

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Trevor John Bartley (Applicant)

AND Te Awamutu Wines & Spirits (1998) Ltd t/a Super Liquor Te
Awamutu (Respondent)

REPRESENTATIVES Gillian Spry, Counsel for Applicant
Joanne Watson, Counsel for Respondent

MEMBER OF AUTHORITY Ken Anderson

INVESTIGATION MEETING 6 April 2005

FINAL SUBMISSIONS RECEIVED 22 April 2005 and 12 May 2005

DATE OF DETERMINATION 23 June 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] Since December 2001, Mr Bartley had been a Customer Services Assistant at a liquor store in Te Awamutu. He says that on 30 January 2004, he was summarily dismissed from his employment by one of the owners of the business, Mr John Reed. In the alternative, Mr Bartley says that if his dismissal was not summary in its nature, then it was constructive. Mr Bartley seeks that the Authority finds that he has a personal grievance and award him the remedies of lost wages and compensation. Mr Bartley also says that he was not provided with an employment agreement and asks the Authority to impose a penalty on the Respondent.
- [2] Conversely, Te Awamutu Wines & Spirits (1998) Limited (“the Employer”) says that Mr Bartley was not dismissed and that his employment remained intact. The Employer understood that Mr Bartley was on sick leave and that he would return to his employment.

Background

- [3] Apart from Mr Bartley, the Super Liquor store operated by the Employer had a number of staff. One of those was Mr Craig Reed, the son of the owners of the business. On Friday 30 January 2004, Craig Reed and Mrs Reed were due to come back from the Coromandel, where they had been on holiday. Craig Reed was to take over the evening duty from Mr Bartley at 6:00pm.
- [4] As the weather was unfavourable with heavy rain, Mr Reed appears to have become concerned that his son may not be back in time to take over from Mr Bartley at 6:00pm. At

about 5:50pm, Mr Reed came from the staff lunch room into the shop and spoke to Mr Bartley about him remaining at work. Just what Mr Reed said is a matter of some contention.

The Evidence of Mr Bartley

- [5] The evidence of Mr Bartley is that Mr Reed said to him: *“You’re working tonight.”* Mr Bartley says that he responded: *“No I’m not I’m going out for dinner with some friends who are going back to Aussie.”* According to Mr Bartley, Mr Reed then said to him: *“You’re bloody well working tonight”* and when Mr Bartley declined, Mr Reed then responded: *“You will work if you value your job.”*
- [7] The further evidence of Mr Bartley is that another employee, Ms Sharon Rusling intervened. This intervention brought on some anger on the part of Mr Reed and he responded to her intervention by saying to her: *“Fuck up you silly bitch and keep your nose out of it.”* Mr Bartley says that Mr Reed was waving his arms around and told him to cancel his dinner plans. Mr Bartley says that he was under the impression that Mr Reed expected him to work until closing time, 10:00pm. Inconceivably, it appears that the two men never did discuss exactly what might be required.
- [8] As it was 6:00pm, the normal finishing time for Mr Bartley and Ms Rusling, they set about to leave the premises. Mr Bartley says that Mr Reed then said: *“If you walk out that door you won’t have a job to come back to.”* Mr Bartley further says that when Ms Rusling reassured him that Mr Reed could not “do that” Mr Reed rushed towards her yelling: *“Shut up, shut up, you can just bugger off, go on bugger off.”*
- [9] Mr Bartley attested that he felt quite stressed and afraid for his safety and that of Ms Rusling. Mr Bartley believed that he had been dismissed. Ironically, given what this has now all come to, as Mr Bartley was leaving, Craig Reed arrived to start his duty for the night
- [10] The next day, Saturday 31 January 2004, Mrs Bartley rang the Employer to convey that Mr Bartley would not be at work that day due to sickness.
- [11] Mr Bartley met with an employment relations advocate on Monday 2 February 2004. He says that he was advised by the advocate that he should inform his employer that he would not be back at work “indefinitely.” Mr Bartley also visited his Doctor and obtained a certificate that conveyed Mr Bartley was: [“unfit to resume work for an indefinite period of time from 2 February 2004.” The Doctor’s certificate was received by the Employer on 3 February 2004.

