Determination Number: WA 106/06
File Number: WEA 432/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Douglas Prince (Applicant)
AND	B & M Entertainment Limited t/a Mermaid Bar (Respondent)
REPRESENTATIVES	David Patten for the Applicant Paul Thompson for the Respondent
MEMBER OF AUTHORITY	P R Stapp
INVESTIGATION MEETING	Wellington 26 April 2006
SUBMISSIONS	19, 26 and 29 May and 9 June 2006
DATE OF DETERMINATION	19 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. Douglas Prince (the applicant in these proceedings) commenced working at the Mermaid Bar in Wellington on 7 June 2005 as a bar manager. He signed off an employment agreement with B&M Entertainment Limited, his employer.

2. His employment ended on 21 June 2005, when John Chow, company director, dismissed him summarily for serious misconduct when he says he, concluded that Mr Prince could no longer be trusted and that his employer could not have confidence in him upon a complaint of sexual harassment. Mr Prince has challenged his dismissal. He claims there was no sexual harassment complaint and he was treated unfairly.

The facts

3. Mr Prince says he accidentally touched a dancer, Bridget Rennie, on the buttock in the morning of 11 June 2005 when he tried to get her attention to open a safe door to put away a bottle of whiskey. He says she had her back to him and when she turned around he accidentally touched her because of the space of where they were standing. Michael Chow,

the general manager, says he had a discussion with Mr Prince on 13 or 14 June 2005 in regard to the incident that had been reported to him.

4. Ms Rennie says she was upset and drew Mischa Wislang's attention to the matter. He is a DJ employed at the bar. Mr Wislang then took the matter up with Michael Chow. Mr Wislang's evidence was contradictory about when he did take the matter up with Mr Michael Chow; on either 13 or 17 June 2005. Mr Prince denied that Mr Chow discussed the matter with him on 13 June.

5. Another DJ, Paul Greathead, says that he was standing behind the booth at the time but could not see anything happen. He says that Mr Wislang was standing behind Ms Rennie. Mr Greathead says he saw where Ms Rennie and Mr Wislang were standing.

6. Ms Rennie says that his action occurred on 11 or 12 June 2005 and was deliberate and caused her to remonstrate with Mr Prince at the time. Mr Wislang says he heard Ms Rennie scream and saw the incident and says that he was standing behind Ms Rennie so he could see it. Mr Prince says that Mr Wislang was standing behind the DJ booth in front of the complainant so it would not have been possible for Mr Wislang to have seen any incident.

7. Ms Rennie acknowledged that she initially did indicate that she accepted an apology from the applicant, when he spoke to her later in the morning about the incident, but she says that this was only to keep the peace. He says that he apologised again to Ms Rennie that evening.

8. How Mr Prince touched Ms Rennie has been variously referred to as a touch or tap with his hand placed on her buttock, to being described by Ms Rennie and Mischa Wislang as a *"grab"*, *"squeeze"* and *"grope"*. Ms Rennie complained that it was inappropriate for Mr Prince to *"fondle the girls like that"*.

9. Messrs Michael and John Chow spoke to Mr Prince about the allegation on 19 June 2005. The Chows subsequently obtained a written statement from Ms Rennie (on 18 June 2005) that was obtained through Mischa Wislang. Mr Wislang also provided his own (undated) statement. The two written statements were given By Mr John Chow to Mr Prince for a meeting 20 June 2005:

> *"I [Bridget Rennie] have been working at Mermaids for the last couple of weeks and claim that on the 11-5-05 at approximately 5.40am Doug grabbed my bum near DJ box. I let him know that it wasn't appropriate for a manager to be fondling the girls, and I wasn't going to accept this kind of behaviour. I brought to Mischa's attention. And am confident that you will deal with this matter appropriately.*

18-5-05"
"On 11 June at approximately 5.40 I saw Doug touch one of Ms Rennies by the name of 'Vixen' on the buttock area while she was waiting to pay for a lap dance. She in turn reacted strongly making it clear to staff and patrons in the area that this was both unwelcome and inappropriate conduct. Mischa"

10. On 20 June 2005 there was a meeting attended by the Chows and their lawyer, Paul Thompson, and Mr Prince and his support person, Anne-Marie van der Linden. Both sides kept their own notes. Mr Prince handed in a written apology and alleged that the Chows tried to get him to resign. He also alleges that John Chow was influenced by an alleged letter or a *"file it now"* note he had received from somebody in regard to allegations about Mr Prince's previous employment at *Pak 'N' Save* that involved allegations of sexual harassment that were never proven. Mr Prince was subsequently successful with a personal grievance claim in the Authority in regard to his employment at *Pak 'N' Save*. Also raised in the background was an issue about Mr Prince's conduct at other times in his employment with references to the alleged conduct of the applicant in general towards other female members of the staff, and in particular allegedly insulting them.

11. The meeting was adjourned and the Chows put Mr Prince's apology (written), the two statements (Rennie and Wislang) and a written explanation of events from Mr Prince (prepared for the 20 July 2005 meeting by Mr Prince) to Ms Rennie. Ms Rennie did not accept the apology, and said so, in writing. The relevant correspondence is set out below:

"20 June 2005

C/- Mermaid Bar
Courtenay Place
Wellington

DearBridget,
I apologise for any distress I have caused as a result of the incident that occurred on 11 June 2005. I never intended to make any level of inappropriate contact with you. However I appreciate that you felt uncomfortable as a result of the contact. I trust that we are able to continue to have an amicable working relationship.
Yours sincerely,
D Prince"

"20-6-05
I don't accept the apology and don't feel comfortable working in the Mermaid if Doug works, I won't work there.
I believe that it was intentional grope made by Doug.
Bridget Rennie"

12. The Chows concluded from this that they had no other option but to dismiss Mr Prince because he continued to deny the complaint. They instructed their lawyer to prepare a letter that was typed up and ready to present at the next meeting.

13. On 21 June 2005 there was another meeting with the same people, but not including Mr Thompson. Mr Prince was handed the letter that had been prepared dismissing him from his employment:

> *"B&M Entertainment Limited*
> *June 21, 2005*
> *Dear Doug*
> ***Summary Dismissal – Sexual Harassment toward Mermaid Bar dancers***
> *We refer to the above noted matter and our meeting of 20 June 2005.*
>
> ***Allegation made***
> *A sexual harassment claim has been made by one of the Dancers at the Mermaid Bar on the 11th of June 2005. She made an allegation of sexual harassment against you as defined under s.108(1)(b)(iii) of the Employment Relations Act 2000 ("the Act").*
>
> ***Investigation***
> *Under s.117(2) of the Act an employee may make a sexual harassment complaint about the behaviour of a person, other than the Employer, to the employers. In this case a complaint had been made to Michael and me. Upon receipt of such an allegation we were statutorily bound to investigate the complaint. We investigated the allegation in a robust and transparent manner. Notwithstanding the environment in which this business operates we have an obligation to provide a safe workplace. Therefore we had to treat this complaint as very serious.*
>
> *We have given you a right to respond to the allegations made and you have done so. In this case we believe the allegations are proven after investigating the matter thoroughly. After considering all the options available to us we believe that summary dismissal is appropriate.*
>
> *We are statutorily obliged under s.117(4) of the Act to take positive steps to prevent any repetition of such a request or of such behaviour that is sexual harassment.*
>
> *We have evoked clause 19a of your employment agreement and terminated your employment, effective immediately. Unfortunately your behaviour had the effect of interfering significantly with the safe and proper conduct of our business and was serious enough to destroy a trust and confidence relationship between an Employer and Employee. Therefore we hold summary dismissal is appropriate rather than a strong warning.*
>
> *We trust that you understand our position.*
> *Yours truly,*
> *B&M Entertainment Limited*
> *John Chow*
> Managing Director"

The Law

14. The dismissal occurred after 1 December 2004. Therefore this matter must be determined under section 103A of the Act. The employer is required to support the grounds relied upon to dismiss the applicant and show that the decision reached was fair. The Authority's role is to scrutinise the employer's decision and to consider it in all the circumstances of the applicant's employment. The parties' representatives made submissions on s 103A as applied in *Air New Zealand Limited v Hudson* (unreported) 30 May 2006 AC 30/06 Judge Shaw.

The issues

15. At issue is whether a fair and reasonable employer would have come to an honestly held belief that Mr Prince deliberately touched Ms Rennie and his touch would constitute sexual harassment. Further, would a fair and reasonable employer determine that such behaviour amounted to serious misconduct leading to a breach of trust and confidence? Was the procedure followed fair?

Submissions from the parties

16. The applicant has relied upon the credibility and reliability of the respondent's evidence failing to establish the events that happened at the time. He says his dismissal was predetermined, unfair and influenced by other factors. It is accepted by the respondent that a credibility finding was required at the time and that the decision to dismiss was the only option available because the applicant persisted to deny the allegation and no other disciplinary action was available to ensure a safe workplace environment. The respondent says that the dismissal was fair: involving the applicant being given notice of the allegation, an investigation being completed and an opportunity for the applicant to comment and mitigate his action. He also had a support person present.

Findings and conclusion

17. It is my decision that Mr Prince's dismissal was unjustified. However, he has contributed to the situation giving rise to his personal grievance and there will be an impact on remedies claimed by the applicant to resolve the employment relationship problem. My reasons are as follows.

18. The dismissal was predetermined. The reason for this was that a letter of dismissal was prepared before the meeting held on 21 June 2005 that involved the on-going investigation,

and handed to Mr Prince before he could have any input into the decision. Mr Prince could have reasonably expected Messrs John and Michael Chow to report their findings before handing down a decision and be given notice of the possibility of being dismissed for his comment and any input on alternative options. This was not done. He did not get that opportunity by being presented with the prepared letter where the decision had already been made and conclusions reached on one option: *"a serious warning"*. I do not accept that by 20 July 2005 the investigation could have been completed.

19. The respondent did not carry out a proper investigation to get a fair conclusion. The Chows did not scrutinise properly the information provided by Ms Rennie, Mr Wislang and Mr Greathead. They believed them and not Mr Prince. None of the respondent's witnesses could correctly remember the date of the incident. Mr Wislang contradicted himself about taking the matter up with Michael Chow on either 13 or 17 July 2005 and what the witnesses say they saw Mr Prince doing, ie Mr Prince trying to open the door or if he was leaving or entering the safe. Because Mr Prince consistently denied his action was deliberate, and claimed it was accidental, the Chows' response to disregard it was not the action of an employer acting objectively and impartially. As an aside the *Pak 'N' Save* matter and other comments about Mr Prince during his employment have left them exposed to criticism that these unduly influenced their decision.

20. I accept that there was an incident that has been referred to as a complaint made by Ms Rennie (although it was made through Mr Wislang before a statement was prepared). I accept that any complaint does not have to be in writing. However, the Chows escalated the matter into what they called a complaint to then rely upon sexual harassment. They did not conduct a sexual harassment enquiry but instead have relied upon an allegation of serious misconduct.

21. The Chows did not meet with Ms Rennie and the other witnesses to test their versions of the events except to put to her the following documents: Mr Prince's written apology, the two statements (Rennie and Wislang) and a written explanation of events from Mr Prince (produced at the investigation meeting and not produced by either party before then). Her only reaction was not to accept Mr Prince's apology. They had to decide whether or not Mr Prince had deliberately and wilfully misbehaved given that they decided to treat the allegation as serious misconduct; possibly leading to a breach of trust and confidence because of sexual harassment. The Chows in their evidence say they decided to believe Ms Rennie because they say she stuck to her version of the events and was supported by other witnesses and she was distressed. They do not seem to have given any weight to Mr Prince's consistent denial

and explanation, or if they did, they disregarded it. The Chows did not make a decision about what Mr Prince says he was doing. They concluded that he acted deliberately using his left hand to touch Ms Rennie, which he says was accidental because of where he was standing, the location of the door of the safe, and where Ms Rennie was standing, and that he did it to get her attention because of the noise. He says he had a bottle of whiskey in his right hand to put back in the safe. It is common ground he had a bottle in his right hand but he added during the Authority's investigation that he was returning a bottle of whiskey from somewhere else to put in the safe. He did not raise this at the time. However, the evidence supports the finding that Mr Prince did touch Ms Rennie on her buttock.

22. The Chows have not satisfied me that their considerations put in their written evidence were made at the time in regard to why they did not believe Mr Prince. They did not make any findings about what the touch involved and who was actually present and where they were standing given the different information available at the time about the nature of the touch, and whether Mr Greathead was there, and where Mr Wislang was standing. Also there is contradictory information about whether the witnesses saw Mr Prince trying to open the door or if he was leaving or entering the safe. Given he denied any inappropriate behaviour the employer was required to make a credibility finding. That was required in the time between the meetings on 20 and 21 July 2005 and did not properly happen. The Chows could not have come to a fair decision without making the decisions on these issues.

23. The Chows deny it was noisy in the Club and raised a doubt about his explanation now being advanced. It is probable that there was a significant amount of noise considering that Mr Greathead says that *if you shout at a reasonable level you can be heard* and Mr Wislang confirmed the complainant's reaction was loud, I hold.

24. The *Pak 'N' Save* issue has clouded the matter. Mr Prince has not established that it was the cause for any bias or ulterior motive to dismiss him, when John Chow says he threw away the note and ignored the matter for his investigation. However John Chow made his decision to dismiss Mr Prince and used the information as one of the factors. I find that no details of the actual allegations involving *Pak 'N' Save* came to light, and throughout the meetings held on 19, 20 and 21 June 2005 not much was actually made of the matter to establish any prejudice. However, Mr John Chow could not and should not have used it as a consideration in making his decision to dismiss Mr Prince on hearsay and an incomplete inquiry, I hold. It was an undue influence in the decision without being properly investigated to be used as a factor.

25. Also, there was a video camera in the proximity of where the incident occurred that the applicant says may have assisted him. However, John Chow says he looked at it and concluded it did not assist. He did not provide the video as requested by the applicant. This was unfair; especially as the video has since been wiped, as it was on a time cycle.

26. If the investigation had been properly conducted the findings of serious misconduct would have been open to the employer and it was within the range of the options available to dismiss Mr Prince for inappropriately touching another worker. What remained unresolved was whether it could have been determined as sexual harassment.

27. The employer reached a conclusion that there was no other option available but without giving Mr Prince the opportunity to comment in regard to his continued employment and any other alternatives. Alternatives could have included counselling given his length of service. A fair and reasonable employer would probably have considered other options and not just the "serious warning" (as was raised), and included counselling or training, given the nature of the offence, before they made a decision, and to be seen to take positive steps to prevent a repetition of any inappropriate behaviour. The Chows simply decided, because Ms Rennie did not accept an apology, that there were no other options and only referred to the "*serious warning",* despite saying in the dismissal letter that "*After considering all the options available to us we believe that summary dismissal is appropriate."* (Emphasis added). The failure to permit Mr Prince to have a proper input into this consideration was not the action of a fair and reasonable employer when they handed him the letter. Also the reference made by the respondent to being: *statutorily obliged under s.117(4) of the Act to take positive steps to prevent any repetition of such a request or of such behaviour that is sexual harassment* could have been covered by an alternative option of counselling or training in regard to appropriate behaviour. The failure to give any consideration to this was not the action of a fair and reasonable employer.

28. Mr Prince's behaviour of touching Ms Rennie once on her buttock was the only incident the respondent could reasonably rely upon given the hearsay about any other conduct being alleged, the *Pak 'n' Save* allegations of which there were no details, the note Mr John Chow says he was given and threw away, and the investigation Mr John Chow asked for into Mr Prince's other alleged behaviour, which occurred after the event.

29. On that latter matter, Mr John Chow requested a Mr Johnson (a business colleague) to investigate Mr Prince. It was expected that Mr Johnson would attend the Authority's investigation but he did not do so. A written statement was produced beforehand. I have

given little weight to his information because of his non attendance. It could have been relevant for assessing remedies. It has not been reliably supported by other than hearsay evidence.

30. Messrs Michael's and John Chow's decision to arrange the investigation after the event into Mr Prince's conduct on other occasions in the Bar supports my conclusion that their inquiry was neither thorough nor complete at the time. The employer was detracted in its inquiry with the raising of the other unsubstantiated allegations associated with Mr Prince making derogatory comments about other workers, all of which amounted in any case, to hearsay at the time, and without any details being provided. It has not satisfied me that the single incident involving Mr Prince touching Ms Rennie was determined without undue influence of other factors.

31. I conclude that the predetermination of the decision, the inadequacy of the Chows' enquiry on the facts and the existence of other options not properly disposed of means that Mr Prince has a personal grievance in that he was unjustifiably dismissed.

Remedies

32. Mr Prince has claimed lost wages (annual salary $52,000 per annum) and compensation ($25,000). His lost wages are based on his annual salary and 52 hours work per week. He was dismissed on 21 June 2005. He has been unemployed since the dismissal. However he has produced much evidence to support trying to obtain alternative employment but without any success. No adequate explanation for the lack of success in obtaining alternative employment has been provided by Mr Prince although I noted he made a claim that it linked to this matter. I hold that was not sufficient or an adequate explanation. He has relied upon the benefit to cover his lost wages. His claim covers approximately 12 months wages. I have decided not to extend the lost wages beyond the three months provided for under s 128 of the Act because of the inadequacy of his explanation on the lack of success in obtaining other employment. Also I have had regard to the short period of his employment with the Respondent. There has been no reason advanced why the problem was not filed in the Authority much earlier (sop filed on 15 November 2005 and even considering any arrangements made for mediation before filing in the Authority), and despite his difficulties to obtain employment, Mr Prince has taken no positive action for assistance other than with the Ministry of Social Development (applying s 123 (c) (1) (b) of the Act). His claim is also affected by contribution that I must have regard to under s 124 of the Act.

33. Mr Prince acknowledged at the Authority's investigation meeting that his action was "*an error of judgement*". He also conceded that he did say on another occasion to Mr Greathead to "*get those f****** bitches out of the dressing room*" and did so on Michael Chow's instruction, which Mr Chow denied. I hold that despite him saying that his action was an accident, he as the bar manager inappropriately touched a co-worker. I hold that when he says it was an accident, he means *an error of judgement,* where I hold, he deliberately sought to get Ms Rennie's attention. In doing so her reaction to remonstrate with him was sufficient to establish that his touch, however it happened, was unwelcome. Indeed I accept her evidence that it distressed her to such an extent she remonstrated by loudly reacting, called in Mr Wislang and refused to accept the written apology later. Mr Prince is directly the cause for the situation arising despite his protestations that he would not have done it deliberately because he was in public and there were others around and that he used the back of his hand. I am supported by Ms Rennie accepting Mr Prince's oral apology made at first to keep the peace and Mr Prince providing a written apology and his acknowledgement in the Authority's investigation that he made an error of judgement.

34. I also conclude that Mr Prince would have understood and known about the appropriate behaviour expected by his employer, especially given his role and the nature of the business and notwithstanding his allegation about Mr Chow's instruction on how to talk to the "*girls*" where he could have behaved differently and created a different standard if his allegation was true.

35. I conclude that Mr Prince's behaviour, touching Ms Rennie, was serious and if the employer had followed a proper course of action it could have concluded that Mr Prince had deliberately touched Ms Rennie and that dismissal could have been in the range of options available. He deliberately sought to get Ms Rennie's attention because it was noisy. Even although he had a bottle in his right hand and says his touch was an accident I conclude on the balance of probabilities his touch was to get her attention without providing in his evidence any adequate explanation as to why he needed to do so. He now accepts it was an error of judgement. It was inappropriate. This means it would be entirely inappropriate to provide Mr Prince with the full range of remedies to resolve his employment relationship problem. As such I assess his contribution at 100%, and make no order for any remedies as claimed in this matter.

36. Submissions were made on costs. Costs follow the event. I must also have regard to the outcome where Mr Prince has been successful in establishing his personal grievance but not been able to establish an entitlement to remedies because of his contribution. My assessment for the reasonable costs is based on $140 per hour for 14 hours for a one day investigation meeting; including attendances and preparation. I award him $1,960 contribution to reasonable costs and the $70 filing fee and order the respondent to pay him these sums accordingly.

P R Stapp
Member of Employment Relations Authority