

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Michael Sutherland (applicant)
<b>AND</b>	Petkovden Company Ltd (respondent)
<b>REPRESENTATIVES</b>	Grant Shand for the applicant Neville Waldren for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	New Plymouth, 27 June 2005
<b>DATE OF DETERMINATION</b>	11 July 2005

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. Mr Michael Sutherland's claim before the Authority has changed significantly on a number of occasions from that first set out in his statement of problem received on 26 January 2005. These changes have occurred via an amended statement of problem received on 11 May, a memorandum received on 24 June, the position advanced during the Authority's investigation on 27 June and, finally closing submissions received on 4 & 8 July. Amongst other changes, the final amount now claimed by Mr Sutherland is much less than that set out in earlier claims. While a far more realistic

claim has finally been advanced, opportunities to settle Mr Sutherland's employment relationship problem much sooner were arguably lost by this approach.

2. Counsel for Mr Sutherland, Mr Grant Shand, says his client seeks the following:
  - a. Compensation under s. 123 (1) (c) (i) of the Act because his dismissal on 31 October 2004 was carried out in a procedurally unfair manner;
  - b. An order that the Authority impose a penalty with the penalty to be paid to the applicant;
  - c. Interest; and
  - d. Costs.
3. The respondent denies Mr Sutherland's allegations and rejects the remedies sought by him – statement in reply received on 17 February.
4. The parties underwent mediation but their employment relationship problem remained.

### **Investigation**

5. During a telephone conference held on 18 April the parties agreed to a one-day investigation in New Plymouth commencing at 10.00 a.m. on Monday 27 June 2005. The parties usefully provided written statements in advance of the investigation.
6. Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

### **Background**

7. From the statements provided by the parties and the evidence presented at the investigation, I am satisfied that key background details are as follows.

8. Mr Sutherland is 27 years old. He has worked in a chefing capacity both in New Zealand and overseas since leaving school.
9. Mr Sutherland started work as Head Chef at Metropol Café, New Plymouth in March 2004. The Café is operated by the Company. Mr Slavko Petkovski is one of the Company's two directors.
10. Mr Sutherland says that, at the end of the working evening of 15 October 2004, Mr Petkovski assaulted him by cutting him twice with a boning knife.
11. Mr Petkovski denies the allegation and says, instead, that Mr Sutherland grabbed his right hand in which he was holding the knife and as he "*instinctively*" pulled his hand back there by (unintentionally) causing a cut to Mr Sutherland's right hand (statement in reply and repeated by way of evidence to the investigation).
12. Shortly before this incident, during the same evening, a dispute had occurred between the two men at the Café bar. Amongst other things, Mr Sutherland says Mr Petkovski told him, by way of angry, vulgar language, to leave and not come back. Mr Sutherland admits to replying with similar language.
13. What happened next is very much disputed by the two men. The violence occurred in a passageway, behind the Café's kitchen, and was not witnessed by anyone else. Mr Petkovski says he went into the area to access a fridge, so as to obtain some bread so that he might prepare a snack for a friend who was with him at the bar. Mr Petkovski could not adequately explain why he took a knife into an area of the Café where food is not normally prepared, when the nearby kitchen was readily available for food preparation. Mr Petkovski was also unable to explain, in his version of events, how it was that Mr Sutherland sustained cuts to both his hands. He also disputes the account of a then waitress who says she saw him take a boning knife from a particular area in the kitchen and slide it into the side of his trousers: he says it was not a boning knife but a bread knife and that he had it in his hand at all times. It is correct to say that Mr Petkovski's account of what happened on the evening of 15 October has changed several times.

14. What is distressingly clear is that a bloody altercation occurred. Mr Sutherland sustained cuts to his hands and was bleeding. He asked another waitress to call the Police. The Police promptly arrived. One of the two Police Officers took a note of Mr Sutherland's and Mr Petkovski's account of what had happened: it says, verbatim,

*“Argument with Michael hadn't cleaned kitchen properly. The manager did not give him beer. Argument occurred. Accidentally cut. Both victims & offender say it was accident. No complaints forthcoming.”*

15. Mr Sutherland agrees that that was what he said to the Police. He said he gave that account because he was in a state of shock at the time, that he was concerned as to the risk Mr Petkovski posed to the welfare of himself and his family, and that he only wished to get to the hospital as soon as possible so that his wounds could be seen to. Mr Sutherland also agrees that, following attention to his injuries, he returned to the restaurant from the hospital to recover his property and car and that, as a result of being approached by a person who was in the restaurant at the time, he stopped for a period to consume the drink offered to him.
16. He says that within days of the accident he turned his mind to what action he should take against Mr Petkovski. He says he approached the New Plymouth Police in respect of his concerns and that, as a result of their advice, sought legal assistance. Mr Shand confirmed that a letter had recently been sent to the Police detailing his client's version of events and asking that they prosecute Mr Petkovski.
17. Mr Sutherland says his employment came to an end in late October when Mr Petkovski advised there was no job for him, and he gave the applicant his holiday pay.
18. Mr Petkovski denies that claim and says instead that the applicant came into the Café on 31 October and asked that his holiday pay be made up: he says that Mr Sutherland told him he would be absent *“until further notice”* (par 12 of his witness statement).
19. Mr Sutherland confirmed to the investigation that he has not worked since 15 October as a result of his injuries and that he remains on ACC.

20. Finally, it should be noted again that, in addition to not being able to account for why he saw fit to take a knife into the passageway to prepare bread, Mr Petkovski's version of the altercation changed significantly in his recounting of it: in the statement in reply he placed the event in the kitchen "*where I was standing*". During the investigation he advised the Authority the incident occurred in the passageway. He did not account for this significant change.

### **The Applicant's Position**

21. Mr Sutherland says amongst other things that, while s. 317 (1) of the Injury Prevention Rehabilitation and Compensation Act 2001 (the IPRCA) provides that no person may bring proceedings in any Court/Tribunal for damages arising directly or indirectly out of personal injury covered by the IPRCA, s. 317 (2) (c) does not prevent a person bringing proceedings relating to a claim of unjustified dismissal. The applicant also concedes that s. 317 (3) of the IPRCA provides that no Court/Tribunal may award compensation in any proceedings in (2) for personal injury covered by the Act.
22. Mr Sutherland says he is not seeking compensation for his personal injury, but instead seeks grievance based compensation for a procedurally unjustified dismissal and the imposition of a penalty: *McGory v Ansett* [1999] 2 NZLR 328, at pp 335 & 336.

### **Discussion and Findings**

#### **Penalty**

23. Mr Sutherland seeks a \$1000 penalty against the Company for its failure to provide him with a written individual employment agreement, i.e. in respect of alleged breaches of the then ss. 64 & 65 of the Act. He asks that the entire amount go to him. He has not provided argument in support of this claim.
24. In his submissions to the Authority on behalf of his client, Mr Neville Waldren properly concedes his client failed to provide Mr Sutherland with a written individual employment agreement. He submits there is no evidence of the applicant being

disadvantaged by that failure. He attempts to argue, however, that the Authority has no jurisdiction to award penalties under s 64 of the Act. This is plainly not so. Section 64 (3), since repealed, provided that every employer who failed to provide an employee with a copy of the intended agreement was “liable to a penalty imposed by the Authority”. Section 63 A (3) of the amended Act now provides for the same. Section 133 provides the Authority full and exclusive jurisdiction to deal with all actions for the recovery of penalties for a breach of the Act for which a penalty in the Authority is provided in a particular provision. In the case of a company being liable for a penalty, section 135 (2) (a) provides for a penalty not exceeding \$10,000.

25. The Company has admitted its breach of s. 64. Is a penalty appropriate? In determining penalties the Employment Court has suggested a series of relevant questions: *Xu v McIntosh* unreported, Goddard C J, 18 November 2004, WC 13A/04. They include: how much harm has the breach occasioned? How important is it to bring home to the party in default that its behaviour is unacceptable or to deter others from it? Was the breach technical and inadvertent or was it flagrant and deliberate?
26. I am satisfied a penalty is appropriate on this occasion. This is because the Act has been in existence since 2 October 2000 and it can now be reasonably expected that employers are aware of their obligations to provide written employment agreements. This expectation is based on media coverage and the extensive efforts of the Department of Labour to make employers aware of their obligation. It is also based on the fact of the Company's use of the Restaurant Association of New Zealand: it is highly likely that organisation has been at considerable pains to communicate details of employers' responsibilities in this area to the Company.
27. What is an appropriate penalty? Bearing in mind the questions posed by the Employment Court I am satisfied the justice of the case is sufficiently met by an order against the Company for the claimed amount of \$1,000.
28. Should this amount be awarded to Mr Sutherland? I do not think so. I can see no disadvantage to the applicant as a result of this breach. The gravamen of the matter is his personal grievance, the penalty action being something of an after thought: see *Varney v Tasman Regional Sports Trust* unreported, Goddard C J, 23 July 2004, CC 15/04. I therefore direct that the entire penalty be paid to the Crown.

**Personal Grievance**

29. Mr Sutherland seeks compensation under s. 123 (1) (c) (i) because – he says – his dismissal on 31 October 2004 was carried out in a procedurally unfair manner. I do not accept that claim for the following reasons.
30. Mr Sutherland says he was summonsed to the Café in late October 2004, given his holiday pay and told his employment was at an end. Mr Petkovski denies this claim and says Mr Sutherland asked for his holiday pay while making clear he was leaving. As Mr Sutherland has not resigned and as Mr Petkovski has not dismissed him it might be said that the employment remains ongoing. However, what is certain is that Mr Sutherland does not seek reinstatement because he is unable to work as a chef as a result of his injuries. He remains today in receipt of ACC compensation. I am satisfied from the above that Mr Sutherland was not dismissed but that his employment at the Café has effectively come to an end as a result of his injury. I am not prepared to accept as made out the applicant's claim his termination was at Mr Petkovski's initiative and was procedurally unfair.

**Determination**

31. For the reasons set out above I find in favour of the penalty claim brought by the applicant, Michael Sutherland, against the respondent, Petkovden Company Ltd, and set the penalty against the respondent at \$1,000.00 (one thousand dollars) for breach of s. 64 of the Act. The penalty is to be paid to the Crown.
32. I find against all other claims brought by the applicant.
33. At the request of the parties costs are reserved.

**Denis Asher**

**Member of Employment Relations Authority**