The Evidence of Mr Reed

- [12] Mr Reed says that because Mrs Reed and Craig had not arrived back shortly before 6:00pm on 30 January, and the business was relatively busy that night, he asked Mr Bartley if he could stay until Craig arrived. Mr Reed says that he did not expect Mr Bartley to work out the night. The evidence of Mr Reed is that Mr Bartley “flatly refused” Mr Reed denies that he told Mr Bartley that he would not have a job to come back to if he left at 6:00pm.
- [13] When questioned regarding his recollection about what he did say to Mr Bartley, Mr Reed’s answers were inconsistent and he had some difficulty with his overall recollection of events. I regret to say that I found his evidence to be generally lacking in credibility. Having also observed Mr Reed’s demeanour and attitude at the investigation meeting, I largely accept the evidence of Mr Bartley as to what occurred on the last day of his employment at the liquor store.

The Evidence of Ms Rusling

[14] Mr Bartley's evidence was collaborated by that of Ms Rusling. I found her evidence to be most credible. Indeed, even though some 14 months had expired since the events in question occurred, Ms Rusling remained visibly upset when recalling those events. Even taking into account the fact that she also did not return to work with the Employer after the evening of 30 January 2004, I accept her evidence as being reasonably objective and truthful overall.

Analysis and Conclusions

[15] The first question that requires determination is: Was Mr Bartley dismissed?

[16] It has been submitted for the Employer that on the day following the conflict with Mr Reed, Mr Bartley instructed his wife to make a telephone call on his behalf to convey that he was sick. Therefore, it must follow, that he concluded that he remained in employment and had not been dismissed. The Employer also points to Mr Bartley providing a Doctor's certificate informing that he was off work for an indefinite period, hence he must have believed his employment remained intact. Furthermore, the Employer says that it was not until a letter dated 5 February 2004, was received from Mr Bartley's advocate, that there was any indication that Mr Bartley believed that he had been dismissed.

[17] However, those submissions overlook the fact that Mr Bartley cannot be expected to have an intimate knowledge of employment law and it was not until he sought some professional advice on Monday, 2 February 2004, that he became appraised of his legal rights, albeit he obtained the Doctor's certificate after consulting an advocate. It appears that Mr Bartley's intention was to obtain a sickness benefit. I also accept Mr Bartley's explanation that he called in sick as he did not want to go back to the workplace but was not sure if he had been dismissed or what his legal rights were.

[18] I am bound to say the circumstances surrounding this matter are quite extraordinary and I cannot help but conclude that the termination of Mr Bartley's employment was an accident that had been waiting to happen for some time. The impression that I have gained is that there was a mutual lack of respect between the parties and that this was exacerbated by Mr Reed's management style, or lack thereof. I make this observation because there appears to be no other explanation for the scenario that occurred on the evening of 30 January 2004.

[19] Quite simply, the scenario was that it appeared that Craig Reed was going to be late arriving to relieve Mr Bartley from his duties at 6:00pm. A reasonable employer would have simply conveyed that fact to Mr Bartley and asked him if he could stay on for a short while with the expectation that Craig Reed would probably arrive quite soon, and indeed he did.

[20] Unfortunately, Mr Reed did not adopt that approach. Rather, he simply told Mr Bartley that he was going to have to work that night without any explanation at all. Not surprisingly, Mr Bartley was not happy about that because he had made arrangements to go out for dinner that evening. Even when Mr Bartley enquired as to the whereabouts of Craig Reed, Mr Reed did not see fit to give any explanation that Mr Bartley may only have to work on for a short time. Instead, Mr Reed adopted an aggressive approach that culminated in an ultimatum being given to Mr Bartley. That is, he told Mr Bartley that he was: "*bloody well working tonight*" and then when Mr Bartley declined and set about to leave the premises, he was told by Mr Reed that if he left he would not have a job to come back to.

- [21] Mr Bartley left and was clearly shaken and he was under the impression that he had been dismissed. Upon obtaining advice, it was confirmed that he could take it that he was dismissed.
- [22] The actions of Mr Reed were not those of a fair and reasonable employer. On the contrary, the actions of Mr Reed were bullying and boorish and having observed him at the investigation meeting, I have no doubts that his actions on 30 January were typical of his attitude towards his employees.
- [23] Having closely considered the evidence available to me I have no difficulty concluding that Mr Bartley was summarily dismissed on the evening of Friday 30 January 2004 and that the dismissal was unjustified. Mr Bartley has a personal grievance.

Remedies

- [24] Having found that Mr Bartley has a personal grievance, I now turn to the remedies that may be available to him.

(a) Reimbursement of Wages

- [25] Section 123(b) of the Employment Relations Act 2000 (“the Act”), provides that where the Authority determines that an employee has a personal grievance, it may provide for:

“the reimbursement to the employee of a sum equal to the whole or any part of the wages or any money lost by the employee as a result of the grievance.”

Further to that provision, s.128 (2) of the Act provides that:

“If this section applies then, subject to subsection (3) and subsection 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months’ ordinary time remuneration.”

Subsection (3) provides that:

“Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.”

- [26] Mr Bartley claims for reimbursement of wages for a period of six months. However, I have seen no evidence that Mr Bartley made any tangible attempt to mitigate his loss. Indeed, it appears that Mr Bartley immediately decided that his best option was obtain a sickness benefit.
- [27] It has been submitted for the Employer that Mr Bartley’s position was always open for him to return to. This was conveyed to him in writing on 24 February 2004 and that this should taken into consideration in regard to mitigation of loss. Apart from the fact that this was some three weeks after the dismissal of Mr Bartley, given the treatment that Mr Bartley was subjected to, he could not reasonably be expected to return.
- [28] While I accept that Mr Bartley’s health may well have been affected to some degree by the circumstances pertaining to his dismissal, I conclude that it is not appropriate to award him

loss of remuneration for more than a 3 month period. As I understand it, the sum of the net loss of wages for 3 months would be \$5,588.31.

Te Awamutu Wines and Spirits (1998) Limited is ordered to pay that sum to Mr Bartley.

(b) Compensation

[29] Section 123(c) of the Act, provides that where the Authority determines that an employee has a personal grievance, it may provide for:

“the payment to the employee of compensation by the employee’s employer, including compensation for-

(i) humiliation, loss of dignity, and injury to the feelings of the employee;

[30] Mr Bartley gave evidence of his feelings following the dismissal and the affect of the dismissal upon him. This evidence was supported to some degree by medical evidence that has not been disputed. I accept that Mr Bartley was affected by his dismissal but not to the degree that would warrant an award of the sum of \$15,000 that he seeks. A sum of \$8,000 is more appropriate.

Te Awamutu Wines and Spirits (1998) Limited is ordered to pay that sum to Mr Bartley.

(c) Contribution

[31] Under the provisions of s.124 of the Act, the Authority is bound to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. I have to say that I gave some thought to whether Mr Bartley could have prevented the circumstances that led to his dismissal by simply exploring further why Mr Reed was asking him to stay and work on the night in question. However, given my overall assessment of Mr Reed’s general attitude and behaviour, I doubt whether Mr Bartley could have altered the course of events. I conclude that Mr Bartley did not contribute towards the situation that give rise to his grievance and the remedies awarded remain intact.

The Failure to Provide an Employment Agreement

[32] Mr Bartley seeks that the Authority orders that the Employer pay a penalty for the failure to provide an employment agreement as required by s.65 of the Act. Mr Bartley gave evidence of the fact that he had never had an employment agreement in the 35-36 years that he had been working and he had not requested that an agreement should be provided.

While the Act requires that parties in an employment relationship formalise the terms and conditions of that relationship in writing and it is in the interests of all concerned that they do so, I conclude that it is not appropriate to order a penalty in this case and decline to do so.

Determination

1. I find that Mr Bartley was unjustifiably dismissed on 30 January 2004. He has a personal grievance.
2. Under the provisions of sections 123 and 128 of the Act, Te Awamutu Wines and Spirits (1998) Limited is ordered to pay the net sum of \$5,588.31 to Mr Bartley.

3. Under the provisions of section 123(c)(i) of the Act, Te Awamutu Wines and Spirits (1998) Limited is ordered to pay the sum of \$8,000.00 to Mr Bartley.
4. I conclude that it is not appropriate to order a penalty in this case for the failure to provide an employment agreement and decline to do so.
5. Costs are reserved. The parties are invited to attempt to reach a resolution of this matter. In the event that a resolution is not achieved, submissions can be made to the Authority for an order, within 21 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority