

the proposed relationship between the parties and the division of tasks which the general manager role would require.

[4] It seemed from the evidence I heard that Mr McPherson was introduced to the directors of Olivers Restaurant by a third party as a person who might be able to assist Olivers Restaurant to re-establish itself in the Central Otago hospitality industry. The restaurant had previously operated from the Central Otago town of Clyde but had been shut for some little time before the present owners took possession in early August 2006.

[5] The directors of Olivers Restaurant, Mr Lopas and his partner, Ms Geeta Roberts, were neither of them experienced in the hospitality industry and although both were successful business people in their own right, they readily conceded that they were not expert in running a restaurant. It followed that the appointment of a general manager was a key role for them in ensuring the viability of the business.

[6] Both Mr Lopas and Ms Roberts gave evidence that, having recruited and appointed Mr McPherson and having him commence duties on 12 September 2006, they almost immediately began to have second thoughts about the appointment because of a number of difficulties which seemed to present themselves with Mr McPherson's appointment.

[7] On Sunday, 24 September 2006, Mr Lopas was in the process of returning Mr McPherson to his home in Alexandra by car and during the course of the journey it is common ground that there was a discussion between the two men about the very initial stages of Mr McPherson's employment. Mr McPherson's evidence is quite stark. He says that Mr Lopas raised some issues about his employment in a very general way and without any particulars. Mr McPherson says that he asked Mr Lopas to pull off the carriageway so that they could discuss the matter but this apparently did not happen. Mr McPherson went on to say that Mr Lopas said to Mr McPherson that Mr Lopas felt the best way to resolve these issues was for Mr McPherson to resign. When Mr McPherson was delivered to his home in Alexandra, he went inside and indicated to his partner that he had just been fired, although it is interesting to note that Mr McPherson's partner was not called to give evidence before the Authority as to what exactly Mr McPherson said on his return.

[8] For his part, Mr Lopas has a quite different recollection of this journey. Mr Lopas says that he did raise with Mr McPherson the quality of his performance and he sought Mr McPherson's impressions of "*how things were going*". Mr Lopas says that he "*informed*" Mr McPherson that he "*had some concerns*" which he was happy to discuss. Mr Lopas says that Mr McPherson asked him directly whether Mr Lopas was sacking Mr McPherson, and Mr Lopas says that his response was "*No way. However there are a number of issues we need to talk about on a formal basis*".

[9] Mr Lopas said that at this point Mr McPherson became agitated and upset and so Mr Lopas suggested that it might be sensible if Mr McPherson took some time off until the issues could be resolved.

[10] At 2.39am on 25 September 2006 (the early morning immediately after the car journey), Mr McPherson sent an email to Mr Lopas in which he purported to record what had happened in the car. Amongst other things, he says:

"Completely out of the blue and without any warning you asked for my resignation with the offer of full pay for the current pay period that I have worked or an alternative of performance review with an outcome I feel is already been [sic] predetermined ... I do not intend to resign ... may I suggest a meeting as soon as possible to discuss issues you may have in a more businesslike manner and resolve any perceived problems or conflicts?"

[11] There was a succession of other briefer emails from Mr McPherson to Mr Lopas in the succeeding 48 hours or so, all directed at the same point of having a meeting between the parties to resolve the differences. Mr McPherson also gave evidence that he had telephoned Mr Lopas, although Mr Lopas had no recollection of that happening.

[12] On 27 September 2006 (that is, the Wednesday immediately after the Sunday drive event), Mr Lopas prepared a formal letter requiring Mr McPherson to attend a disciplinary meeting the following day, Thursday, 28 September 2006 to respond to a number of specific allegations.

[13] The meeting on Thursday, 28 September 2006 duly took place with the principal protagonists, Mr Lopas and Mr McPherson, present and with each having a witness of their own. In Mr Lopas's case, the witness was Mr Jopson who also gave evidence to me at the investigation meeting.

[14] I am satisfied from the evidence I heard from Mr McPherson, Mr Jopson and Mr Lopas that Mr Lopas properly put to Mr McPherson the allegations that were of concern to Olivers Restaurant. In Mr Lopas's written statement of evidence, he outlines four particular allegations which I am satisfied he put to Mr McPherson fairly and squarely and invited Mr McPherson to respond. I am also satisfied, based on the evidence that I heard, that Mr McPherson accepted that the allegations were true, apologised and said that he thought that he was doing a good job. Both Mr McPherson in his oral evidence to me and Mr Lopas in his written evidence are quite explicit that Mr McPherson admitted the allegations, apologised for them but said by way of explanation that he thought he was doing a good job.

[15] In the investigation meeting, the only gloss which Mr McPherson sought to put on his response to the allegations was to say that the "*description in the employer's evidence is a lot more colourful than I remember the reality*". The only matter that Mr McPherson desired to absolutely resile from at the investigation meeting was the abuse of the director, Ms Roberts, which Mr Lopas indicated he had accepted at the meeting on 28 September. In my investigation meeting, Mr McPherson was wanting to resile from the claim that he had abused Ms Roberts. He did, however, reiterate again that he accepted that the allegations were truthful in part and he certainly previously had said to me that he admitted the allegations, apologised and said that he thought he was doing a good job.

[16] In the evidence of the witnesses for Olivers Restaurant, each of the allegations that formed the basis of the disciplinary meeting on 28 September was referred to by one of the witnesses who was actually present at the relevant time and I took the opportunity of putting to Mr McPherson each and every one of the claims made against him to give him an opportunity to tell me how he had actually responded on the day. His evidence was very straightforward and, with the exception of seeking to resile from the allegation that he abused Ms Roberts, he accepted that what had been alleged about him was truthful. He said that he had been under stress and he again expressed regret.

[17] After the 28 September meeting, Olivers Restaurant took a period to reflect on what it had heard from Mr McPherson and a further meeting was called for Tuesday, 3 October 2006 at which Mr Lopas, on behalf of Olivers Restaurant, indicated to Mr McPherson that he had lost trust and confidence in Mr McPherson as a

consequence of the issues complained of, all of which Mr McPherson had acknowledged during the earlier meeting, and therefore that Mr McPherson's employment was terminated.

Issues

[18] The first issue for determination is whether in fact Mr McPherson was constructively unjustifiably dismissed in the car on 24 September 2006 and if the answer to that question is in the negative, then the next issue for determination is whether the actual dismissal process adopted by Mr Lopas was or was not a fair process.

Constructive dismissal?

[19] I am absolutely satisfied that Mr McPherson was not dismissed, constructively or otherwise, in the car on Sunday, 24 September 2006. I prefer Mr Lopas's recollection of that conversation and I think it much more likely that Mr Lopas' recollection is accurate.

[20] Although Mr McPherson sent an email to Mr Lopas shortly after the car journey in which he recorded his understanding that he had been dismissed (albeit constructively), and Mr McPherson says that he told his partner when he got home that he had been dismissed, none of his other behaviour is consistent with a dismissal having happened in the car.

[21] For instance, Mr McPherson continues to pester Mr Lopas for a meeting to discuss Mr Lopas' concerns which is completely inconsistent with the notion that he has already been dismissed. Further, it is difficult to understand why Mr McPherson would have bothered to attend two disciplinary meetings and give an account of himself if he had already been dismissed.

[22] It seems quite incongruous that an employee would, after making an allegation that he had been constructively dismissed, then proceed to behave as if he had yet to be dismissed, and indeed spend time and energy encouraging the employer to engage with him so that matters could be resolved. Further, if Mr McPherson was genuinely convinced that he had been constructively dismissed, why would he not have raised that conviction in the initial disciplinary meeting? Indeed, there is no further reference in the behaviour of Mr McPherson to the suggestion that he has been

constructively dismissed after the email sent in the early morning of 25 September 2006.

[23] I am also encouraged to reach this conclusion by virtue of my assessment of Mr Lopas's business experience. While he himself freely admitted that he was not experienced in the hospitality industry, unchallenged evidence was given that Mr Lopas was a successful businessman in other respects and that he had significant experience in employment matters. That being the case, it seems much more likely that Mr Lopas would have been able to deal appropriately with a matter such as this and rather unlikely that he would have made the sort of blunder which Mr McPherson claims he made in the car journey on 24 September 2006.

[24] My considered view then is that Mr McPherson was not constructively dismissed nor was he dismissed at all on 24 September 2006.

Was the dismissal process fair?

[25] I am satisfied on the evidence I heard that the dismissal process adopted by Olivers Restaurant was indeed a fair one in all the circumstances. It is common ground that at the disciplinary meeting on 28 September 2006, Mr Lopas put to Mr McPherson all of the matters that were of concern to him and that Mr McPherson responded to each of those matters of concern by, in the first place admitting them, and in the second apologising for the errors that he had made, and in the third place, saying that he thought he was doing a good job.

[26] Although Mr McPherson tried to resile from the issue of having allegedly abused Ms Roberts, I am satisfied on the balance of probabilities that he did in fact accept that he had abused Ms Roberts when the parties met on 28 September 2006.

[27] That being the position, at that disciplinary meeting, Olivers Restaurant were confronted with a succession of serious allegations which, in my view, go to the root of the employment relationship in the circumstances the evidence discloses in this particular case, and each and every one of the particulars troubling the employer was accepted by the employee as being fair and accurate. So much so, that in addition to admitting the allegations raised by the employer, the employee also apologised for his errors.

[28] Having then reflected on what it heard, the employer called Mr McPherson to a further meeting, indicated it had lost trust and confidence in him and it dismissed him from his employment.

[29] I am satisfied then that the employer has followed a proper process of investigation. Having reached that conclusion, I now must decide whether pursuant to s.103A of the Act, Olivers Restaurant is justified in dismissing Mr McPherson for misconduct. I have reached the conclusion that Olivers Restaurant did conduct a fair and proper investigative process and that Olivers Restaurant was justified in dismissing Mr McPherson for misconduct because, applying the relevant test, I hold that a fair and reasonable employer would have dismissed Mr McPherson in the circumstances that existed in this particular case.

Determination

[30] I am satisfied that Mr McPherson was not dismissed constructively or otherwise on 24 September 2006.

[31] I am also satisfied that Mr McPherson was dismissed for cause on 3 October 2006 and I have reached the conclusion, for the reasons I have outlined above, that that decision was justified in the circumstances of this particular case.

[32] It follows that I do not find that Mr McPherson has a personal grievance by reason of having been unjustifiably dismissed.

Costs

[33] Costs are reserved.

James Crichton
Member of the Employment Relations Authority