

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 140/10
5126291

BETWEEN

KARL TATTERSON
Applicant

A N D

T R SMART LIMITED t/a
ROBBIE'S BAR AND BISTRO
NEW BRIGHTON
Respondent

Member of Authority: James Crichton
Representatives: Kevin Murray, Advocate for Applicant
Alyn Higgins, Counsel for Respondent
Investigation Meeting: 29 April 2010 at Christchurch
Determination: 1 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Tatterson) alleges that he was unjustifiably dismissed by the respondent (Robbie's) and also subjected to disadvantage as a consequence of unjustified actions of Robbie's and unlawful discrimination as well. Robbie's resist Mr Tatterson's claims and counterclaim against Mr Tatterson alleging breach of contractual arrangements.

[2] Mr Tatterson commenced employment with Robbie's in May 2004 as a kitchen hand. Mr Tatterson claims that in late 2004, he was offered an apprenticeship by Robbie's as a chef and in consequence of that promise, he says he commenced his studies at the beginning of the 2005 academic year. While it is clear on the facts that Mr Tatterson did commence his cheffing studies at the beginning of the 2005 academic year, the claim that he was offered an apprenticeship by Robbie's at the end of 2004 is denied by Robbie's. Robbie's says that that discussion took place in May 2005, not at the end of 2004.

[3] It is common ground that the training agreement between the parties dates from May 2005 and that in return for course fees being paid by Robbie's, Mr Tatterson agreed to work for Robbie's for a three year period.

[4] On 23 January 2008, Mr Tatterson resigned his employment with his last day of work being 10 February 2008. The training agreement between the parties provided that if Mr Tatterson left the employment inside of the three year period, he had to repay the course fees which had been paid for him by Robbie's.

[5] There is a dispute between the parties about whether Mr Tatterson fulfilled his obligations under the training agreement or not. Mr Tatterson says that his obligations were fulfilled by the end of January 2008 while Robbie's says that Mr Tatterson had not completed his obligations and therefore is obligated to repay the full course fees paid by Robbie's.

[6] The matter proceeded to the Authority in the usual way after an unsuccessful mediation.

Issues

[7] The Authority needs to investigate and determine the following issues:

- (a) When did the parties agree on Mr Tatterson's apprenticeship?
- (b) What were the parties' obligations under the training agreement?
- (c) Did Mr Tatterson resign or was he dismissed?

When did the parties agree on Mr Tatterson's apprenticeship?

[8] Mr Tatterson's evidence is unequivocal that he entered into discussions with Mr Tony Smart of Robbie's in November 2004 about commencing a cheffing apprenticeship at Robbie's and that this initial discussion culminated in an offer conveyed by Mr Smart to Mr Tatterson in December 2004 wherein Mr Smart offered Mr Tatterson a cheffing apprenticeship. Mr Tatterson says that he accepted that offer at the commencement of the new year, that is January 2005.

[9] Mr Ivan Tatterson (the applicant's father) gave evidence in support of his son. He says that his son (who was 17 at the time) was offered the apprenticeship in late 2004 and that he accepted it early in 2005 before the Christchurch Polytechnic

Institute of Technology's (CPIT) course began in February 2005. Mr Tatterson Snr also said in his evidence that his son frequently asked Mr Smart for the documentation to support the arrangement and that this did not emanate until May 2005.

[10] Mr Smart for Robbie's is equally unequivocal that there was no discussion between himself and Mr Tatterson in late 2004 and that Mr Tatterson started the cheffing course at CPIT *on his own initiative*. Mr Smart said that in 2004, Mr Tatterson was doing two shifts a week as a kitchen hand and that in 2005 he was still a kitchen hand. Mr Smart was clear that the impetus for offering Mr Tatterson the apprenticeship came from a meeting of franchisees of the Robbie's franchise where it was suggested that because chefs were in high demand and short supply, all of the franchisees should seek to hire apprentice chefs on the basis that Mr Smart subsequently offered Mr Tatterson. Mr Smart said that after that discussion at the franchisees' meeting, he then progressed the matter with Mr Tatterson which culminated in the training agreement signed in May 2005.

[11] The question of when the parties agreed on the apprenticeship is relevant because of the consequences that flow from it in terms of the time that Mr Tatterson was bonded to Robbie's after completion of his training. The provisions of the training agreement which, it is common ground, was executed by the parties on 2 May 2005, require that Mr Tatterson work for Robbie's for the two year training period (that is the period he is attending classes at CPIT) and for one year thereafter, making a total of three years. Mr Tatterson resigned his employment by letter dated 23 January 2008 giving his last day of work as 10 February 2008 and his evidence is that in respect of the date of the resignation letter and the operative date of the resignation, these dates were selected having regard to the fact that he had, by then, completed three years in the employment of Robbie's including two years while he was attending CPIT.

[12] The essence of Mr Tatterson's evidence is that the impetus for his enrolling in the CPIT course beginning 2005 was the commitment already established with Robbie's for the apprenticeship to commence. Mr Tatterson is adamant that he had a verbal commitment from Mr Smart and that evidence is supported by Mr Tatterson's father. It does seem an extraordinary leap of faith for a 17 year old young man to enrol in an expensive Polytechnic course which, in the absence of any agreement with his employer, he would have to fund entirely from his own resources and in

circumstances where the course, by its very nature, required a significant practical component as well. I conclude it is more rather than less likely that Mr Tatterson had Mr Smart's agreement before he enrolled in the cheffing course at CPIT. There is no doubt that the apprenticeship and the training agreement which underpinned it was not formalised until May of 2005, but I am satisfied on the evidence that Mr Tatterson's recollection of events is to be preferred as to when the commitment was actually made.

What were the parties' obligations under the training agreement?

[13] In essence, the training agreement, which I hold recorded after the event, a tacit agreement already entered into between the parties, effectively set off the reimbursement of course fees against a bonding arrangement. In practical terms, provided Mr Tatterson passed his courses to an acceptable standard, his course fees were to be reimbursed in full by Robbie's and in return, Mr Tatterson agreed to serve the employer, first while he was completing his training (a period of two years) and then for a period of one year thereafter.

[14] The importance of the conclusion that I have just reached about when the in principle arrangements were reached between the parties is that, because I have decided that the parties reached their basic agreement in late 2004, Mr Tatterson was right to consider that his obligations to the employer had been fulfilled by the beginning of 2008. Mr Tatterson struck me as a sensible young man and his resignation given on 23 January 2008 to take effect from 10 February 2008 was, I am satisfied, a considered act rather than simply a random choice of date. In my opinion, Mr Tatterson made his decisions in that regard because of his conviction that he had fulfilled his obligations to the employer under the training agreement. That, in my judgment, supports my conclusion that Mr Tatterson was correct in his recollection that there had been an understanding reached with Mr Smart in late 2004.

[15] In respect of the other side of the training agreement's equation, Robbie's was to reimburse Mr Tatterson for his course fees provided Mr Tatterson had passed the respective courses with 60% or more of a mark and provided his attendance was satisfactory to the training institution. It follows in a practical sense, Mr Tatterson had to fund the course fees and then, on passing the relevant courses, seek reimbursement from Mr Smart of Robbie's. I am satisfied on the evidence before the Authority that Mr Smart did not fulfil his obligations in respect of reimbursement.

First, Mr Smart maintained that he had no obligation to fund courses for the first half of 2005 because the training agreement was only signed in May 2005. Given my finding that the fundamental commitment between the parties was made at the end of 2004 and the beginning of 2005, I hold that Mr Smart was obligated to meet course fees for the whole of the 2005 academic year, not simply the second semester as he decided.

[16] Mr Smart maintained in his evidence that the training agreement was altered because Mr Tatterson had completed the first half year of his training. He points to the alterations in the agreement and the initialling of them as evidence for his view that there was an acceptance by Mr Tatterson that the first half of the first year, in terms of fees, were *on him*. I do not accept that view at all. The reason, I am satisfied, that the agreement was changed is because the length of the course was shortened and the training requirement for the course Mr Tatterson was undertaking was reduced from three years to two years and the alteration reflects that reality rather than the gloss that Mr Smart seeks to put on the position.

[17] The effect of that fundamental disagreement about what the parties' obligations were meant that Robbie's did not pay all of Mr Tatterson's fees in accordance with the terms of the agreement. Robbie's regarded the first half of the first year as not its responsibility and, as a consequence there was a constant shortfall. I am satisfied on the evidence before the Authority that Mr Tatterson had to borrow \$4,356.60 for the payment of his first year's tuition and of that, only \$2,107 was reimbursed by Robbie's. That, as I say, is because Robbie's considered it did not have to meet the fees for the first half of the year.

[18] However, the position was the same or similar in the second year of tuition where again, Mr Tatterson had to borrow the sum of \$4,785.30 to meet his tuition obligations to CPIT in that second year. Even for the second year, where there can be no argument about Mr Tatterson's entitlement under the agreement, Robbie's failed to pay Mr Tatterson the sum of \$2,785.40.

[19] It follows that, on the Authority's analysis of the position, Mr Tatterson is rightly aggrieved that Robbie's has failed to meet all of his tuition costs as it was obligated to, and that the total of \$5,035 remains due and owing by Robbie's to Mr Tatterson.

Did Mr Tatterson resign or was he dismissed?

[20] I am satisfied that Mr Tatterson resigned from the employ of Robbie's of his own volition and was not dismissed from his employment. Again, there are two different views about this question, as with the other questions. Mr Tatterson says that he resigned his employment because he had been told by the head chef at Robbie's (Simon) that he was not required after the end of his bonded three year period of service. Mr Smart, for Robbie's, contested that evidence and indicated that he personally was responsible for all hiring and firing decisions and that Simon would neither have the authority or indeed the inclination to express such a view.

[21] Although Mr Tatterson would not have known necessarily what authority Simon had or did not have, I prefer Mr Smart's evidence on this point. This is not because of something Mr Smart said but because of the evidence of Mr Tatterson himself. Mr Tatterson told me in his evidence that apart entirely from being told he was no longer required by Simon, he had *no intention of staying on after the end of the training agreement*. Furthermore, as I have already remarked, I was satisfied that Mr Tatterson tendered his resignation in a deliberative way identifying a date that would meet his obligations under the training agreement and I think the motivation for him to leave was simply his desire to further his career in cheffing.

[22] That view of the evidence is also supported by the nature of the letter of resignation dated 23 January 2008, which makes no mention whatever of the conversation with Simon but simply refers to Mr Tatterson's need to take this step *to further my career*. The whole tone of the letter suggests a voluntary disengagement to pursue other opportunities rather than a resignation forced by the employer's desire to relinquish Mr Tatterson's services. Indeed, it would seem somewhat surprising for Robbie's to go to the trouble of training a young chef and then seeking to dispense with his services immediately that he had completed his training.

[23] Finally, I call in aid of my view that this was a voluntary resignation, the evidence of Ms Teena Mowat. Ms Mowat gave evidence at my investigation meeting that she had been told by Mr Tatterson towards the end of 2007 that he felt that he had achieved all he could at Robbie's and that he needed to move on professionally. She knew of two trials that Mr Tatterson had undertaken with Christchurch restaurants around this time, and one of the trials that she referred to resulted in Mr Tatterson being offered employment when he left Robbie's. I accept Ms Mowat's evidence as

truthful. It seems to me absolutely consistent with the view that Mr Tatterson had reached a point in his career where he thought he needed to move on (as he was perfectly entitled to do), and accordingly I decline to accept the evidence that there was any encouragement by Robbie's to have Mr Tatterson leave the employment.

Determination

[24] As will be evident from the section of the determination immediately above, I am not persuaded that Mr Tatterson was unjustifiably dismissed. I think his resignation was genuinely voluntary and based on his desire to move on professionally.

[25] However, the position is otherwise in relation to the claim that Mr Tatterson has suffered disadvantage as a consequence of the unjustified actions of Robbie's where it seems to me clear that Mr Tatterson should have been paid all of the fees which he incurred in the training that he undertook to become a professional chef. That, as I indicated earlier in this determination, is the Authority's interpretation of the obligations of the employer in the training agreement and those obligations have not been met in full. I conclude that the parties committed to the principles of their agreement by the beginning of 2005 and the training agreement entered into in May 2005 must be read subject to that conclusion.

[26] Mr Tatterson claims lost wages, compensation and reimbursement of the unpaid tuition fees together with a penalty for breach of good faith.

[27] I am not persuaded there had been a breach of good faith or indeed any evidence of unlawful discrimination. Nor am I satisfied that there are wages due and owing because, given there was no dismissal, no loss flowed from that consequence. There is no evidence that Mr Tatterson suffered lost wages as a consequence of the grievance I have found proved, namely the unjustified action causing disadvantage. Conversely, Mr Tatterson is entitled to receive the balance of the tuition fees which remain unreimbursed by Robbie's and there will be an order to that effect.

[28] Compensation for the unjustified action causing disadvantage is difficult to quantify appropriately. As I noted in the course of the determination, the parties interpreted their obligations differently and I am not persuaded that the employer was activated by bad faith or indeed ought to be subjected to a penalty for breach. I think the appropriate course is to make a very modest compensation award to reflect the

fact that Mr Tatterson has suffered disadvantage by having to carry this debt since the end of the employment in circumstances where that ought not to have happened.

[29] Before making an order as to remedies I need to consider whether Mr Tatterson has contributed in any way to the circumstances giving rise to his grievance. I am satisfied that nothing Mr Tatterson did contributed to those circumstances: s.124 of the Employment Relations Act 2000 applied.

[30] Accordingly, to remedy Mr Tatterson's grievance with his employer Robbie's, I direct that Robbie's pay to Mr Tatterson the following amounts:

- (a) The sum of \$1,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 for Robbie's unjustified act in failing to honour its obligations under the training agreement to Mr Tatterson, causing the latter disadvantage; and
- (b) The sum of \$5,035 being reimbursement of unpaid tuition fees due and owing pursuant to the training agreement between the parties;
- (c) The filing fee of \$70 in the Authority.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority