

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 155/07  
5077590

BETWEEN                      FREDERICK                      ROBERT  
   STEVENS  
   Applicant

AND                              STICKY    FINGERS    2006  
   LIMITED  
   Respondent

Member of Authority:    James Crichton  
  
Representatives:            Scott Wilson, Counsel for Applicant  
   Andrew Shaw, Counsel for Respondent  
  
Investigation Meeting:    19 September 2007 at Christchurch  
  
Determination:              18 December 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]    The applicant (Mr Stevens) alleges a personal grievance on the grounds of unjustified dismissal together with a personal grievance arising because of the unjustifiable actions of the respondent employer causing him disadvantage.

[2]    The respondent employer (Sticky Fingers) resists those allegations in their entirety.

[3]    The parties attended mediation but were unable to resolve their differences.

[4]    Mr Stevens was employed as a bar manager by Sticky Fingers but had commenced employment with the previous owners of the business in August 2005. Sticky Fingers took over the business on 2 October 2006.

[5]    Mr Stevens claims to have asked Sticky Fingers for a position description on its taking over the business but that claim is denied by Sticky Fingers. For its part, it

claims that Mr Stevens was made a written offer of employment on 20 September 2006 and that he accepted that offer on 26 September 2006. The documents available to the Authority confirm that Mr Stevens was offered an employment agreement on 20 September 2006 and that he accepted it on 26 September 2006.

[6] On 9 January 2007, there was an altercation involving Mr Stevens and Ms Fyfe which ultimately resulted in Mr Stevens' dismissal.

[7] Mr Stevens had been attending a concert with his wife and visited the bar run by Sticky Fingers after the concert. Ms Fyfe was sitting at the bar having a drink. Mr Stevens approached her and sought to have a discussion with her about matters that were of concern to him.

[8] Ms Fyfe's evidence was that she became anxious and distressed by Mr Stevens' approach and demeanour and after several minutes of discussion, she managed to remove herself from the bar and retreat to her office.

[9] During the course of the *discussion*, Ms Fyfe sent a text message to one of Sticky Fingers' directors who happened to be nearby and that director, together with other directors who were also in physical proximity to the bar, attended urgently.

[10] Their evidence is that they found Ms Fyfe in her office clearly distressed.

[11] Sticky Fingers determined to suspend Mr Stevens as a consequence of the complaint received from Ms Fyfe and it was decided that the South Island Operations Manager of Sticky Fingers (Mr Hickman) should conduct that investigation.

[12] There was an initial meeting on 11 January 2007 at which allegations of threatening and abusive behaviour were raised by Mr Hickman. Mr Hickman referred to the Sticky Fingers' House Rules which formed part of Mr Stevens' individual employment agreement.

[13] There was a further meeting of the parties on 16 January 2007 at which the outcome of the investigations to date were conveyed to Mr Stevens by Mr Hickman. Mr Hickman also provided to Mr Stevens a copy of the video surveillance footage relevant to the 9 January incident.

[14] That meeting was adjourned to give Mr Stevens an opportunity to further consider his position and a subsequent meeting took place on 18 January 2007. At

this meeting, Mr Hickman conveyed the substantive findings of the investigation and Mr Stevens said that the allegations were without foundation. Mr Hickman offered to defer the meeting in order that Mr Stevens could obtain legal representation and this course of action resulted in Mr Stevens obtaining representation for the latter part of this meeting by his present counsel.

[15] At the reconvened meeting on 18 January 2007, Mr Hickman advised Mr Stevens of Sticky Fingers' decision to terminate Mr Stevens' employment on the grounds of abusive behaviour and insubordination and that determination was subsequently conveyed by letter dated 19 January 2007.

### **Issues**

[16] It will be helpful to review the factual matrix by reference to the following matters:

- (a) The period of employment prior to the 9 January incident;
- (b) The 9 January incident;
- (c) The employer's investigation process.

### **Before the 9 January incident**

[17] There is little dispute that Mr Stevens was employed at the bar premises by the previous owner and that when Sticky Fingers took over the operation, Mr Stevens was offered continued employment on terms and conditions provided by Sticky Fingers. He accepted the basis of this new employment by Sticky Fingers on 26 September 2006. These terms and conditions of employment took effect from 2 October 2006 when Sticky Fingers commenced operation of the bar in their own right.

[18] I accept the evidence of the Sticky Fingers witnesses to the effect that Mr Stevens told them that *he effectively ran the bar side of the business* under the previous owner. It follows that the directors of Sticky Fingers thought that Mr Stevens could take some overall responsibility for the bar because that was effectively what he had allegedly been doing in the past. Sticky Fingers' position was that the staff it inherited from the old operator would continue broadly doing the same work they had previously done.

[19] However, Mr Thompson, a director of Sticky Fingers, gave evidence (supported by others of the Sticky Fingers witnesses) that in the lead up to the busy Christmas period, the business was losing staff, so much so that temporary staff were brought in by Sticky Fingers from other venues.

[20] Mr Thompson says that Mr Stevens was unhappy with these temporary staff and according to Mr Thompson, Mr Stevens was given authority by the company's general manager, Ms Fyfe, to do his own recruiting.

[21] Ms Fyfe says that, despite giving Mr Stevens this clear responsibility (together with responsibility apparently to roster staff on for duty), Mr Stevens did not fulfil his obligations in a satisfactory way and accordingly she subsequently relieved him of that responsibility.

[22] Mr Stevens denies that he performed inadequately in this role but there is no doubt that at a point in December 2006 (and the date is in dispute), Mr Stevens was relieved of those responsibilities. He says he discovered by chance an email from Ms Fyfe to the operations manager wherein Ms Fyfe stated that she had taken over the hiring role and that she had discussed the matter with Mr Stevens. Mr Stevens says that Ms Fyfe never discussed it with him and she is equally adamant that she did. Whether she did or she did not, there was an altercation between the two of them, according to Ms Fyfe; Mr Stevens acknowledges that he raised the matter with Ms Fyfe but denies there was an altercation. I prefer Ms Fyfe's evidence.

[23] What is important about this exchange which Mr Stevens says happened on 19 December and Ms Fyfe says happened on 29 December, is that it resulted in an email from Mr Stevens to the directors. Mr Thompson, one of the directors, commented that he thought it *extremely unusual to receive an email directly from a staff member two management levels down in the organisation*. For his part, Mr Stevens says in his own defence that he did what he would have done under the previous owners. The email effectively raises the question of whether the directors had any concerns about the quality of Mr Stevens' work.

[24] There was a meeting on 8 January 2007 which involved the directors, together with Ms Fyfe and Mr Stevens. By all accounts, the meeting commenced well enough but rapidly deteriorated and, according to Mr Collins (another director), Mr Stevens *became very agitated and started accusing [Ms Fyfe] of not supporting him in a loud*

*and at times very hot tempered voice. For some period of time nobody else could get a word in as [Mr] Stevens went on and on – when others did try and speak he completely cut them off (the directors included).*

[25] Mr Stevens' account of that meeting does not refer to any outburst from him and simply records that the issues that he had raised in his email were *not really addressed in any constructive manner.*

[26] In particular, Mr Stevens alleges that there was no resolution of the issue between him and Ms Fyfe. It will be recalled that Mr Stevens alleged that Ms Fyfe had not spoken to him about removing him from the recruiting role of bar staff whereas Ms Fyfe said she had and that there was an altercation between the two of them about that.

[27] I am also satisfied that Mr Stevens did become agitated at the 8 January meeting as I prefer the recollection of the directors of Sticky Fingers to Mr Stevens' own recollection. I do, however, accept Mr Stevens' evidence that Ms Fyfe did not really engage with him at the 8 January meeting. Ms Fyfe agrees that she preferred not to try to deal with Mr Stevens' objections because she felt that it would get into a *he said she said* scenario and that that would be unproductive.

[28] It follows that, for those reasons, the issue between Mr Stevens and Ms Fyfe was not resolved at the meeting on 8 January 2007 and it is that fact which led to the next discussion between those two individuals which ultimately resulted in Mr Stevens' dismissal.

### **The 9 January incident**

[29] Mr Stevens and his wife attended a concert with friends the following day, 9 January 2007. They arrived at Sticky Fingers bar sometime after 11.30pm that night. They sat down and ordered some food and drinks.

[30] Mr Stevens' evidence is that he saw Ms Fyfe sitting at the bar with *her purse over her shoulder*, drinking a glass of wine. In his brief of evidence, Mr Stevens goes on to make the following observation:

*I felt that this would be an opportune time to discuss with her the fact that she lied to me and about me as well as leaving me twisting in the wind at the most recent meeting with the directors.*

[31] Mr Stevens then approached Ms Fyfe and proceeded to endeavour to engage her on this matter. Mr Stevens' evidence in responding to a question from me was that he wanted to deal with the matter *outside the workplace*, hence his approach to Ms Fyfe when she was obviously *off duty*. Conversely, Mr Stevens told me that he thought Ms Fyfe wanted to deal with the dispute formally, that is to say within the workplace, and that she was disinclined to deal with it when she was *off duty*.

[32] Mr Stevens describes the incident in one paragraph of his brief of evidence and while some of the comments that he attributes to himself are firm, there is no sense from his description that the discussion was inflamed or capable of causing real offence.

[33] Ms Fyfe, on the other hand, describes the exchange in five detailed paragraphs of her brief of evidence. There can be no doubt that the result of the discussion, however described, was to leave Ms Fyfe shaken, crying and fearful. Indeed, at the end of the altercation with Mr Stevens, Ms Fyfe sent what amounted to an SOS text message to one of the directors of Sticky Fingers who happened to be nearby and effectively asked him for help.

[34] When the director (Mr Thompson) and his co-director Mr Collins turned up at the bar premises, they found Ms Fyfe locked in her office crying.

[35] I am satisfied on the balance of probabilities that Ms Fyfe's account of the incident with Mr Stevens is to be preferred. It is consistent with Ms Fyfe's distress after the altercation ended and with the condition in which she was found by the directors of Sticky Fingers whose evidence I regarded as truthful.

[36] That being the position, I am satisfied that Ms Fyfe endeavoured to direct Mr Stevens to raise the matter properly during work time if he had an issue and I am particularly drawn to that conclusion because Mr Stevens himself made the point that Ms Fyfe wanted to bring the dispute back into the workplace while he was trying to deal with it informally.

[37] The importance of this issue is that Sticky Fingers, in its subsequent investigation of Mr Stevens' behaviour, alleged that he had abused and threatened Ms Fyfe but also that he had been insubordinate in that he had refused what amounted to a lawful and reasonable instruction from Ms Fyfe (his superior) to not persevere

with the discussion in front of customers and other staff and to make a time to have the discussion during work hours.

### **The employer's investigation**

[38] When Mr Thompson and his fellow director Mr Collins arrived at the bar premises after the call for help from Ms Fyfe on the evening of 9 January 2007, Mr Collins' evidence is that on his arrival, Mr Stevens came up to him and said *you are probably going to get a complaint about me tonight*. Mr Collins thought that Mr Stevens was under the influence of drink.

[39] In deciding how to respond to this event, Mr Thompson and Mr Collins had a discussion and they decided that Mr Stevens ought to be suspended from duty until the end of the investigatory process. They made this decision, I accept, without any knowledge of the rostering arrangements (neither director I accept knew when Mr Stevens next worked for instance), but the directors were conscious of the fact that Mr Stevens frequently brought his wife into the premises as she also was an employee of Sticky Fingers.

[40] Mr Stevens' evidence on the suspension issue was that he was simply told that he was suspended and that he was given no opportunity to make submissions about the appropriateness or otherwise of that sanction.

[41] Mr Murray Hickman is the South Island Operations Manager of one of the groups of companies associated with Sticky Fingers and it was he who was asked to do the employment investigation relating to Mr Stevens' conduct.

[42] Mr Hickman wrote to Mr Stevens by letter dated 11 January 2007 summoning him to a meeting, the first meeting between the parties after the incident. In the 11 January letter, Mr Hickman sets out the matter to be investigated as *threatening and abusive behaviour*. There is, at this early stage, no mention of insubordination.

[43] Mr Stevens' evidence is that he denied that he had threatened or abused Ms Fyfe.

[44] It was not until the second meeting on 16 January 2007 that an additional allegation of insubordination was added. During this second meeting, Mr Stevens indicated that his view was that anyone who had been drinking alcohol ought not to be

considered as an appropriate witness to the proceedings in contention between the parties. This view was perhaps an odd one given that Mr Stevens had himself been drinking and wished his view of matters to be considered by the employer.

[45] Mr Hickman considered that submission by taking an adjournment and then reverted to Mr Stevens with the view that there would be no arbitrary ban on witnesses who had been drinking.

[46] A final meeting on 18 January commenced, then adjourned to allow Mr Stevens to obtain legal representation. I do not accept Mr Stevens' evidence he was uncomfortable about proceeding without advice; I prefer the evidence of Mr Hickman that it was he (Mr Hickman) who was uncomfortable about proceeding with Mr Stevens unrepresented and that it was Mr Hickman who insisted Mr Stevens have advice.

### **Discussion**

[47] Much was made in the closing submissions of Mr Stevens about Sticky Fingers' judgment call in allegedly preferring the evidence of witnesses to the evidence from the surveillance tape which was running at the time of the incident between Ms Fyfe and Mr Stevens. It is suggested by Mr Stevens that the two pieces of evidence are contradictory and that, in preferring the views of witnesses to the evidence of the surveillance tape, Sticky Fingers erred in its decision-making.

[48] I do not accept that submission. The position is that the surveillance tape covers one minute that is relevant to the proceeding and by all accounts the incident between Ms Fyfe and Mr Stevens took longer than that. Mr Hickman told me in his oral evidence that the video record would be set off by movement but the short point is that if the conversation took longer than the video tape records, then it is not in my judgment the best evidence of the discussion. In my view, a fair and reasonable employer might choose to prefer the evidence of witnesses who saw the event to the evidence taken from a surveillance tape which recorded only a portion of the discussion and that without sound.

[49] Mr Stevens also alleges that the process by which the disciplinary investigation was conducted by Sticky Fingers was inappropriate and unfair. I do not think that allegation is made out either. I am satisfied on the basis of the evidence I heard that Sticky Fingers first appointed an appropriate person to conduct the inquiry,

second adopted a measured approach to the investigation without undue haste, third actively encouraged Mr Stevens to obtain proper advice, fourth gave proper consideration to his submissions, and fifth made a reasoned and reflective judgment to dismiss after considering and balancing all the evidence and assessing whether the behaviour complained of constituted serious misconduct or not.

[50] The central issue in relation to the justification for the dismissal remains the employer's treatment of the 9 January incident. Sticky Fingers was faced with a complaint from a senior manager. The directors themselves saw Ms Fyfe immediately after the incident. They were able to form a view about her demeanour contemporaneously. They gave their evidence of that view before me.

[51] The directors also had worked with Ms Fyfe for some time. They knew her well. Evidence was given, which I accept, that Ms Fyfe was level headed and had never had employment issues with staff before.

[52] The directors decided to suspend Mr Stevens. Their evidence was they thought the complaint against him was such as to justify that course of action; no doubt they were influenced by Ms Fyfe's response to the incident and perhaps by the desire to protect her from further contact with Mr Stevens. They gave evidence they had no knowledge of the rosters which Mr Stevens worked so their view was the only practical way of *freezing* the situation was to suspend.

[53] It is clear that the directors gave Mr Stevens no reasonable opportunity to comment on the suspension. It was, in truth, a *fait accompli*. Had Mr Stevens been able to comment, could he reasonably have expected to influence matters? I hold that suspension was available and appropriate and that the failure to seek Mr Stevens' input into that response was no more than a technical breach.

[54] Having effected the suspension, the directors instructed Mr Hickman to do the investigation. Mr Hickman set up a meeting with Mr Stevens and put the allegations to Mr Stevens. Mr Stevens denied the allegations of harassing and bullying behaviour absolutely. Mr Hickman was thus put to proof by considering the evidence of both sides.

[55] I am satisfied Mr Hickman's responses were measured and considered and his judgements reasonable in all the circumstances. The burden of the evidence available to the decision-maker favoured the complainant Ms Fyfe. As well as her own

evidence, there was the evidence of the directors who had responded to her call for help and saw her in a distressed state, the evidence of other staff who thought Mr Stevens was *over the top* and the evidence of Ms Fyfe's judgement and experience in her previous work with the employer.

[56] I am satisfied also that it was available to Mr Hickman to reach the conclusion that Mr Stevens had been guilty of insubordination. This allegation was not put until the second disciplinary meeting on 16 January. Ms Fyfe speaks in her evidence of directing Mr Stevens to raise the issues troubling him during *work time*; Mr Stevens' own evidence tends to support that conclusion also. I am satisfied Ms Fyfe did so direct Mr Stevens and that by his actions, Mr Stevens repudiated that instruction. In my view, a fair and reasonable employer could appropriately reach the conclusion that there was insubordination in consequence.

### **Determination**

[57] For reasons I have already made clear, I am not satisfied that Mr Stevens has made out his case that he has suffered an unjustified dismissal at the hands of his employer, Sticky Fingers, nor am I satisfied that Mr Stevens has suffered a disadvantage as a consequence of unjustifiable actions of his employer.

[58] In my opinion, Sticky Fingers conducted a proper and thorough investigation into the allegations against Mr Stevens and then reached the decision that a fair and reasonable employer in those circumstances would have reached, namely that the behaviour of Mr Stevens constituted serious misconduct and dismissal was the appropriate penalty for that infraction.

### **Costs**

[59] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority