

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 1/09
5092971

BETWEEN COREY WHINN
 Applicant

AND TAIRUA LANDING LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Mania Hope for Applicant
 John Grey for Respondent

Investigation Meeting: 8 September 2008 at Thames

Submissions Received: 22 September from Applicant
 19 September from Respondent

Determination: 5 January 2009

DETERMINATION OF THE AUTHORITY

[1] In an amended statement of problem lodged in the Authority on 12 May 2008 Mr Corey Whinn claims one or more conditions of his employment have been affected to his disadvantage as a result of unjustified actions of his employer, also that he was unjustifiably dismissed from his employment on 23 August 2007 and that there has been a breach of the employment agreement he entered into with Tairua Landing Limited (“TLL”). TLL denies the claims.

[2] The issues for this determination are:

- Did TLL breach its employment agreement with Mr Whinn?
- Was Mr Whinn disadvantaged in his employment?
- Was Mr Whinn dismissed, and if so, was that dismissal unjustified?
- What, if any, remedies should be awarded?

Did TLL breach its employment agreement with Mr Whinn?

[3] Mr Whinn claims the Respondent breached the employment agreement between them when Ms Boakes withdrew an offer of employment as a Supervisor after it had been accepted, unilaterally reduced his rate of pay, and then made unlawful deductions from his final pay.

Withdrawal of offer of supervisor position

[4] Mr Whinn claims he was offered and he accepted the position of supervisor at the Restaurant in April 2007. This claim is inconsistent with the written employment agreement offered to Mr Whinn and which, at the investigation meeting, Mr Whinn said he had accepted in its entirety with the exception of the hourly rate of pay. That agreement describes Mr Whinn's role as "Front of House Person" and sets out the duties required to be undertaken by Mr Whinn. This aspect of Mr Whinn's claim fails.

Unilateral reduction of wages

[5] Mr Whinn says he was employed by TLL in January 2007 as an employee. Ms Boakes says she paid Mr Whinn as a contractor and that he was responsible for his own tax liability. TLL did not deduct PAYE tax from the payments it made to Mr Whinn. Also, Mr Whinn has not accounted to IRD for his earnings during that period.

[6] The evidence shows that there was a clear misunderstanding by both Mr Whinn and TLL with regard to the nature of the relationship between the parties from January until May 2007. TLL understood Mr Whinn was a contractor, while Mr Whinn believed he was an employee. With no formal record of the agreement entered into, I have given the benefit of the doubt to Mr Whinn. I have concluded that for the period January to May 2007, Mr Whinn was an employee.

[7] Each time Mr Whinn was paid he received a note outlining the number of hours he worked and the amount of pay due, including any deductions for food or other purchases made. The amounts he received were gross amounts with no PAYE or other statutory deductions made.

[8] In May 2007 Mr Whinn was formally offered and accepted a position with TLL. At this time he was provided with a copy of a written employment agreement, however he never signed the agreement. At the investigation meeting Mr Whinn told me he accepted all the terms and conditions in the written agreement except the hourly rate which he disputed with Ms Boakes. For this reason he refused to sign the agreement.

[9] I am satisfied having reviewed the evidence on this issue, that Mr Whinn was employed and paid on the basis of first \$12.00 and then \$13.20 for each hour he worked between January and April 2007. A handwritten note produced by Mr Whinn supports my conclusions. Consistent with the payments he had been receiving, the written agreement confirms Mr Whinn's hourly rate as \$13.20 per hour.

[10] The new arrangements with Mr Whinn commenced on 19 May. After he received his first weekly pay Mr Whinn complained to Ms Boakes that his pay had been reduced from what he had previously received. What Mr Whinn didn't realise was that he now had PAYE tax deductions made from his previously untaxed wages.

[11] Mr Whinn challenged the hourly rate of \$13.20 complaining that it was not enough. After correspondence and dialogue on the matter Mr Whinn texted Ms Boakes on 31 May 2007 and advised her he would accept \$14.20 per hour to settle their dispute, but expected to be paid \$16.00 per hour once his Bar Managers Licence was approved.

[12] From 31 May 2007 Mr Whinn was paid \$14.20 per hour for each hour worked as front of house and \$16.00 per hour for each hour worked in the Kitchen. I find that it was agreed that when Mr Whinn received his Bar Manager's licence his rate of pay for his front of house work would increase to \$16.00 per hour.

[13] I find Mr Whinn was initially happy with the \$13.20 per hour as set out in the employment agreement as that was consistent with what he had been receiving prior to 14 May 2007. As already stated, Mr Whinn's change in acceptance occurred only after his first pay, when his pay was subject to the normal PAYE tax treatment. On the facts as I have found them to be, there was no reduction in Mr Whinn's hourly rate and therefore his claim that his hourly rate was unilaterally reduced fails.

Unlawful deductions from final pay

[14] Mr Whinn claims \$332 was unlawfully deducted from his final pay. On 18 May 2007 Mr Whinn completed a Bar Managers Course and on or about 7 June 2007 applied for a Bar Managers licence. In association with undertaking the course and completing the application Mr Whinn signed a statement to the effect that if he left the employ of TLL before 7 December 2007 the costs of the course and application could be deducted from his final pay. Mr Whinn claims that as he did not leave of his own account, but rather, was dismissed, the deduction should not have been made.

[15] I am satisfied that pursuant to the Wages Protection Act Mr Whinn gave express consent for TLL to make a deduction from his final pay, including holiday pay, if he "...should leave the employ..." of TLL. The consent does not require that Mr Whinn should leave voluntarily, but simply requires Mr Whinn to leave. The deduction of \$332 was therefore a lawful deduction undertaken with Mr Whinn's express consent.

I find there have been no breaches of Mr Whinn's employment agreement by Tairua Landing Limited.

Was Mr Whinn disadvantaged in his employment?

[16] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether TLL's actions disadvantaged Mr Whinn in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act (see *Mason v Health Waikato* [1998] 1 ERNZ 84).

[17] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If TLL establishes justification for its disadvantageous actions, there is no grievance (see *McCosh v National Bank*, unreported, AC49/04, 13 September 2004).

[18] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely

an employee's subjective dissatisfaction at their circumstances. (see *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000)

[19] There are three actions by the respondent which Mr Whinn claims were unjustified and has led to one or more conditions of his employment being affected to his disadvantage. These are:

- Offer of position of supervisor which was accepted and then withdrawn by TLL;
- Unilateral reduction of his hourly rate from 16.00 per hour to \$13.20 per hour;
- Two written warnings issued to Mr Whinn which are unjustified.

Offer of position of supervisor which was accepted and then withdrawn

[20] As set out earlier in this determination I am satisfied Mr Whinn was not offered the position of supervisor. Given that, it can not have been withdrawn. This aspect of Mr Whinn's claim fails.

Unilateral reduction of his hourly rate from 16.00 per hour to \$13.20 per hour

[21] I have found that Mr Whinn's rate of pay was not unilaterally reduced and therefore, this aspect of his claim fails.

Two written warnings issued to Mr Whinn which are unjustified.

[22] The owners of TLL, Mr and Mrs Boakes, travelled overseas in July returning to the restaurant on 11 August 2007. In their absence Mr Terry Furneyvall, the Head Chef, had overall responsibility for the running of the restaurant.

[23] TLL had a number of regular customers who frequented its restaurant. One of these was Ms Cisca Scott. It was common ground at the investigation meeting that Ms Scott was well known to the staff at the restaurant including Mr Whinn. If Ms Scott was dining at the restaurant she would occasionally help out by clearing tables when the staff were busy. This seems to have been an accepted practice as no-one asked Ms Scott to desist from it.

[24] On Saturday 21 July 2007 Ms Scott and her mother attended the restaurant. It happened to also be a night when the All Blacks were playing a test match and so the restaurant staff, including Mr Whinn were expecting a very busy night.

[25] Ms Scott says Mr Whinn refused to serve her and asked her to leave. Mr Whinn says he did tell Ms Scott he didn't want her there, but it was said in jest. Mr Furneyvall, says Mr Whinn approached him and asked him to ask Ms Scott to leave. Mr Furneyvall considered that request unusual and so he approached Ms Scott himself to find out what was going on. Mr Furneyvall's uncontested evidence is that when he approached Ms Scott she was very upset as a result of Mr Whinn asking her and her mother to leave. He invited Ms Scott and her mother to place their dinner orders with him, and he then took over serving her personally.

[26] The following day was Ms Scott's birthday. She attended the restaurant once again to have a late breakfast. Ms Scott, believing she could order any meal as a celebration of her birthday, requested an item from the breakfast menu. She was advised by Mr Whinn that it was not available. It was common ground at the investigation meeting that when Ms Scott ordered her meal the breakfast menu had finished. Ms Scott says Mr Whinn was rude to her and refused to allow her to have her choice of meal. Ms Scott complained to Mr Furneyvall who completed an incident report.

[27] Mr Furneyvall raised both incidents with Mr Whinn, who says that Mr Furneyvall indicated to him that he would issue him [Mr Whinn] with a warning for his treatment of Ms Scott but says he never received any warnings. In contrast Mr Furneyvall says he gave Mr Whinn a verbal warning for both incidents as his conduct toward Ms Scott did not accord with the usual conduct expected toward valued customers.

[28] Upon the Boakes' return to the Restaurant on 11 August 2007 Ms Boakes became concerned about the tension between staff members. Allegations and counter allegations were being made which resulted in Mr Boakes investigating what had occurred during their absence.

[29] After speaking with Mr Furneyvall and Ms Scott in relation to Ms Scott's complaints, from 21 and 22 July, Mr Boakes issued Mr Whinn with a written warning. Mr Whinn was advised to change his attitude and curb his outbursts towards particular customers.

[30] I am satisfied the written warning was issued in the absence of any notion of procedural fairness. Mr Boakes took the time to speak with both Mr Furneyvall and Ms Scott about the incidents but never saw fit to discuss them with Mr Whinn and to seek his explanation.

[31] On 14 August, Mr Whinn was rostered on as duty chef until 3.00pm. During his shift Mr Whinn left his work station to discuss a personal issue with his partner. When he returned to his work station Ms Boakes told Mr Whinn that as Mr Furneyvall was unwell, he could not leave his work station unattended. Ms Boakes told Mr Whinn that leaving his work station as he had, to speak with his partner, was unacceptable and would warrant a warning. Ms Boakes says Mr Whinn then refused to speak with her, and left his work station early that afternoon at about 2.35 without logging off.

[32] Ms Boakes says that Mr Whinn was expected to return to work at 4.20pm to complete the evening shift. She says he did attend work, but was rude and would not discuss any issues with her.

[33] Mr Boakes wrote to Mr Whinn issuing him with a second written warning. Again the warning was issued without any regard to any notion of procedural fairness.

[34] The warnings made Mr Whinn's employment less secure. This is an action of disadvantage. I find the warnings were issued in a manner that was unfair and in breach of the requirements of procedural fairness. Mr Whinn has therefore suffered from a disadvantage in his employment by an unjustifiable act of TLL.

Was Mr Whinn dismissed, and if so, was that dismissal unjustified?

[35] Ms Boakes says Mr Whinn's behaviour from 14 August continued the next day and on 16 August she sat down with Mr Whinn, Mr Boakes, Mr Furneyvall and

Ms Zimmerman (the restaurant manager and Mr Whinn's mother) to discuss several matters including Mr Whinn's behaviour. At that meeting Mr Whinn acknowledged his behaviour was unacceptable and agreed to improve.

[36] Ms Boakes says Mr Whinn's behaviour did not improve and he and Ms Zimmerman became very difficult when asked to accommodate Mr Furneyvall's need for time off to attend to a medical condition which required attention.

[37] Those difficulties led to Ms Boakes, on 23 August, endeavouring to speak with Ms Zimmerman about an argument Ms Zimmerman had had with Mr Furneyvall and difficulties over rostering. Ms Zimmerman had left work early that day and had left her cell phone at the Restaurant. Ms Zimmerman asked Mr Whinn, who was not rostered to work that day, to call into the restaurant and pick it up for her.

[38] Ms Boakes says that when Mr Whinn came back into the restaurant she endeavoured to discuss work issues with Mr Whinn, but he refused to talk to her. Ms Boakes says, Mr Whinn shouted at her to "...get out of my way..." and then violently pushed her backwards. Ms Boakes says Mr Whinn pushed her so hard she fell against the door opening.

[39] Mr Whinn says that he was standing beside the opening of the Bar area when Ms Boakes approached him and blocked his exit. Mr Whinn says he asked Ms Boakes three or four times to move so that he could leave the premises. He denies raising his voice, or pushing Ms Boakes. Mr Whinn says he simply pushed past Ms Boakes and walked out of the restaurant.

[40] I am satisfied on the balance of probabilities that Mr Whinn did use unnecessary force to get past Ms Boakes and out of the restaurant on 23 August. At the investigation meeting Mr Furneyvall demonstrated what he had witnessed and told me Ms Boakes went "...flying into the architrave". Ms Wendee Dewes, another employee working at the time confirmed Mr Furneyvall's evidence.

[41] Ms Boakes attempted to make contact with Mr Whinn following his departure but was unable to reach him despite leaving two voice mail messages on Mr Whinn's cell phone for him to make contact with her.

[42] Mr Boakes then determined to dismiss Mr Whinn for what he considered as an unprovoked attack on his wife. Mr Boakes communicated the decision to dismiss via a text message as he says he had been told previously by Ms Zimmerman, not to approach Mr Whinn at his home address.

[43] Later that night Ms Boakes delivered a letter to Mr Whinn's letter box confirming the decision to dismiss him from his employment.

[44] I am satisfied Mr Whinn's action in pushing Ms Boakes was serious enough to constitute serious misconduct. Not only were his actions unprovoked, and unnecessary but it was witnessed by both staff and customers, and caused Ms Boakes considerable distress.

[45] However, there was a complete absence of procedural fairness. Mr Boakes heard about the incident from Ms Boakes but never met with Mr Whinn to seek any explanation from him. He simply sent Mr Whinn a text advising him he had been dismissed. A letter confirming the dismissal was then delivered to Mr Whinn's letterbox that evening.

[46] I find that dismissal was an action a fair and reasonable employer would have taken in all the circumstances of this case. However, in considering how Mr Boakes acted in putting the dismissal into effect, an employer acting fairly and reasonably would have written to Mr Whinn, providing clear notice of the need to meet, including setting out the allegations and potential consequences if serious misconduct was proven, together with allowing an opportunity for Mr Whinn to seek advice and representation at any meeting at which his explanations would be sought.

[47] Mr Whinn was, therefore, unjustifiably dismissed.

Remedies

[48] Mr Whinn has been successful in his claim for unjustified disadvantage and his claim for unjustified dismissal. He is therefore entitled to a consideration of remedies.

Unjustified disadvantage

[49] Mr Whinn is entitled to a remedy for this successful claim, however, I am satisfied that he contributed towards the situation that gave rise to this personal grievance. I have therefore reduced the award I would normally have made to Mr Whinn by 50%. To compound matters, Mr Whinn gave very little evidence as to any hurt and humiliation suffered as a result of receiving the two written warnings.

Tairua Landing Limited is ordered to pay to Mr Whinn \$500 without deduction pursuant to section 123(1)(c) of the Employment Relations Act 2000, within 28 days of the date of this determination.

Unjustified dismissal

[50] On 23 August 2007 Mr Whinn pushed Ms Boakes so hard she fell into the door. Ms Boakes gave compelling evidence about the affect Mr Whinn's actions had on her. She told me that she was so fearful of him that she was unable to go into the town or work in the evenings at the restaurant in case Mr Whinn came in to drink with his friends.

[51] It was common ground at the investigation meeting that after his dismissal Mr Whinn attended the restaurant and created difficulties for other employees. In particular I heard evidence of two incidents during which employees felt compelled to contact Mr Boakes, who then attended the restaurant and removed Mr Whinn. Following these incidents a trespass notice was served on Mr Whinn.

[52] I am satisfied that had Mr Boakes followed the steps of procedural fairness, there was a high likelihood Mr Whinn would have been dismissed. In these circumstances I decline to make an award for lost wages to Mr Whinn.. (*Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315; *Waitakere City Council v Ioane* [2004] 2 ERNZ 194)

[53] I am bound by section 124 of the Act to consider the extent to which Mr Whinn's actions contributed towards the situation that gave rise to his personal grievance of unjustified dismissal, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[54] Mr Whinn was dismissed as a result of his conduct in pushing Ms Boakes. Mr and Ms Boakes considered this to constitute assault, however, no complaint was made to the Police as they considered the fact that he had lost his job as being punishment enough. Mr Whinn's actions caused much distress for Ms Boakes. To compound matters, Mr Whinn continued to attend at the Restaurant and cause problems for other employees.

[55] I have already found Mr Whinn would have been dismissed for serious misconduct had a fair and reasonable process been followed. Therefore Mr Whinn must be found to have contributed significantly towards the situation that gave rise to the personal grievance.

[56] With regard to the unjustified dismissal claim I am satisfied it is just to reduce the remedies available as a result of Mr Whinn's conduct. Mr Whinn is entitled to an award for contribution to his costs but no other remedy. This will acknowledge Mr Whinn established to my satisfaction a personal grievance based on a claim that he was dismissed unjustifiably, without rewarding him for significant blameworthy conduct.

Costs

[57] Costs are reserved. The parties are encouraged to resolve that question between them, however if they fail to reach agreement on the matter Mr Whinn may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority