

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Jared Johnstone (Applicant)  
**AND** Morrison Bar Limited (Respondent)  
**REPRESENTATIVES** Blair Edwards for applicant  
No appearance for respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**INVESTIGATION MEETING** 8 September 2005  
**DATE OF DETERMINATION** 14 September 2005

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

The applicant submits that he was suffered unjustified disadvantage in his employment and that he was constructively dismissed. He also submits that during his period of notice he was unjustifiably dismissed.

There was no appearance at the investigation meeting by or on behalf of the respondent. I am satisfied the respondent has been served with the Statement of Problem and Notice of Investigation Meeting.

The meeting was delayed to allow for the situation that the respondent had been unavoidably detained. However, as there was neither an appearance for nor contact from the respondent to explain its absence I have proceeded to hear and determine the matter in accordance with Clause 12 of the Second Schedule of the Employment Relations Act 2000.

**Background**

Mr Johnstone was formerly the General Manager of a bar/night club called Morrison. His employment with the above named respondent commenced on 1 June 2004. Prior to this he had been General Manager of the Club under the ownership of Denim Holdings Ltd. He is a minor shareholder in this company. When the majority shareholders decided to sell the Club to Mr Ng (Sole Director of Morrison Bar Ltd), Mr Johnstone was offered ongoing employment with the new owner. There was a verbal agreement between the parties that his previous terms and conditions - contained in a written employment agreement - would continue. It was also verbally agreed that the employer would reimburse him for authorised expenditure made on behalf of the business.

The new owner also made promises to bring increased working capital to the business to relieve Mr Johnstone of the heavy workload he was under. Unfortunately the promise of increased operating

funds did not eventuate and in fact Mr Johnstone's workload increased. As time went on contractors and suppliers refused to supply services and products to the business because their accounts had not been paid. Mr Johnstone was left to manage these situations and this led to him undertaking the cleaning of the premises and personally collecting and paying for necessary supplies. Mr Johnstone was frequently not paid on time and started incurring penalties from his bank when automatic payments (timed to be paid after his salary was deposited) were not paid. His evidence was that he had frequently foregone his own wages in order to pay the staff, suppliers and contractors necessary to keep the business trading.

The situation became increasingly intolerable for Mr Johnstone and he resigned on 19 March 2005 to take effect from 28 March. On 23 March Mr Morrisson arrived at work to find the locks on the doors had been changed and that his own office had been breached by a locksmith and the locks changed. Mr Ng (Director of the Respondent company) raised with Mr Johnstone an allegation of theft and told him not to return to the premises.

*Note:* Mr Johnstone originally brought a claim for arrears of wages and other monies owing to him by the respondent (AEA 301/05). However, more recently he has submitted this personal grievance claim. I note the evidence was that claim was submitted to the respondent by courier on the same day it was filed with the Authority i.e. 85 days following the expiry of the notice given by Mr Johnstone. I have already noted that I am satisfied that the respondent has been served with the Statement of Problem and Notice of Investigation meeting and that opportunity to challenge the submission of grievance within 90 days has been afforded to the respondent.

## **Applicant's Evidence**

Mr Johnstone said that he had a central role in the concept, establishment and operation of Morrisson's. He had small shareholding in the original company that set up and owned the bar/club and was its General Manager. His role as General Manager was to oversee all areas of the club's operations including the hiring and management of staff and contractors, negotiations with suppliers, contractors, entertainers and promoters, the management of security (cash and premises), stock control, licence management, functions, PR and the like.

Prior to the proposed change of ownership Mr Johnstone said he met with Mr Ng (the respondent's Director) on several occasions. He was assured by Mr Ng that he wanted no change to the current structure of the business. Mr Johnstone agreed to continue in his role on the understanding that he continued to have a free hand (operationally speaking) in the management of the business. Mr Ng agreed to this and said he would be introducing improved resources to reduce Mr Johnstone's heavy workload particularly in respect of financial and staff management systems.

It was agreed his current terms and condition of employment would continue and that the company would reimburse Mr Johnstone for business related expenses.

The reality experienced by Mr Johnstone in the employment of Morrisson Bar Ltd was very different to that agreed between himself and Mr Ng.

The promised increase in working capital did not eventuate and in fact no working capital was provided to the business. Over the ensuing months Mr Johnstone's workload increased as staff, contractors and cleaners failed to turn up due to non payment. Mr Johnstone and other staff were left to take up the slack and Mr Johnstone frequently had to pay suppliers and transport supplies himself just to keep the business open. He was criticised for taking these steps. His salary was not paid on time and he started to incur penalties from his bank when automatic payments were declined due to late payment of his salary. Mr Johnstone said he had often foregone payment of his

own salary to ensure staff salaries were paid and creditor's demands satisfied. Staff tensions developed as staff became worried about the stability of the business. He had to counsel and assure staff. It was also of concern that since June 2004 the respondent had owed him increasing sums by way of business related expenses.

For months Mr Johnstone took his concerns up with Mr Ng who fobbed him off with promises of increased working capital and new business investors on the horizon. Mr Johnstone advised he stopped taking matters up with Mr Ng after tradesmen arrived to disconnect the dishwasher due to non payment of the lease. This meant there would be no dishwasher and the business could not trade without one. Mr Johnstone tried to impress the reality of the situation on Mr Ng by telephone. Mr Ng hung up on him twice. Mr Johnstone had to find the money to prevent the dishwasher being repossessed. This happened approximately one month before he resigned.

Mr Johnstone gave evidence that Mr Ng began to introduce and use illegal drugs on the premises. He proposed to Mr Johnstone that they obtain supplies of crystal methamphetamine to sell within the Club. Mr Johnstone said he objected strenuously to this proposal.

The resulting mental and physical stress became intolerable and Mr Johnstone decided to resign. He resigned on 19 March 2005 to take effect on 28 March. Mr Johnstone gave notice in the hope Mr Ng would pay him what he was owed.

That was not the case. The respondent did not pay any wages after the notice was given. Mr Johnstone arrived at work on 23 March to find the locks had been changed including the locks on his own office. Mr Ng accused him of taking \$2000 that had been set aside to pay the cleaning contractor but which had gone missing the previous weekend. Mr Johnstone explained he had no knowledge of the whereabouts of the money and was in the belief it was in the safe in his office. Mr Ng told him collect his belongings and leave and not to return until he had recovered the money or could advise where it was. Mr Johnstone did not return to the work place. On reflection Mr Johnstone believes that it was Mr Ng – the only other person with access to the combination of the safe – that removed the money in question.

Mr Johnstone described the effect this dismissal had on him in compelling terms. He was under intolerable stress in the latter part of his employment and this was compounded by his dismissal with the allegations of theft. The hospitality industry is close and his departure from Morrisson has been the subject of speculation within the industry and that has impugned his integrity and stripped him of confidence. He has suffered serious financial consequences as a result of his dismissal and his credit rating has been affected. He has had to live with family and rely on family members for financial support. He feels he has been suffering from depression for the last six months and that he is only now in the position to pick up the pieces and move on with his life.

A statement from the applicant's mother supported his evidence as to the serious effects this employment culminating in his dismissal has had on him and the worry this has occasioned his family.

## **Issues to be Decided**

The applicant submits that the respondent's breaches of duty towards him amounted to unjustified disadvantage in respect of which he has a personal grievance against his former employer. He also submits that the same breaches of duty gave rise to a constructive dismissal. He also alleges he was unjustifiably dismissed during his notice period.

I am of the view that the employer's conduct towards Mr Johnstone should be treated as a claim of constructive dismissal claim and a claim of unjustified dismissal.

In respect of the claim of constructive dismissal, the applicant bears the onus of showing, on the balance of probabilities, that the termination was, as a matter of law, a dismissal not a resignation. *NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holding Ltd* [1991] 2 ERNZ 267.

For Mr Johnstone to establish that his resignation was in fact and law a dismissal he needs to show that there was breach of duty by the respondent of such magnitude that it entitled him to terminate the contract of employment.

In *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 the Court of Appeal held that constructive dismissal included, but was not limited to cases where:

1. An employer gives an employee a choice between resigning or being dismissed;
2. An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;
3. A breach of duty by the employer leads an employee to resign.

In respect of the claim of unjustified dismissal Mr Johnstone must establish (prime facie) that there was a dismissal. The onus then shifts to the respondent to show the dismissal was justified.

The issues to be decided are:

- Did the respondent breach its duty towards the applicant?
- If so were the breaches sufficiently serious as to warrant the applicant treating the employment as having been repudiated by the respondent?
- Was the applicant unjustifiably dismissed from his employment?

## **Discussion**

The applicant presented as a most credible witness and I accept his evidence.

In his letter of resignation Mr Johnstone gave relatively brief reasons for his resignation including the new owner's departure from the original concept of Morrison's and the high price the management task had taken on him in a business which was incredibly under-resourced and trading in insolvency. Mr Johnstone expanded on his concerns in another letter he wrote to the respondent on 28 March. In that letter he recited the same issues described in his evidence above.

To answer the questions set out above I find that the respondent was repeatedly in breach of his duty towards Mr Johnstone both in terms of the increasingly unreasonable workload that was placed on him and in the failure to meet its basic obligations to pay him on time and to reimburse him for expenses incurred by him in keeping the business open and trading.

On the face of it Mr Johnstone has, in continuing his employment, accepted the breaches and affirmed the contract of employment.

I find however that the ongoing nature of the breaches and the escalating severity of the breaches, bad faith and illegal conduct – including the promotion and consumption by Mr Ng of drugs in the workplace meant that the worry and stress of managing the business began intolerable and started to affect Mr Johnstone's mental and physical wellbeing. It took a long time for Mr Johnstone to accept the continuing and escalating breaches of duty as a repudiation of his contract by his employer. This was, I find, because Mr Johnstone (who had been involved in the business from its concept had an enormous emotional and intellectual investment in the success of this business. It is for this reason too I find that the outcome of his employment with Morrisson Bar Ltd has had such a serious impact on him.

In the event however, the breaches of duty became so serious that Mr Johnstone had no choice but to recognise the respondent's repudiatory conduct and he gave notice of his resignation. The fact he gave notice and intended to work out that notice does not, in the circumstances of this case, militate against a finding of constructive dismissal. It was entirely sensible of Mr Johnstone to give notice in the hope that he would be paid the substantial sums owed to him by the respondent.

I find that Mr Johnstone was constructively dismissed from his employment with the respondent. Further, whilst he was working out his notice I find he was summarily dismissed from his employment in circumstances where allegations of theft on his part were not the subject of a thorough investigation following a fair procedure. The unfair treatment in relation to these allegations is an aggravating feature of Mr Johnstone's dismissal.

## **Determination**

Based on my findings above I find the applicant was constructively dismissed from his employment with the respondent and that he was unjustifiably dismissed during the period of his notice. He has personal grievances against his former employer.

## **Remedies**

### Lost Remuneration s.123 (1) (b)

I accept the evidence from the applicant and his mother that the unreasonable treatment of the applicant by the respondent culminating in his decision to resign and subsequent unjustified dismissal has had a very serious effect on him. He has in effect been in no fit state to mitigate his losses by searching for new employment. He is only now looking forward to starting a new job in the next week or so.

The loss of remuneration suffered by Mr Johnstone as a result of the grievance is \$27,461.54 from the date of expiry of the notice given by him to the respondent to the date of hearing. I consider that in the circumstances of this case an award of the full sum lost is warranted.

Therefore pursuant to s.123 (1) (b) I direct the respondent to pay to the applicant the sum of \$27,461.54 gross to compensate him for remuneration lost as a result of his personal grievances

The applicant also seeks to recover bank penalties he incurred as a result of insufficient funds being available to meet his automatic payments. This situation came about because his salary was frequently not paid on the due date.

Section 123(1) (b) provides that where an employee has a personal grievance the Authority may provide for the reimbursement to the employee of wages *or other money* lost as a result of the dismissal. The Act does not limit loss to the loss of contractually defined income *Brett Hjorth v Onesource Ltd* unreported decision AC 47/05.

I therefore direct the respondent to pay to the applicant – in addition to the lost remuneration awarded above – the sum of \$1,687.50 net to reimburse him for bank penalties which he incurred because his salary was not paid on the due dates.

Compensation for Humiliation, Loss of Dignity and Injury to Feelings s.123 (1) (c) (i)

I accept the evidence before me that the breaches of duty by the employer which forced the applicant to resign and the subsequent unjustified dismissal had an extremely damaging effect on him from which he is only now recovering. An award under this head at the higher end of the scale is warranted.

I therefore direct the respondent to pay to the applicant the sum of \$12,500 net under this head

## Summary of Orders

The respondent is to pay to the applicant the following sums to remedy the grievances determined:

	\$
Lost remuneration	27,461.54 gross
Reimbursement of other monies lost	1,687.50 net
Compensation under s.123 (1) (c) (i)	12,500.00 net

## Costs

The parties are to file and serve submissions on costs to allow that matter to be determined.

Janet Scott  
Member of Employment Relations Authority