

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 195
5329053

BETWEEN JONATHAN KENT SOUTH
Applicant
AND STAB IN THE DARK
LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Laurence Herbke and Sarah Saunderson-Warner,
Counsel for Applicant
Richard McLeod, Advocate for Respondent
Investigation Meeting: 18 October 2011 at Dunedin
Determination: 6 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr South) alleges that he was unjustifiably constructively dismissed from his employment by the respondent (Stab in the Dark). Stab in the Dark resists that contention.

[2] Mr South was employed as the main cleaner at the Captain Cook Tavern (the Cook) in Dunedin which was operated by Stab in the Dark. He had been employed in that role for about 5½ years and typically worked Monday to Saturday between 6.30am and 11.30am, meaning that he usually worked between 12 and 18 hours a week.

[3] It is common ground that the employment relationship was a happy one until the events that Mr South complains about. There were no disciplinary warnings or complaints about Mr South's work and he told me he always felt welcome at the Cook

and that, on a personal level, he felt that he was friendly with the owners of the business.

[4] In the second half of 2010, Mr South became aware of “till variations” at the Cook and he overheard various conversations between staff about this problem and remembers seeing a staff newsletter commenting on the problem.

[5] On Friday, 29 October 2010, Mr Richard McLeod, one of the principals of Stab in the Dark which operates the Cook, telephoned Mr South in relation to this issue. Mr South told me that the conversation began on a friendly basis but that Mr McLeod then went on to tell him that the Cook had security footage of Mr South standing in the office next to the tills. These were the tills from which money had gone missing and Mr McLeod indicated to Mr South that it was necessary therefore for the two of them to have a discussion about this.

[6] There is dispute between the parties as to exactly what was said between them. Mr McLeod denies telling Mr South that his behaviour was “suspicious” and says that what he did was simply ask for an explanation of why Mr South was where he was filmed in the security footage. Stab in the Dark’s position was that Mr South did not need to be in the vicinity of the tills for the purposes of his work, and so an explanation of what he was doing there was appropriate. Conversely, Mr South said that Mr McLeod told him his behaviour was suspicious and that he (Mr South) had denied stealing from the Cook. Despite the difference between the parties, Mr South concedes that Mr McLeod did not accuse him of stealing.

[7] It seems common ground that, in response to Mr McLeod’s request for an explanation, Mr South said something like “*I don’t know what to tell you*”. Although it is not pleaded in his statement of problem, Mr South told the Authority in his oral evidence that he denied stealing money from the Cook in the telephone discussion with Mr McLeod and he went on to make the point that it would have been silly of him to “pinch” money because he knew where the cameras were.

[8] Mr South alleges that Mr McLeod talked of two options, one of which was that Mr South resign and the other of which was that Mr McLeod would have to “take it further”. Mr South thought that “take the matter further” meant that Mr McLeod was going to refer the matter to the Police. Mr South said that he was not told that he had the option of thinking the matter over, was not told that he could consult a lawyer,

was not told that he had the option of seeing the security footage, and was not told if the employer had any other evidence against him. Mr South resigned promptly and never returned to the Cook again for work purposes. He told the Authority in his oral evidence that “*a theft conviction would be terrible for a cleaner*”. He has not worked for four or five months and he attributes his lack of work in part to his honestly disclosing to potential employers that he had been accused of theft at the Cook but denied it.

[9] Mr McLeod absolutely denies giving Mr South the choice of “*resign or be dismissed*”. What Mr McLeod says happened was that Mr South seemed unable to offer any explanation on the spot, which would have cleared the matter up there and then, and accordingly Mr McLeod determined that it would be necessary to have a formal disciplinary meeting. In his oral evidence, Mr McLeod told the Authority that he did not get the chance to spell out to Mr South that his intention was to conduct a disciplinary inquiry (rather than refer the matter to Police) because Mr South had already indicated he would resign. In his oral evidence to the Authority, Mr McLeod indicated that he urged Mr South to think the matter over before he committed to resigning and in fact urged Mr South not to resign.

[10] It is also evident from the material before the Authority that Stab in the Dark sought to contact Mr South after this telephone discussion in order that a disciplinary meeting could be set up to deal with the outstanding issue. Stab in the Dark was unsuccessful in contacting Mr South and he subsequently returned his keys and property to the Cook’s manager.

[11] During the investigation meeting, the Authority formed the view that the parties may have been talking past each other during the telephone discussion that is central to the employment relationship problem and the Authority offered to stay its hand in the preparation of a determination on the matter in the hope that the parties might be able to resolve matters by agreement. It seemed to the Authority that each party continued to speak well of the other and that the issue which had caused the breach could be resolved by discussion. Despite the efforts of the parties, for which they are to be commended, a settlement of matters was not able to be achieved and the matter falls to the Authority for determination in the usual way.

Issues

[12] The Authority must determine the following issues:

- (a) What happened in the telephone discussion on 29 October 2010?
- (b) Was Mr South constructively dismissed from his employment?

What happened in the telephone discussion?

[13] The Authority is satisfied, on the balance of probabilities, that Mr South erroneously concluded that Mr McLeod would refer matters to the Police if he did not resign. Understandably, Mr South was concerned at the prospect of having a Police record as a person who earned a living as a cleaner. However, the Authority is satisfied that Mr McLeod's intention in "*taking the matter further*" was simply to conduct a disciplinary inquiry into what appeared on the security camera footage. Mr McLeod was entitled to take that step because Mr South had offered him no information in the telephone discussion of 29 October 2010, that would enable Mr McLeod to draw any conclusions about Mr South's behaviour. It seems common ground that Mr South said something like "*I don't know what to tell you*" when the opportunity was open to Mr South to provide an explanation if there was one.

[14] Amongst other things, there seems a difference between the parties as to whether Mr South ought to have been in the office at all. Stab in the Dark says that Mr South ought not to have been in the office whereas Mr South's evidence is that he was responsible for cleaning the office as well as the entertainment areas, albeit not as frequently. Mr South acknowledged that he would occasionally pick up coins from the floor for bus money but he claims to have told Mr McLeod that he had never taken money from the tills. If he made that statement, Mr McLeod has no memory of it and it seems common ground that no more fulsome explanation was provided by Mr South about the allegations.

[15] The Authority concludes then that Mr McLeod was perfectly entitled to contemplate a formal disciplinary inquiry. It is, however, equally clear from Mr McLeod's own evidence that he never got a chance to tell Mr South that this was his intention because Mr South had immediately got the wrong end of the stick, thought that Mr McLeod was going to refer the matter to the Police and offered his resignation, in effect, to pre-empt that referral. Mr McLeod's position presumably

was that he had nothing to refer to the Police in the absence of any evidence, mere suspicion being not enough and he sought to inquire into the matter in order to put the matter to rest one way or the other. In Mr McLeod's defence, it is fair to note that he tried to contact Mr South himself and through his manager after the telephone discussion to enable the disciplinary meeting to be set down. That suggests that Mr South's recollection of the conversation between himself and Mr McLeod is mistaken when Mr South claims that Mr McLeod told him he had to resign or Mr McLeod would take the matter further. It is clear that Mr McLeod did say he was going to take the matter further, but Mr McLeod hotly denies the suggestion that he told Mr South he had to resign and indeed his evidence is that he tried to talk Mr South out of resigning and told him to think about it overnight before actually taking the step. I prefer Mr McLeod's recollection of the events on this point to Mr South's; as I noted above, Mr McLeod's recollection of the discussion is consistent with Mr McLeod's subsequent attempt to get hold of Mr South for the purposes of a disciplinary meeting which would have been otiose if Mr McLeod had been determined to extract a resignation from Mr South. Furthermore, it suggests that Mr McLeod was hopeful that Mr South would think better of his threatened resignation and enable the disciplinary process to proceed, hopefully to a satisfactory outcome for both.

Was Mr South constructively dismissed?

[16] There can be no doubt that Stab in the Dark's process in putting its concerns to Mr South over the telephone was a defective one. In Mr McLeod's defence though, it is right to point out that he thought well of Mr South, thought that Mr South would be able to clear the matter up quickly with a quick telephone discussion, and was physically away from Dunedin on sick leave. Accordingly, having been advised of the problem in his business, he took the only step available and rang Mr South to see if he could get the matter cleared up.

[17] Unfortunately, that potential short cut backfired because Mr South, the Authority is satisfied, got quite the wrong end of the stick, acted precipitately by resigning and refusing to reconsider his position and now seeks to claim that he has been constructively dismissed because of the process adopted by the employer. But as I indicated to the parties at the investigation meeting, it would be difficult to find a clearer case than this for an example of significant contribution from the grievant

himself. If, as Mr South correctly maintains, the employer's process was defective, it is also fair to say that the employer's process only became defective because Mr South acted precipitately and jumped to an erroneous conclusion.

[18] The Authority is satisfied that Mr McLeod never sought, by word or deed, Mr South's resignation. He asked Mr South for an explanation about what appeared to be suspicious behaviour and got no explanation. That being the position, he had to take the matter further, but taking the matter further involved a disciplinary meeting, not a referral to the Police. Mr South was not about for long enough to hear that part of the message and had already told Mr McLeod he was resigning.

[19] The Authority is not persuaded that Mr McLeod sought Mr South's resignation. The evidence does not support that conclusion for reasons already set out. Nor is there evidence that Mr McLeod set out upon a course of conduct with the dominant purpose of having Mr South resign his employment. There is absolutely no suggestion in the evidence that Mr McLeod sought to rid himself of Mr South; all he sought was an answer to a query posed by viewing the video footage, an answer which he never received because Mr South would not engage with him.

[20] Nor does it appear to the Authority that this is a breach of duty case. Certainly, the telephone discussion turned out to be ill-advised, but plainly, if Mr South had engaged with his employer in the way that Mr McLeod obviously expected, particularly given their good relationship, the matter might well have been short circuited and the employment relationship problem that subsequently arose might never have happened. In that regard, there is dispute about precisely what information Mr South conveyed in the telephone discussion; Mr South maintains that he told Mr McLeod that he had not stolen any money but Mr McLeod does not recall getting that message and, in any event, both parties' evidence coincides in concluding that Mr South offered Mr McLeod no detailed explanation of precisely what he was doing in the areas that Mr McLeod was anxious about. In the circumstances, a bald denial by an employee, no matter how valued, cannot be enough. The employer is entitled to a proper explanation of behaviour that is *prima facie* suspicious.

Determination

[21] The Authority is not satisfied that Mr South has proved his personal grievance. The onus rests on him to satisfy the Authority that his resignation was effectively

forced on him by the behaviour of the employer. This is a case where, sadly, the Authority's conclusion is that Mr South was exclusively the architect of his own misfortunes by not responding fulsomely to an opportunity to explain himself when provided with it, and/or by not engaging formally with the employer in an environment where he could have the benefit of advice and all the attendant protections of the law.

[22] At the investigation meeting, the Authority expressed its view that it was a great pity that the parties could not resolve matters because there was clearly some residual esteem both ways. Mr South remained unemployed at the time of the investigation meeting. He needed to find further employment. Stab in the Dark has the ability to assist Mr South in his pursuit of further employment by offering to assist him in that pursuit. Mr McLeod might, for example, agree to making a statement on Mr South's behalf or perhaps even being a referee. Those are not matters on which the Authority can or should make a direction, but they are offered in the hope that they can assist the parties to both resolve the difference between them and to move on.

Costs

[23] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority