

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 11/08
File Number: 5088565

BETWEEN KIM GRAHAM
 (FORMERLY BRAMLEY)
 Applicant

AND M P J HOLDINGS LIMITED
 trading as THE PINETREE
 ARMS
 Respondent

Member of Authority: G J Wood

Representatives: Robert Foitzik for Applicant
 Mark Shaw for Respondent

Investigation Meeting: 8 January 2008 at Wellington

Determination: 28 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Kim Graham (formerly known as Kim Bramley), claims that she was unjustifiably dismissed by the respondent (The Pinetree Arms) from its Paraparaumu Beach tavern. It is the position of The Pinetree Arms that Ms Graham was justifiably dismissed, principally for consuming its product on and off the premises without authorisation and without paying for it.

The Facts

[2] Ms Graham had worked for the previous owners of a Paraparaumu Beach tavern for 10 years as a bar manager when the tavern was taken over by a company associated with Mr Mark Shaw and a number of his siblings. Ms Graham's employment was continued by the Pinetree Arms as a bar manager working part time hours of up to 30 per week.

[3] While her employment was not without incident, Mr Shaw and Ms Graham got on well together and Ms Graham had no reason to doubt Mr Shaw's integrity. In fact, during the course of the five years they worked together, Mr Shaw had removed Ms Graham from a violent relationship with a previous partner, given her away at her last wedding and loaned her \$1,000 when she got into financial trouble.

[4] During this period Ms Graham also had difficulties with the law, which resulted in a number of drink/driving convictions. As a result in 2006/2007 she was required to undertake a significant amount of periodic detention, which conflicted with her normal working hours. I accept that Mr Shaw gave her the opportunity to take working time off and change her shifts so that work would not impact on her ability to do her community service, not as Ms Graham claims that he was reducing her hours because of concerns about the Police's opposition to her application to have her manager's licence renewed. I therefore conclude that Mr Shaw reduced Ms Graham's hours at her own request because of the desire not to conflict with her community service duties and her wish to participate in a new "Texas Holdem" poker promotion.

[5] The other relevant matter in the parties' employment involved a formal warning given to Ms Graham in July 2006 following unacceptable conduct that included drinking on duty, leaving the bar for personal reasons, staying on after the bar's closure and helping herself to wine, and not locking away the takings in the safe. It was noted that any repeat breach of these rules would result in immediate termination of her employment.

[6] Ms Graham acknowledged receipt of this letter and had in fact written to Mr Shaw the week before admitting to helping herself to wine and drinking on the job while working at The Pinetree Arms. She apologised for her behaviour and offered to pay \$5 per week until she had made amends.

[7] Clearly, therefore, the employment relationship was characterised by some historical misconduct by Ms Graham, together with serious problems associated with alcohol consumption that were treated leniently by The Pinetree Arms and in particular its principal, Mr Shaw.

[8] By February/March 2007 Mr Shaw was becoming increasingly concerned about events occurring at the tavern when he was not there, such as after hours drinking and shrinkage, which he believed Ms Graham may have been involved with. For a number of weeks, he was assessing the amount of Chardonnay (a drink known to be favoured by Ms Graham, but not many of the sports tavern's clientele) not paid for when Ms Graham was in sole charge of the tavern. I accept that Mr Shaw's tallies showed significant shrinkage over a number of weeks.

[9] Matters came to a head as far as Mr Shaw was concerned on 30 April. Mr Shaw left the tavern at 2pm with Ms Graham in sole charge. Mr Shaw happened to drive past the tavern that afternoon on two occasions on his way to and from looking at a house for sale. He observed that there were half a dozen or so patrons in the bar, which pleased him because it was normally quiet on a Monday afternoon at that time of year. On reviewing the till tapes the next morning, Mr Shaw observed that there were a large number of 'no sales' rung up between 2 and 4pm and no sales whatsoever during that period. I do not accept Ms Graham's explanation proffered for the first time at the investigation meeting that there were in fact no patrons in the tavern at that time.

[10] Mr Shaw also noted the next day, on doing a stock take, that the stock of Chardonnay, Ms Graham's drink of choice, was subject to significant shrinkage. He decided that he needed to investigate matters with Ms Graham in a formal disciplinary setting. Accordingly he rang her that morning to tell her that she needed to attend a formal meeting and that she should bring a witness. Ms Graham asked if her job was on the line and was told that the matter was serious and that she should bring a witness. The only thing she was told about the reason for the meeting was that Mr Shaw had concerns about what had happened on her shift the previous day.

[11] I find that, given that Ms Graham had never been involved in a meeting of this sort before and that she questioned whether her job was on the line, that she knew that it was a serious matter, but did not know what the matters in issue would be.

[12] Mr Shaw then arranged for a Mr Brian Ward, a tavern patron and businessman, to be his witness and note taker at the disciplinary meeting, which was held on 2 May at 10am.

[13] At the commencement of the meeting, Ms Graham made it clear that she did not have a witness and did not believe that she needed one.

[14] Mr Shaw first focused on the number of 'no sales' on the till, particularly during the two hour period between 2 and 4pm. Mr Shaw did not articulate this at the disciplinary meeting, but he suspected that the reason for the 'no sales' was that Ms Graham was taking money from customers and appearing to put it in the till but in fact taking the money and ringing up a 'no sale'.

[15] Ms Graham was angry about being accused over these matters and told Mr Shaw so in loud and colourful language. She quite rightly wanted to see the till tapes. As part of Mr Shaw's response to the initial outburst by Ms Graham, he showed her the till tape. He was, however, keen to ensure that he retained possession of it and would not photocopy it. As it turns out, the till tapes are of such low print quality that they are unable to be photocopied properly, as the Authority discovered during its own investigation.

[16] Ms Graham's immediate response was that a young boy had come across for change from the bookshop next door, as had somebody from the Four Square supermarket over the road. Mr Shaw explained to Ms Graham that he did not accept these explanations as requests for change seldom if ever happened and certainly never twice in one Monday afternoon. Ms Graham then explained that perhaps the reason was that the TAB machine and the pool table were jamming. Mr Shaw told Ms Graham that he rejected those explanations as well, because there was no reason to use that till for those purposes.

[17] After her explanations were rejected, Ms Graham became extremely angry and commenced shouting and swearing at Mr Shaw. She accused him, using abusive language, of coming up with excuses to get rid of her, of previously trying to reduce her hours and that the real issue was the Police's opposition to the renewal of her manager's licence.

[18] Mr Shaw next raised the issue of there being no sales of any description over the 2-4pm period, yet he had driven past the bar twice and seen people drinking. Ms Graham's response was that there was a credit card tab at the bar over this period. Mr Shaw responded that that was not the case and that no credit card tab had been used on that day. Ms Graham now accepts that while a credit card was used on the previous day, Sunday, none had been used that day.

[19] Mr Shaw stated that as there were no credit card sales during that period that her excuse was not accepted and that he believed that there must have been alcohol sales over this period. Ms Graham had of course impliedly accepted this when she stated that there was a tab being run. This is in contrast with Ms Graham's explanation, given for the first time in the Authority, that there was nobody at the bar.

[20] Mr Shaw then raised his concern that there was regular shrinkage of Chardonnay following her shifts, but did not show Ms Graham the informal records he had jotted down to justify his view. He noted that in some cases the shrinkage could be as much as five or six glasses per shift.

[21] Ms Graham had no explanation for this shrinkage. She did not deny it. She simply *put her head down and refused to answer*, according to Mr Shaw, whose evidence I accept, for the reasons given below. Ms Graham was very distressed and almost incoherent by this point, and would have benefitted from a break. Mr Shaw accepts that Ms Graham became extremely angry, upset and even incoherent at times during the meeting. In retrospect he accepted that it would have been appropriate for him to give Ms Graham more time to consider the matters in issue.

[22] Mr Shaw had heard enough, however. He concluded that given that Ms Graham had received a final warning over the same issues and that he could not tolerate her consuming alcohol

during working hours, her employment was to be terminated summarily. He told Ms Graham so and that he wanted her keys to the tavern returned forthwith.

[23] Ms Graham was very upset at being dismissed, but she went back to the tavern that afternoon to collect her belongings and have a drink with another member of the staff, whom she told about her dismissal.

[24] After her dismissal, Ms Graham wrote to the Pinetree Arms about the 'no sales', explaining that she was using the change bags (which were kept under the till) to put change into the till, and that she had to do it twice because she made a mistake the first time. She explained to the Authority that this could not be done all at the same time because the bags could not be accessed when the till was open as they were kept directly underneath it. Mr Shaw rejected her explanation. I conclude that he was correct to do so because the time delay between each of the 'no sale' transactions was not consistent with even two series of transactions involving the change bags. I am satisfied on the balance of probabilities that had two sets of transactions over the change been required because a mistake had been made the first time, this would still not have resulted in seven 'no sale' transactions over a period of two hours, with gaps of up to 30 minutes between each 'no sale' transaction.

[25] Mr Shaw also noted in evidence that purchases of Chardonnay by the Pinetree Arms had significantly reduced in the six months since Ms Graham had been dismissed, compared with the six months earlier. He put that down to Ms Graham taking product.

[26] Ms Graham has been unable to obtain other paid employment and is currently on a sickness benefit. She claims that her work at another local tavern is casual and unpaid.

[27] Mediation and further attempts during the course of the investigation meeting by the parties to resolve matters on their own terms were unsuccessful. It therefore falls to the Authority to issue a determination.

Credibility

[28] There can be no certainty about what occurred many months ago between the parties. Where there are areas of dispute the Authority must determine, on the basis of what was more likely than not, what actually occurred. In all matters in dispute before the Authority I have preferred the evidence of Mr Shaw to that of Ms Graham for a number of reasons. First, Mr Shaw was clear in his evidence, but also made concessions where appropriate, such as over his handling of the disciplinary meeting with Ms Graham. By contrast, Ms Graham's evidence was often unclear and

she sometimes resorted to the sorts of behaviours that she denied exhibiting in the disciplinary meeting, such as getting upset and swearing. Finally, the evidence about the key disciplinary meeting of Mr Brian Ward supported that of Mr Shaw. His evidence was similarly clear and direct and was backed up by a file note he had prepared within a day of the meeting. I accept, however, that Mr Ward's assessment of later parts in the meeting (when issues covered the historical matters involving the warning that Mr Ward was not aware of) was not entirely accurate. While this file note was not completely accurate therefore, and omitted a lot of material, the areas that were addressed were usually done so accurately, I conclude. I also do not accept that Mr Ward would give false evidence to the Authority just to protect Mr Shaw. My findings of fact have therefore proceeded accordingly.

The Law

[29] The test for unjustifiable dismissal is set out in s.103A of the Act. Justification must be determined on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[30] In discussing this test it was held in *White v. Auckland District Health Board* (unreported, Colgan CJ, AC10/07, 23 February 2007) at para.[97]:

... that there be two separate considerations, first of what the employer did (the substantive dismissal or justification and the grounds for it) and, second, how the employer acted (the process leading to those outcomes). In both cases, substance and procedure, the Court and Authority must be satisfied that what the employer did and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or disadvantage occurred. ... So even if relevant events may later come to light or the employer may consider that there were other grounds for the dismissal based on things known at the time, these cannot affect considerations of justification for dismissal.

[31] The standard a fair and reasonable employer is to be held to as to how it acted is set out concisely in *NZ Food Processing IUW v. Unilever* [1990] 1 NZILR 35 at 46 as follows:

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
3. *An unbiased consideration of the worker's explanation in the sense that that consideration must be free from predetermination and uninfluenced by irrelevant considerations.*

Failure to observe any of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of a disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that

unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion for the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standard of a fair minded but not over indulgent person.

[32] In assessing both justification and the facts on which the Authority bases its determinations, account must be taken of the seriousness of the allegations made against any party or witness. This is because the more serious the allegation the more convincing proof of it must be, because of the potential consequences for those upon whom the allegations are being made. This was highlighted in *Kostic v. Dodd and Milligan* (unreported, Couch J, CC14/07, 11 July 2007) at para.[79] where it was held:

In making a finding of fact on this issue, I have regard to the decision of the Court of Appeal in Whanganui College Board of Trustees v. Lewis [2000] 1 ERNZ 397 where, at para.[20], they described the standard of proof to be applied in employment proceedings as “the balance of probabilities flexibly applied according to the gravity of the matter”.

That description was specifically used in Lewis to describe the standard of proof applicable to justification of a dismissal but it is equally applicable to proof in the Employment Court of other facts relating to a personal grievance. In this case, the allegation that Mr Kostic assaulted Mr Dodd is one of considerable gravity. Assault is a crime and is regarded as morally reprehensible. To find such an allegation proved, I must be clearly satisfied on the balance of probabilities that it occurred.

[33] In determining remedies, the Authority must take account of any contributory actions by Ms Graham. This involves assessing any blameworthy behaviour by Ms Graham against any failures by The Pinetree Arms in its actions in dismissing Ms Graham, so as to come up with a fair result in equity and good conscience. In other words, the assessment of contributory actions must enable the Authority to do justice to the overall situation that is proved at the investigation into the personal grievance: *Ark Aviation v. Newton (CA)* [2001] 1 ERNZ 133.

[34] In some cases, even where an employer has conducted an unsatisfactory inquiry, but the evidence establishes dishonesty on the employee’s part, remedies may in fact be reduced to nil (see for example *Paewhenua v. Manukau City Council* unreported, Travis J, 7 August 1997, AEC86/97)).

Determination

[35] It is clear that Ms Graham’s dismissal was unjustified on procedural grounds. First, Ms Graham was not told about what the disciplinary meeting on 2 May was about in advance. She therefore had no opportunity to prepare her responses, which she should have. This default was

exacerbated by the fact that Ms Graham was not given sufficient time during the meeting to have a fair opportunity to refute the allegations made against her. This can be seen by Mr Shaw's acceptance, for instance, that he should have given Ms Graham an opportunity during the meeting to compose herself and her thoughts. Therefore the dismissal is unjustified because Ms Graham was not given notice of the allegations of misconduct in advance and a real opportunity to attempt to refute them.

[36] In assessing remedies I am entitled to take into account my findings of fact as a result of my investigation. In this case, I am satisfied that there is a sufficient level of proof that Ms Graham was in fact guilty of serious misconduct during the course of her employment at The Pinetree Arms in and around the end of April 2006 (*Ark Aviation* and *Kostic* applied).

[37] Like Mr Shaw I am not satisfied to the level of proof required that there was serious misconduct in Ms Graham's ringing on of several 'no sales' in the afternoon of 30 April. I am satisfied, however, that customers almost certainly would have purchased drinks in the two hours in question on that day and that accordingly Ms Graham has failed to account for those drinks. Once her denial that there were no customers is rejected it follows as a matter of logic that there were sales and that those sales were not accounted for by Ms Graham. No other explanation has ever been put forward. In this regard, it is significant that Ms Graham did not state at the time that there were no customers at The Pinetree Arms. Her explanation that a credit card transaction was involved was disproved. Because of the above points and the fact that customers in bars do purchase drinks, Ms Graham felt compelled to claim in evidence before the Authority that there were no customers, despite Mr Shaw's eye witness evidence to the contrary. Furthermore, it is significant that Ms Graham did not deny helping herself to Chardonnay at the time. In contrast, I have accepted Mr Shaw's evidence that he was monitoring shrinkage and that only Ms Graham could have been responsible for this. Ms Graham, while denying that she was responsible for the shrinkage, did accept that there were long periods when she was the only one on duty. Finally, there is Mr Shaw's evidence, which I accept, that The Pinetree Arms has not had to purchase Chardonnay in anything like the same quantity since Ms Graham ceased to be employed there. All these facts provide evidence to a sufficient standard for me to conclude that Ms Graham did in fact fail to account for chardonnay belonging to the Pinetree Arms on 30 April.

[38] Having found as a matter of fact that Ms Graham was responsible for taking and/or consuming alcohol which was the property of The Pinetree Arms without authorisation and either taking money from The Pinetree Arms without authorisation or giving away free drinks, it follows that she is guilty of serious misconduct, the outcome of which, if properly investigated, would

inevitably have been dismissal, particularly given her existing final warning for the same offence. In these circumstances, a finding that Ms Graham's contribution to the personal grievance is 100% is appropriate (*Paewhenua* applied).

[39] I therefore conclude that while Ms Graham was unjustifiably dismissed on procedural grounds, she is entitled to no remedies and order accordingly.

Costs

[40] Costs are reserved.

G J Wood
Member of the Employment Relations Authority