to what Ms Simons was saying and objected to her behaviour, but for slightly different reasons. Each of the complainants filed a written statement with the Halswell Tavern. Those statements complained about Ms Simons' behaviour and, in particular, about her language and the observations she made, in colourful language, about work mates. Not unnaturally, having received a contemporaneous telephone report from the duty manager at the time that Ms Simons was in the bar, and having made the decision to ask the duty manager to expel Ms Simons, Mr Norris thought it appropriate to conduct further inquiries.

[21] By the time Mr Norris saw Ms Simons on 3 February 2010, he had received one of the complainant's statements only. That was the statement of Ms Hermione Alexander. While Ms Alexander's statement complains about Ms Simons' behaviour, it does not give particulars of the sort of language Ms Simons was allegedly using save to complain that Ms Alexander's business was being discussed in public by Ms Simons. It will be remembered that Ms Simons stoutly maintained that the meeting she had with Mr Norris on 3 February 2010 was the end of it so far as the disciplinary inquiry was concerned; Mr Norris, on the other hand, was equally adamant that the 3 February meeting had enabled him to address the issues raised by

Ms Alexander and he sought to obtain a commitment from Ms Simons that she would apologise to Ms Alexander but Ms Simons refused. Mr Norris was quite clear that he had told Ms Simons that the matter could not be concluded until he had seen and considered the statement of the other complainant, Ms Melissa Davenport. Amongst other things, Mr Norris, in his evidence, made clear that he told Ms Simons that he would provide her with a copy of Ms Davenport's statement when it became available and would require her to respond to that. He did say that he wanted to resolve matters before Ms Simons was due to start her next rostered shift, but that was some days away.

[22] For the avoidance of doubt then, I am satisfied that the 3 February meeting did not resolve all matters and that Ms Simons is simply mistaken in her view that the whole issue had been dealt with. Given that there were two complainants and that only one of those complaints was to hand at the time that Ms Simons saw Mr Norris, it would seem inevitable that the matter would continue until the second complaint had been received in writing, Ms Simons had an opportunity to consider that and then respond to it.

[23] The question of whether or not the matter was resolved at the 3 February meeting is not just important for itself but also because Ms Simons appears to rely on that mistaken belief of hers as a partial explanation for her continued failure to deal with the employer's subsequent correspondence with her. Once the statement from Ms Davenport had been received, a copy was promptly sent to Ms Simons. Mr Norris, having studied the statement from Ms Davenport, became more concerned about the nature of the incident that Ms Simons had been involved in on 30 January because Ms Davenport's statement is far more graphic concerning Ms Simons' behaviour. Having sent the copy of the further complaint out to Ms Simons, Halswell Tavern endeavoured to get a commitment from her for a further meeting.

[24] In the meantime, on 7 February 2010, Ms Simons was involved in another altercation with another duty manager when she attended at the tavern before she received a letter from Mr Norris forbidding her attendance there until the matter was resolved. When a copy of this communication was given to her by hand by the duty manager working on 7 February 2010, it is alleged that she abused him roundly as well and then made some uncharitable remarks about that man's sexual behaviour.

Halswell Tavern wrote again to Ms Simons pointing out to her that she would need to respond to those latest allegations as well.

[25] It is common ground that Ms Simons spoke to Mr Norris on 11 February 2010 but he says that the understanding was that Ms Simons would then speak to Lane Neave, Halswell Tavern's lawyers, to set up the meeting with the dates when she was available whereas she says that Mr Norris was going to communicate her available days to the lawyers.

[26] While it proved difficult to get Ms Simons to attend a further meeting, her behaviour in ringing Mr Norris on 11 February 2010 and proposing dates on which she was available for a further meeting rather gives the lie to her own proposition that the meeting with Mr Norris on 3 February 2010 resolved all matters. The correspondence which remained unanswered from Ms Simons began on 18 February 2010. That letter from the Halswell Tavern spelt out Mr Norris' understanding that Ms Simons was to talk to Lane Neave and arrange a meeting. If there had been any confusion in Ms Simons' mind after the 11 February telephone call with Mr Norris, the receipt of the letter of 18 February 2010 would have dispelled that confusion. The next letter from Halswell Tavern is dated 24 February 2010, although it will be recalled this is the letter that Ms Simons claims not to have received. Then, on 2 March 2010, Halswell Tavern wrote to Ms Simons again noting there had still been no contact and that, in those circumstances, all it could do was give a preliminary indication that it considered, on the evidence available to it, that Ms Simons had committed serious misconduct and the preliminary view was that dismissal might be the appropriate penalty. Halswell Tavern again sought a response.

[27] Finally, in response to that communication, Ms Simons produced her statement of 10 March 2010 together with a supporting statement from her partner, Mr Stoddart. As I have already noted, those documents provided Ms Simons' (and her partner's) view of the events complained of, rejecting most of the allegations made against her. It also raised the sexual harassment allegation for the first time in a substantive way.

[28] At the end of the sexual harassment investigation, Ms Simons was again invited to a disciplinary meeting to complete the inquiry into her behaviour on 30 January 2010. That request was conveyed by letter dated 7 April 2010 and again, there was no substantive response. It is true that Ms Hindson forwarded an email on

behalf of Ms Simons to Lane Neave dated 8 April 2010 in which an undertaking was given that Ms Simons would respond in the next week. Exactly seven days after the previous letter on 14 April 2010, Ms Simons was dismissed from her employment without having responded to the employer's offer to meet to discuss matters. Ms Simons says that the employer ought to have waited longer after receipt of her sister's email, but given Ms Simons' behaviour to date of consistently ignoring communications from the Halswell Tavern, it seems to me its approach is entirely understandable and the approach that a fair and reasonable employer would adopt when confronted with an employee who, by refusing to promptly engage with the employer, frustrates the employer's process.

[29] No doubt there will be few cases where a dismissal will be held to be safe when the employee has not been heard on the substance of the allegation by the employer's decision-maker. However, I am satisfied this is one of those cases. I think Halswell Tavern did everything it reasonably could to get Ms Simons to address the behaviour complained of and that Ms Simons adopted the technique of quarrelling with employer on matters of detail but refusing to engage appropriately with the employer on matters of substance. That is not good faith behaviour by an employee, and in my judgment may not be relied upon by an employer to prevent an employer from completing a proper employment investigation. I am satisfied that a fair and reasonable employer, having been circumscribed by the uncooperative behaviour of the employee, would in the particular circumstances of this case conclude that Ms Simons was guilty of serious misconduct and that dismissal was the appropriate sanction.

Determination

[30] It follows that Ms Simons' claim fails in its entirety.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority