Please refer to page 12 regarding Name suppression for SLTA

Determination Number: AA 388/05
File Number: AEA 623/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Deborah Anne Nichols (Applicant)
AND	Te Awamutu Wines & Spirits (1998) Limited t/a Super Liquor Te Awamutu (Respondent)
REPRESENTATIVES	Gillian Spry and Kate Ashcroft, Counsel for Applicant Joanne Watson, Counsel for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	20 April, 10 May and 7 June 2005
SUBMISSIONS RECEIVED	20 May, 17 and 28 June 2005
DATE OF DETERMINATION	30 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 5 February 2004 a letter raising personal grievances was written on behalf of the applicant, Ms Deborah Nichols, and two others, to the respondent Te Awamutu Wines and Spirits (1998) Ltd, which company had employed them. It is franchised to the Super Liquor chain of bottle stores and runs a retail liquor store in Te Awamutu where it trades under the name Super Liquor Te Awamutu. The employer company shall be referred to in this determination as "SLTA",

[2] The directors of SLTA are Mr John Reed and his wife Mrs Janice Reed. They manage the store, assisted by their son Craig, and they also operate another liquor store in Raglan.

[3] Ms Nichols grievance raised with SLTA was expressed to be "constructive dismissal and sexual harassment under the Employment Relations Act 2000." Her grievance was not able to be resolved with mediation and has been brought to the Authority for investigation and determination.

[4] Ms Nichols asks the Authority to find from its investigation that while employed by SLTA she was sexually harassed. She asks the Authority to find that this harassment was a serious breach of duty by her employer that forced her to leave her job and that she was therefore constructively dismissed by SLTA. She also asks for a finding that SLTA failed to provide her with a written employment agreement, as required by ss.64 and 65 of the Employment Relations Act 2000. (The penalty claim pre-dates the December 2004 amendments to those provisions.)

[5] I note that findings in favour of Ms Nichols other than those sought by her, are open to be made by the Authority under s.160(3) of the Act. No matter how an employment relationship

problem has been presented to the Authority, the overall objective of an investigation is always to resolve the problem.

[6] To resolve her problem Ms Nichols seeks orders requiring SLTA to pay;

$10,507.78 - as reimbursement for wages lost by her over the six months following the contended dismissal, and

$15,000 - as compensation for humiliation, loss of dignity and injury to feelings suffered by her, and

$5,000 - to punish SLTA for breaching ss.64 and 65 of the Act.

The complained of harassment

[7] Ms Nichols is in her mid-forties and has three early or near early teenage children. She complains of sexual harassment suffered by her at different times in the course of her employment by SLTA. That employment commenced in November 2002 and finished near the end of January, or in early February, 2004. She worked as a customer services assistant for five days a week in SLTA's retail liquor store, for which she was paid $12 per hour after an initial trial period.

[8] Ms Nichols accuses Mr John Reed and his son Mr Craig Reed of the sexual harassment.

[9] Mrs Janice Reed has not been accused of any kind of wrong by Ms Nichols in relation to her employment.

[10] Ms Nichols complains that she suffered both verbal and physical abuse. The first kind was in the form of comments made at different times by the two Reed men that were discriminatory, denigratory, demeaning, belittling, offensive and racist. Some of the comments she says were directed at her personally. Others were made within her hearing and were directed to or were about other employees, customers or members of the general public. The comments allegedly often incorporated words such as "fuck", "cunt" and "bitch".

[11] One example of verbal abuse Ms Nichols gives is of co-worker, Ms Sharon Rusling, and herself being yelled at by Mr Craig Reed, to "…leave Trevor alone and fucking get out here, go on. Get out here and watch the fucking shop." Another example is of hearing Mr John Reed pass comment about a member of the public seen going into the bottle store of a trade competitor located directly across the road from SLTA's premises, as follows; "What's that stupid old slut going over there for? Fucking old cunt." Ms Nichols complains that both Reed men would abuse her by telling her to "fuck off' or to "fuck up" and would refer to her as "bitch", "bastard" and "cunt."

[12] The complained of physical abuse carried out by the Reed men was touching, patting and groping Ms Nichols with their hands and in some cases a vacuum cleaner pipe and a duster, on parts of her body including breasts, waist, buttocks, crotch and legs.

[13] Two particular occasions of handling or attempted handling are relied on by Ms Nichols to substantiate her complaints of sexual harassment. The first was on Tuesday 4 November 2003, the day of the Melbourne Cup, and the second was on Thursday 18 December 2003.

4 November 2003

[14] Being a Tuesday, this was Ms Nichols day off from her job. She went to the Te Awamutu SLTA store at about 5.30 pm. to return some glasses hired by her bridge club where she had spent the afternoon. At the store she found Mr John Reed and others congregated around a television set that had been made available for customers and staff to watch the running of the Melbourne Cup. Some drink was available and was being consumed.

[15] Ms Nichols evidence is that after she had joined the group around the television Mr John Reed walked over to her, reached out and patted her left breast. As he did this he said, "what have you got there." She says that she was shocked by Mr Reed's completely unprovoked action. Mrs Nichols further evidence is that Mrs Reed, who was also present, saw it and said to Mr Reed, "cut it out", whereupon he had laughed and walked away.

[16] Ms Nichols explained that on her clothing above her left breast she had been wearing a small safety pin which had earlier held a card she had worn at the bridge club for the purposes of a competition. She said she had removed the card upon leaving the clubrooms but had left the pin to be removed later.

[17] Ms Nichols described Mr Reed's touching as several quick patting-like contacts by his hand directly on her breast. The safety pin was higher up from where he touched her.

[18] A few minutes later Mr Reed had walked in her direction and, she said, had swung his arm out towards her in an attempt to touch her genital area. She said she was able to push his arm away before it reached her crotch. She said Mr Reed's reaction was to snigger at her, and she is sure that Mrs Reed saw what happened and looked ashamed.

[19] Mr John Reed in his evidence said he remembered Ms Nichols being present around the television after the 2003 Melbourne Cup had been run. He described her condition as on the way to being drunk. He said he had merely looked closely at, and asked her about, a brooch or badge she was wearing and he denied grabbing at her breast or crutch. These he said are things that he would never do, and he said that he found it embarrassing to even answer allegations of this kind.

[20] Mrs Reed said she saw nothing untoward occur between her husband and Ms Nichols, although she had told Mr Reed not to touch Ms Nichol's "badge". Mrs Judy Pease the office manager who had also been present said she had not seen Mr Reed act in the way complained of by Ms Nichols. Mr Trevor Bartley, then a customer services assistant, said he too was present but had not seen anything.

[21] Ms Sharon Rusling, another customer services assistant at that time, said she saw Mr Reed behave as described by Ms Nichols on 4 November 2003. She told the Authority she saw Mr Reed put his hand directly onto Ms Nichol's breast, and later had seen him lean in as if trying to touch her crotch before she stepped aside from the contact.

18 December 2003

[22] Ms Nichols evidence was that on Thursday 18 December 2003 after finishing work, she and Ms Rusling had gone for Christmas drinks at a nearby veterinary club or clinic. Later they returned to SLTA's store to buy wine to take home. Mr John Reed and Mr Bartley were present. Ms Nichols told the Authority that while she was standing at the counter Mr Reed had said to her "come here" and had then reached out and lunged towards her over the counter in the direction of her right breast. She said she instinctively drew back but in doing so lost her balance and would

have fallen if she had not been held up by Mr Bartley who had been standing nearby.

[23] Although he said he remembered the occasion Mr Reed was able to say very little about this alleged incident, except that Ms Nichols had been drinking before she had returned to the store.

[24] Mr Bartley in his evidence said he had seen and heard what took place as described by Ms Nichols and confirmed that he had prevented her from falling after she had lost her balance. Mr Bartley described the state of Ms Nichols and Ms Rusling when they returned to the store as "happy but not merry."

Conduct of Mr Craig Reed

[25] In particular Ms Nichols complains that on a number of occasions Mr Craig Reed pushed a long handled duster and a vacuum cleaner pipe between her legs, at the same time making lewd comments and laughing. He is also accused of touching Ms Nichols mid-section, of tickling and pinching her and of attempting to handle her crutch and her behind. On some occasions she said he had asked to enter the women's toilet while she was occupying it, opening the door and laughing as he did so.

[26] Ms Nichols said Mr Craig Reeds conduct would have been noticed by Mrs Reed, Mrs Pease, Ms Rusling and Mr Bartley. The first two women said they had seen nothing like the conduct Ms Nichols complained of. Mr Bartley said he had seen Mr Craig Reed push a vacuum cleaner between the legs of Ms Nichols and had heard him laugh when she had told him off.

Credibility of witnesses

[27] I believed Ms Nichols when she was giving her evidence. I sat near her when she did so facing one or more of the Reeds directly across the table. She left me with the impression of being a truthful witness overall in her answers to questioning from Ms Watson and from the Authority, as well as from Ms Spry.

[28] After reconsidering and reflecting upon that evidence and of all the other witnesses' evidence, I accept as truthful her account of what she complained of was said and done to her by Mr John Reed and Mr Craig Reed. The preponderance of all the evidence strongly supports her account and I find that the conduct complained of happened as described by Ms Nichols.

[29] I accept that the conduct she described occurred on other occasions during her employment and was not confined to the specific dates of 4 November and 18 December 2003.

[30] Mr John Reed and Mr Craig Reed did not give me confidence in their credibility or their evidence itself. However it is on what they said that I have assessed their credibility, rather than their particular bearing and behaviour during the investigation meeting, which they may have experienced as an ordeal.

[31] Although primarily I have assessed credibility from my observation of Ms Nichols and Mr John Reed and Mr Craig Reed, and also from the inherent plausibility of the evidence as given by any of these witnesses, there are other indicators as to who was likely to be telling the Authority the truth. These are found in several of the circumstances. There is the fact that Ms Nichols made a formal complaint to the Police about the Reeds behaviour. There is the corroborative evidence given by Ms Rusling and Mr Bartley as to what they heard and saw on 4 November and 18 December 2003.

[32] Another source of indicators is the evidence of similar treatment from Mr John Reed and Mr Craig Reed experienced by Ms Rusling and Mr Bartley, and also by another employee and even by a customer of SLTA. This evidence was objected to by Ms Watson as being similar fact.

[33] In civil proceedings there is no rule requiring similar fact evidence to have enhanced probative value before it may be admitted. I have followed what has recently been said by the House of Lords, that relevance is the applicable test and that similar fact evidence "is admissible if it is potentially probative of an issue"; see *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, per Lord Phillips, 28 April 2005. In the Authority it is not so much an issue of admissibility but a question of the weight to be attached to the similar fact evidence.

[34] I consider that the similar fact evidence I heard had relevance in showing a well marked pattern of behaviour exhibited particularly by Mr John Reed and particularly towards females. What is also relevant is the particular management style or attitude shown to employees by the Reed men. It is clear to me that they had little respect for employees as people with feelings and little respect for the personal dignity of those employees.

[35] The onset of the particular medical condition diagnosed in Ms Nichols at the time she stopped working for SLTA is I find another good indicator of what happened to her. Although she tried to ignore or tolerate the complained of behaviour, or hoped she could bear up to it, she unwittingly allowed stress to accumulate over time until she became unwell from it. The medical evidence is that Ms Nichols suffered "a significant mental health episode" at the time she left SLTA, prior to which she had "remained in good health."

Police complaint

[36] From a copy of her statement I find that Ms Nichols formally complained to the Police on 28 April 2004 about the conduct of Mr John Reed and Mr Craig Reed. She confirmed to the Police in writing signed by her that the extensive statement was true and correct. She may be taken to have known, as most adults do, that making a false statement to the Police is an offence. Her Police statement in content is consistent with the evidence she gave to the Authority. Ms Rusling too complained to the Police.

[37] Ms Nichol's subsequently withdrew her Police complaint. I accept that she did so to prevent Police action compromising her ability to proceed with her grievance claim which she had raised before she went to the Police. As a response to the Police complaints SLTA and the Reeds had claimed to have a right to silence in respect of the investigation of their grievances, and when the complaints were withdrawn SLTA and the Reeds were concerned to obtain written confirmation of that from Ms Nichols and Ms Rusling. The withdrawal of her Police complaint cannot I find be taken as any kind of acknowledgement by Ms Nichols that her complaint was unfounded.

Ms Rusling and Mr Bartley grievance claims

[38] Ms Nichols, Ms Rusling and Mr Bartley, who had all been working together at SLTA raised grievances at the same time after consulting the same professional advisor. Ms Rusling raised the same grievance as Ms Nichols, alleging that she too had been sexually harassed and constructively dismissed by behaviour of Mr John Reed and Mr Craig Reed. On behalf of Mr Bartley the grievance raised was one of unjustified dismissal.

[39] The circumstances of Mr Bartley's dismissal on 30 January 2004 precipitated the departure of Ms Nichols and Ms Rusling from their jobs at SLTA around the same time. Their three grievance claims were not resolved between the parties themselves or through mediation and were all pursued

to the Authority. Once there Ms Rusling's grievance was resolved by agreement of the parties, but investigations have been required to be undertaken and completed to determination stage in the separate cases of Ms Nichols and Mr Bartley.

[40] As Ms Ruslings claim was settled nothing can be inferred from that outcome alone as to the merits of her grievance. She nevertheless gave evidence to the Authority as to what she had experienced herself and of what she had seen or heard others experiencing.

[41] Mr Bartley's claim has now been resolved by the Authority. In a written determination dated 23 June 2005 (AA 232/05) Authority member Mr Ken Anderson found that Mr Bartley had been unjustifiably dismissed by Mr John Reed of SLTA on 30 January 2004. Mr Bartley was awarded a total of $13,500 for lost wages and as compensation for humiliation, loss of dignity and injury to feelings. He was found not to have contributed to the situation that gave rise to his unjustified dismissal.

[42] Although the Authority also found that Mr Bartley had not been given a written employment agreement as required by s.65 of the Employment Relations Act, it imposed no penalty for this breach by SLTA.

[43] The Bartley determination of Mr Anderson has some relevance to Ms Nichols case now to be determined, not because of the finding of unjustified dismissal made against SLTA but because Mr Bartley, Ms Rusling and Mr John Reed gave evidence to Mr Anderson and were also witnesses in the investigation into Ms Nichol's grievance claims. Establishing the true facts is central to the resolution of this case in which unfortunately there are considerable conflicts of evidence. Although I must decide for myself from my own direct contact with the witnesses whether or not they have told the Authority the truth, I take some assistance from the assessment of my colleague Mr Anderson as to the general credibility of the same witnesses and their evidence.

[44] Mr Anderson in his determination quoted evidence given by Mr Bartley and Ms Rusling. I note in particular the evidence that Mr John Reed had told Ms Rusling not to involve herself in the matter that lead to Mr Bartley's dismissal and had addressed her as follows;

> *Fuck up you silly bitch and keep your nose out of it.* – and also;
>
> *Shut up, shut up, you can just bugger off, go on bugger off.*

[45] Ms Nichols has complained that she was addressed by Mr John Reed in a similar way from time to time. Mr Anderson said he found the evidence of Ms Rusling to be "most credible" and he accepted her evidence as being reasonably objective and truthful overall. Mr Anderson said he also largely accepted the evidence of Mr Bartley. Mr John Reed's evidence however was generally found by Mr Anderson to be lacking in credibility. His demeanour and attitude at the investigation meeting were commented upon adversely by Mr Anderson.

[46] Mr Anderson also commented critically on the management style and the attitude of Mr John Reed as an employer. He mentioned a lack of respect shown by Mr Reed towards employees and his bullying and boorish conduct typical of his behaviour towards his employees.

[47] These findings by Mr Anderson are not of course determinative in relation to Ms Nichol's case, but they are persuasive. His decision was issued after I had finished interviews with witnesses. When I read the decision I found Mr Andersons views of the witnesses substantially accorded with my own independently formed views of those same people who had been witnesses in my investigation. I too accept the corroborative evidence of Ms Rusling and Mr Bartley given

in relation to Ms Nichols claim. I also accept as relevant and probative the similar fact evidence given by them.

Harassment of customer – Ms A

[48] A customer of SLTA, who I shall call Ms A, gave evidence of her experience. Ms A was an impressive witness whose evidence I believed when I heard it and which I now totally accept after having reflected on it. She lived in the same street as the SLTA store and went to it for that reason. On one occasion Mr John Reed, she said, had patted her bottom, and the next time she visited he had given her a full frontal cuddle. She told him not to do this.

[49] On the last occasion Ms A visited the SLTA store she was served by Mr John Reed. She said that he had walked up behind her where she was waiting at the counter to be served, pushed on her back and said "I'd like to bend you over the counter." She told him not to touch her again and she never returned to the store. As well as that evidence I accept that she complained to the Police about his actions and I accept that she has not pursued the complaint because of difficulties in gathering evidence to support charges in relation to conduct of this nature.

[50] Ms A had no doubt that Mr Reed was referring to sexual activity in his actions and words on the last occasion she had gone to his store. Mr Reed was unimpressive in responding to this evidence. He gave no credible answer to it and resorted to making a facetious comment about Ms A which somewhat confirms his lack of respect for his employees and for those such as Ms A, a customer who helped provide him with a living.

Harassment of another employee – Ms B

[51] A former SLTA employee, who I shall call Ms B, was issued with a summons by the Authority and attended the investigation meeting. I found that she overstated the particular event involving Mr John Reed she gave evidence of. She said in her written statement that Mr Reed had been standing behind her in a line of people waiting to go into a restaurant for lunch and that he had fiddled with her bra strap. She said she had thereupon turned around "punched him and told him to fuck off".

[52] Before this occasion she had experienced some concerning behaviour from Mr John Reed but she said it was not what she would describe as sexual harassment. When questioned about the restaurant incident Ms B said that when she had "punched him" she had swung around and glanced a blow at him. I find that she did not punch Mr Reed as she said in her written statement. Ms B watered down her oral evidence. I am sure she knows the difference between a punch and the glancing blow she demonstrated. It is safer to put aside her evidence and not rely on it.

Permanent name suppression of Ms B

[53] It is in the interests of justice that the interim non publication order made on 7 June 2005 by the Authority in relation to Ms B should now be made permanent. Regrettably Ms B's appearance as a witness and the particular evidence she gave, drew retaliation from Mrs Reed. This was in the form of a letter written to Ms B's employer. The letter constituted contempt of the Authority's investigation in the course of which Ms B had been summoned to give her evidence. In other circumstances Mrs Reed's conduct could have been actionable by Ms B against her. The letter is discussed in more detail at the end of this determination.

[54] I order that the name of Ms B, the witness heard by the Authority on 7 June 2005 at Hamilton, may not be published by anyone to anyone else in any form, written or oral. Neither is any

evidence or information obtained during this investigation that might tend to identify Ms B, to be published. The order is made under clause 10 of Schedule 2 of the Act.

Mrs Pease

[55] Mrs Judy Pease was understandably a reluctant witness. As the office assistant she was present at SLTA on most occasions when the harassment of Ms Nichols is alleged to have occurred, and she is also a close personal friend of Mrs Reed. Rather than being adamant that alleged conduct had not occurred, her evidence was usually that she had not seen it. I do not find her evidence puts in doubt that of Ms Nichols, Ms Rusling, Mr Bartley or Ms A.

[56] It is significant that Ms Pease did say to the Authority that she stood by the written reference she had earlier given for Ms Nichols. The reference stated that Ms Nichols was honest and reliable.

Constructive dismissal

[57] I have found that all of the complained of behaviour by Mr John Reed and by Mr Craig Reed did occur. As well as the particular behaviour occurring on 4 November and 18 December 2003, I find that there was other physical behaviour and regular verbal abuse suffered by Ms Nichols on undetermined dates but as alleged by her.

[58] I also find that this behaviour experienced by Ms Nichols was sexual harassment as defined in s.108 of the Employment Relations Act. There was both language and behaviour of a sexual nature by both Mr John Reed and Mr Craig Reed who were representatives of SLTA, Ms Nichol's employer. This behaviour was not welcomed by Ms Nichols and indeed she regarded it as offensive. Further, I find that both through the nature of the Reeds behaviour and the repetition of it, Ms Nichols employment and job satisfaction were detrimentally affected.

[59] The detriment she suffered was being humiliated, embarrassed, intimidated and frightened by her employers representative Mr John Reed physically accosting her or attempting to do so in her workplace. Her detriment was also the suffering of a stress related illness, as diagnosed by her medical advisors. That illness and the causes of it prevented her from actually performing her work. Her will to work was taken away and the satisfaction that she could reasonably expect to get from her job was destroyed.

[60] I find that the sexual harassment was a serious breach of duty by the employer. Duties were imposed both by statute and under an implied term of the employment agreement in this case. The statutory duty was to refrain from giving any employee grounds for a personal grievance through sexual harassment, and the further duty to provide a safe and healthy working environment, as required under s.6 of the Health and Safety in Employment Act 2002. The implied contractual duty was to refrain from acting in a way that destroyed the basic trust and confidence that is the foundation of an employment relationship.

[61] The breaches of statutory and contractual duty were serious enough to make it foreseeable that there was a risk of Ms Nichols not wishing to put up with her employers conduct and taking herself out of the workplace by leaving her job. These are the ingredients of a constructive dismissal, as has been determined by the Court of Appeal in *Auckland Power Board v Auckland Local Authorities Union* [1994] 1 ERNZ 168.

[62] I reject SLTA's claim that Ms Nichols absence from work had more to do with the disagreement over her being asked to work on 26 and 27 January 2004, Auckland Anniversary Day

and the day after. Neither do I consider that her back injury suffered when lifting a beer keg was the real reason she stayed away. I accept that Ms Nichols did ask the Reed men to desist in their behaviour. If her complaints were no stronger than that it is understandable in the circumstances as she had no one she could effectively complain to.

[63] I also find it makes no real difference that Ms Nichols was not working at the times she was harassed by Mr Reed on 4 November and 18 December 2003. What is significant is that she was harassed by her employer while she was present at her usual workplace. Employment laws do not cease to operate at the same time as an employee goes off duty.

[64] I find that the event that triggered her absence from work was hearing of the unreasonable way Ms Bartley had been dismissed on 30 January and the realisation from the state of her health that she could no longer bear her employers particular kind of unreasonable treatment of herself. She was also aware of Ms Ruslings claims to have endured similar treatment, some of which Ms Nichols had seen.

[65] I do not consider there was a conspiracy entered into by Ms Nichols, Ms Rusling and Mr Bartley, uniting them to extract money from the Reeds by bringing grievances at the same time. It seems to me that the dismissal of Mr Bartley, for whom they obviously had some sympathy, caused Ms Nichols and Ms Rusling to reflect on their own long term treatment from the Reed men and decide not to put up with it. I find it improbable that Ms Nichols diagnosed illness was coincidental to the workplace situation that had been experiencing.

[66] Applying the legal test given by the Employment Court in *Z v A* [1993] 2 ERNZ 469, I find that but for the sexual harassment Ms Nichols would not have left her job. There was a direct causal link between the harassment and her leaving when she did. I find that the date of dismissal was the date Ms Nichol's consultant's letter of 5 February 2004 was received by the Reeds or SLTA. That letter communicated to them her views about returning to work.

[67] For the above reasons the determination of the Authority is that Ms Nichols was constructively dismissed by SLTA through the actions of its representatives Mr John Reed and Mr Craig Reed. It follows from the circumstances of the dismissal that it was unjustified. Ms Nichols therefore has a personal grievance and is entitled to remedies against SLTA.

Remedies for unjustified dismissal

[68] Ms Nichols did not contribute to the situation that gave rise to her unjustified constructive dismissal and her remedies are not required to be reduced on that account.

[69] I accept the evidence of Ms Nichols as to how the sexual harassment affected her personally and there is also compelling medical evidence of the affects the employer's conduct had on her health. Her children also provided evidence which I accept, as to the changes they noticed in their mother at material times.

[70] The amount of compensation should reflect the reaction of Ms Nichols herself to the particular breaches of duty by the employer and also her reaction to the consequent loss of a job, job satisfaction and economic independence and security for both herself and her children. Ms Nichols needed the employment but as well as that she had liked the job itself.

[71] I consider that $13,000 is the appropriate level of compensation and I order SLTA to pay that sum to Ms Nichols under s.123(1)(c)(i) of the Act.

[72] Because she was not well enough Ms Nichols was unable to mitigate her loss of income by finding new employment. Her illness was caused by her employer's breaches of duty and was not a supervening medical condition unrelated to her grievance. Ms Nichols is entitled to reimbursement of lost wages which I award as the full amount claimed. Repayment of any benefit she has received covering the six months after dismissal is a matter she must take up with the provider.

[73] SLTA is ordered to pay to Ms Nichols under ss.123(1)(b) and 128(2) of the Act, the sum of $10, 507.78.

Written employment agreement

[74] SLTA's simple answer to this complaint was that a written agreement had been made available to Ms Nichols for her to sign or uplift but she chose not to do so.

[75] At the request of the Authority a copy of the document was produced by Mrs Pease. She said she had printed off a copy in the office and given it to Mrs Reed, after which she had no further involvement. Mrs Reeds evidence was that Ms Nichols had not gone up to the office and signed the document where it was available for her to do so.

[76] The document produced by Mrs Pease is unsigned and Ms Nichols claims never to have seen it while she was employed. The document is headed up 'Individual Employment Contract' and bears the names of the parties "Super Liquor Te Awamutu (John & Janice Reed)' and 'Deborah Anne Nichols.' It is dated 13 November 2002.

[77] I do not need to resolve any issue that the failure was one of the employee rather than the employer, by neglecting to sign a document that had been offered for that purpose. This is because the document is expressed to be made under "section 19 of the employment's Contracts Act 1991" (authors misspelling). All that it has in common with what is required under the Employment Relations Act is the presentation of words on printed paper which relate to an employer and an employee.

[78] In any event the contents of the contract were inadequate, as there was no explanation (plain language or otherwise) at all of the services that are available for the resolution of employment relationship problems. That explanation is required by s.65(2) of the Act to be included in every individual employment agreement. I note that under s.115 of the Act a failure to include such explanation provides 'exceptional circumstances' for the purposes of granting leave to raise a grievance outside of the 90 day period.

[79] The resolution of an employment relationship problem is what this investigation has been about and therefore the absence of the required explanation was material to the personal grievance claim. The Employment Relations Act had been in force for over two years by the time Ms Nichols became employed by SLTA. An employer of its size ought to have known its obligations, as employer organisations were providing training and information in the new Act extensively even before it was passed in October 2000. This neglect or failure is a further reflection of the poor attitude shown to the welfare of their employees by the Reeds, who are the directors and managers of SLTA.

[80] I find that SLTA breached s.64(2) of the Act (as the provision was before amendment in December 2004) by failing to provide Ms Nichols with a copy of an individual employment agreement that complied with s.65(2) of the Act. The maximum penalty for that breach is $10,000 in the case of a company. A penalty more than a nominal one would have been warranted

in the circumstances of this case, as there was nothing 'technical' about this breach.

[81] Although neither party has asked me to, I am bound to have regard to s.135(5) of the Act which imposes a 12 month limitation on action taken to recover a penalty. The obligation to supply a written agreement under s.64 was fixed to the pre-contractual period, or the period "before" entry into the agreement. (Under the current s.63A it is fixed to the period of bargaining which ends when the agreement is entered into.) Fortunately for SLTA the claim for a penalty was not commenced until over a year after the agreement was entered into. The breach has not been expressed in the Act to be a continuing one for penalty purposes. The limitation period began running from 13 November 2002 and expired 12 months later, while Ms Nichols remained employed.

[82] It would however seem consistent with the Act's general purposes and the protections offered by it, for the Act to expressly make it an obligation throughout the employment for the employer to supply the employee with a written employment agreement. Further amendment to s.63A of the Act may be considered necessary to achieve that.

[83] No penalty is therefore ordered against SLTA.

Mrs Reeds letter to Ms B's employer

[84] Mrs Reed has confirmed that she wrote to Ms B's employer on 23 August 2005, a few weeks after Ms B had given evidence to the Authority. Ms B gave that evidence under summons, as a witness called by the Authority itself. Mrs Reed has explained in a recent affidavit that Mr John Reed was unaware of what she was doing at the time the letter was written and did not find out about it until after it had been received by Ms B's employer. Mr Reed has confirmed Mrs Reed's sworn evidence in this regard.

[85] Mrs Reeds letter to Ms B's employer included the following lines;

> *The reason for ceasing to trade with you is because of* [Ms B].
>
> [Ms B] *involved herself in a matter concerning us that was nothing to do with her.*
>
> *You give me no alternative but to cease trading with you until* [Ms B] *is no longer in your employment.*

[86] It was stated in the letter that the trade SLTA had been doing with Ms B's employer was worth about $100,000 per year to that firm. To the Authority it therefore seemed that the objective of Mrs Reed in writing her letter was to put economic pressure on Ms B's employer to end the employment. Fortunately this has not happened otherwise Mrs Reed might be facing legal action from Ms B for inciting or instigating a breach of an employment agreement. A penalty is recoverable for such action under s.134 of the Act.

[87] The motive behind Mrs Reed's letter appears to be retribution against Ms B for giving evidence. Mrs Reed confirmed in her affidavit that she had written the letter because she had not liked the evidence Ms B had given against her husband.

[88] For the purposes of this determination I regard the writing of the letter and its contents as providing no material evidence of character against Mr John Reed or Mr Craig Reed. I also consider that the action of Mrs Reed in writing the letter is not linked closely enough to Ms Nichols grievance to require that it should be taken into account in fixing the level of compensation

awarded. Neither is it required to be taken into account in fixing costs, as the action is something beyond the manner SLTA conducted its response to the Authority's investigation.

[89] Mrs Reed's action was in the nature of contempt for which punishment is an available remedy generally, whereas costs awards are intended to compensate rather than punish. Mrs Reed's action struck at the very heart of the justice system, which is reliant upon witnesses coming forward to give evidence without fear or favour. Because of the seriousness of what she has done the Authority will refer the letter to the Solicitor-General for that law officer to take such action as he considers necessary to see that respect for the rights of witnesses is maintained.

Name suppression for SLTA

[90] Ms Watson sought name suppression of the Reeds and SLTA, even in the event of the company being held to have unjustifiably dismissed Ms Nichols. Suppression was also sought for any evidence that might lead to SLTA or the Reeds being identified. In the event which is now coming to pass, Ms Watson said the company would wish to consider taking a challenge against the Authority's determination to the Employment Court. She argued SLTA should have the opportunity of reversing the determination before further damage was done to the reputation of SLTA and the Reeds through any publication of details about this case. Ms Watson submitted that publicity about a case of this nature and its particular outcome adverse to SLTA, would inevitably harm the Reeds and their business and might also reflect badly on other stores trading under the Super Liquor banner.

[91] It is likely that there has already been considerable publicity about the parties and this case in their community. I note the evidence of Mrs Reed that even before the investigation meeting commenced this case had become the subject of gossip in Te Awamutu, which she describes as a small town where people know each other.

[92] Name suppression for an unsuccessful party pending its challenge to the Court might be considered if that was in the interests of the successful party, but in this case Ms Nichols does not seek that suppression and indeed she is expressly opposed to that step.

[93] Another consideration is the length of time the suppression may have to last for. The challenge might take up to one year or longer to be disposed of by the Court, and it would be contrary to the interests of justice for rumour and speculation in the community to continue for that long.

[94] More pressing considerations are that employees or prospective employees are entitled to know what sort of employer SLTA has been found to be by the Authority. Customers or prospective customers should also be aware of how one of them, Ms A, was treated. A further black mark on the commercial and employment reputation of SLTA was made by the action of Mrs Reed writing her letter to Ms B's employer, a trade associate, and stating that she was ceasing to do business with that company while Ms B remained in its employment. It concerns the Authority that Mrs Reed's affidavit to the Authority about her letter and why it was written, indicates a lack of awareness of her conduct and of the plain meaning of the language she chose to use in the letter.

[95] It seems more likely that Super Liquor stores and liquor stores generally in the Te Awamutu area would wish it to be known through publication of SLTA's name that they were not the employer and business that this determination is about.

[96] I therefore conclude that the suppression of SLTA's name is not in the interests of justice and no permanent order will be made.

[97] I will however make an interim order to allow the respondent a short time in which to apply to the Court, if SLTA or the Reeds wish to challenge this determination declining permanent suppression.

[98] Accordingly, under clause 10 of Schedule 2 of the Employment Relations Act the Authority orders that until 5 pm. on Monday 3 October 2005, the names of SLTA and any of Mr John Reed, Mrs Janice Reed and Mr Craig Reed, may not be published. The Authority also prohibits for the same limited time the publication of any evidence or information obtained during the investigation and which might lead to the identification of SLTA or any of the Reeds. This order will lapse after 5 pm. on Monday 3 October 2005 and only the permanent non-publication order given in relation to Ms B will then remain.

Costs

[99] Ms Nichols is entitled to costs, although on the usual basis of reasonable contribution rather than total indemnity. She has had legal aid in the sum, as at 17 May 2005, of $5,190. I take into account the further costs likely to have been incurred by the continuation of the meeting (for less than half a day) on 7 June 2005.

[100] Actual costs have been quite reasonable given the preparation required for a case of this difficult nature which brought with it almost a necessity to try and obtain corroborative evidence from other witnesses. I consider $3,750 represents a reasonable contribution to actual costs reasonably incurred. SLTA is ordered to pay $3,750 to Ms Nichols pursuant to clause 15 of Schedule 2 of the Act. SLTA is also to pay her the lodgement fee of $70.

A Dumbleton
Member of Employment Relations Authority