

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 233
5343202

BETWEEN JAMES DAVID ALLEN
 Applicant

A N D THE BREUWAN TRUST
 t/a THE HARBOUR VIEW
 HOTEL RAGLAN
 Respondent

Member of Authority: K J Anderson

Representatives: James Allen in Person
 A Higgins, Counsel for Respondent

Investigation meeting: 21 February 2012 at Hamilton

Date of Determination: 10 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Allen claims that he was unjustifiably dismissed on 4 March 2011. Mr Allen also claims that he was disadvantaged during his employment by an unjustifiable action by his employer. He asks the Authority to find that he has a personal grievance (or grievances) and award him the remedies of loss of wages and compensation under s.123 of the Act.

[2] Conversely, the respondent (the Hotel) says that the decision to dismiss Mr Allen was justified and was carried out according to a fair process; and Mr Allen was not disadvantaged in his employment by an unjustifiable action.

[3] In the alternative, the Hotel says that, should the Authority find any unjustified actions exist, then the contribution of Mr Allen should be taken into account by reducing any remedies that may be awarded.

[4] Mr Allen gave evidence and for the Hotel, there is evidence from Mr Jeffrey Holloway, the general manager, Mr Michael Chubb, chef, Ms Amanda Piha-Fisher, chef, and Ms Angela Stockley, restaurant manager. All of the evidence and supporting documents provided by the parties has been closely considered and taken into account by the Authority, albeit it may not be specifically referred to in this determination.

Background

[5] Mr Allen worked at the Hotel as a chef, commencing his employment on 3 October 2008. An employment agreement was signed by the parties on the same date.

[6] Mr Holloway is the general manager of the Hotel and along with his wife, has operated the business for approximately 12 years. At the relevant times, the kitchen at the Hotel was under the charge of a head chef (Marcus) and Mr Allen was accountable to him, and then later, he was also accountable to Mr Michael Chubb, the sous chef. The evidence of Mr Holloway is that while he and his wife have a good general working knowledge of the kitchen, the day-to-day operations are left largely to the head chef.

[7] At some point in 2009, the head chef went on holiday. According to the evidence of Mr Holloway, upon his return, the head chef voiced concerns to Mr Holloway about the attitude of Mr Allen and the way he was performing his duties. Mr Holloway says that he spoke to Mr Allen and informed him that he must listen to and follow the instructions of the head chef. Mr Holloway says that an issue also arose in regard to Mr Allen closing the kitchen when food orders were still being taken, contrary to the Hotel's accepted procedures. Mr Holloway spoke to Mr Allen about this and informed him that he was not to close the kitchen without clearing it with the restaurant manager.

[8] Towards the end of 2010, Mr Allen received verbal warnings for lateness and failure to perform his duties appropriately. Subsequently, Mr Allen raised a personal grievance claiming that he had been disadvantaged in his employment by an unjustifiable action by his employer: namely, the warnings.

[9] On 1 December 2010, the parties attended mediation. The outcome was that the verbal warnings were removed from Mr Allen's employment record. There was also an agreement reached about the setting of work rosters and it was confirmed that

Mr Allen would assume the role of senior chef, with the hierarchy for the kitchen then being: head chef, second-in-charge (sous chef) and senior chef. The above matters are recorded by the *Memorandum of Understanding for Ongoing Employment Relationship* (memorandum of understanding). It was also agreed that Mr Allen would adhere to the Hotel's standards; including food hygiene, ordering, menu items, recipes, portions and kitchen procedures. Mr Allen also agreed to follow the decisions of the head chef or the second-in-charge, "with a positive attitude in the best interests of the business".

[10] From the memorandum of understanding, it appears that while agreement was reached on a number of operational matters relating to the kitchen at the Hotel, Mr Allen's personal grievance remained unresolved, or at least without a satisfactory remedy as far as Mr Allen was concerned, albeit the verbal warnings were removed from his employment record. It is appropriate to record at this point that there is no tangible evidence of Mr Allen being disadvantaged in his employment by an unjustifiable action by his employer.

Events of 2011

[11] The evidence of Mr Holloway is that despite the outcome of the mediation and the memorandum of understanding, Mr Allen continued to refuse to follow instructions.

[12] The evidence of Mr Chubb is that, as a result of the mediation that occurred on 1 December 2010, he was offered and duly accepted the position of second-in-charge of the kitchen (sous chef). Mr Chubb says that Mr Allen failed to do the things that were asked of him. Also, Mr Allen instructed other kitchen staff to do things differently from what Mr Chubb required, hence creating confusion in the operation of the kitchen. Mr Chubb attested to an incident that occurred on the evening of 31 January 2011, regarding Mr Allen deep frying a steak. Mr Chubb says that this is an unacceptable practice and he later raised this with Mr Allen. Mr Chubb says that Mr Allen became argumentative about this matter.

[13] Mr Chubb had concerns about Mr Allen's attitude and expressed them in a letter to Mr and Mrs Holloway on 4 January 2011. In summary, Mr Chubb conveyed concerns about:

- (a) Mr Allen advocating deep frying and microwaving steaks and insisting that this was an acceptable practice;
- (b) Mr Allen disregarding instructions.

A number of examples were provided pertaining to Mr Allen failing to carry out appropriate practices in the operation of the kitchen. Mr Chubb concluded his letter thus:

An ideal outcome for me would be for James [Mr Allen] to accept reasonable instruction from the head chef and sous chef and to follow tasks through even in the absence of both of us. In the meantime I strongly feel that James' attitude and work standards means that he is completely incapable of working without supervision and I strongly feel that these issues, especially his unacceptable attitude towards any instruction at all, needs immediate review.

[14] Via a letter dated 4 February 2011, Mr Holloway forwarded Mr Chubb's written complaints to Mr Allen and asked him to provide a written response by 3pm on Wednesday, 9 February 2011. Mr Allen was requested to:

Please outline any reasons for your behaviour and any justification you believe you have for the behaviour complained of. Once we have had an opportunity to consider your responses we will decide what if any further action is warranted.

[15] The further evidence of Mr Chubb is that he had occasion to present another complaint to Mr and Mrs Holloway, relating to his experiences with Mr Allen on 4 February 2011. It seems that Mr Allen reacted strongly to the earlier complaint that Mr Chubb had made. In a letter to Mr and Mrs Holloway, Mr Chubb complained of being "confronted" by Mr Allen in a manner that he described as "inappropriate and intimidating". Mr Chubb also complained that Mr Allen's actions were "way too confrontational" and as a consequence, he left the workplace two hours earlier than normal.

[16] Via a letter dated 5 February 2011, Mr Holloway forwarded Mr Chubb's second written complaint to Mr Allen. Mr Holloway informed Mr Allen that:

Mike [Mr Chubb] as the sous chef is your supervisor along with Marcus the head chef. They are to be treated with respect and all reasonable instructions given by them are to be followed. Whilst I am not prejudging what occurred yesterday I wish to reinforce that any disrespectful or threatening behaviour is unacceptable. All staff have the right to work in a safe environment free of intimidation and threats and any deviation from this will be properly investigated.

Please read the attached correspondence and provide me with a reply in writing if you wish by 12 midday on Thursday 10 February 2011. I will consider any response before deciding on any further action if required.

[17] Mr Allen responded to Mr Chubb's complaints via a comprehensive letter dated 9 February 2011. Mr Allen defended his cooking methods (deep frying and microwaving) and informed that he believed his cooking methods "are correct and professional". Mr Allen also responded in some detail in regard to the complaints that Mr Chubb had made and included a number of disparaging comments about Mr Chubb. In response to Mr Chubb's complaint about being intimidated or threatened, Mr Allen said this was "a lie". Mr Allen alleged that Mr Chubb threatened "to deck me" and that Mr Chubb's second letter of complaint "shows how desperate he is to take over the kitchen and cause havoc". Mr Allen informed that he resented Mr Chubb's "lies and his stirrings for his own purposes and greed". Mr Allen finally gave his version of Mr Chubb leaving work early on 4 February 2011.

[18] The evidence of Mr Holloway is that upon consideration of Mr Allen's written response to Mr Chubb's complaints, he felt that Mr Allen had not provided a satisfactory explanation to the critical concerns that existed. Mr Holloway says that given the threats and the personal comments about Mr Chubb, including calling him "a boy" and "a scared boy", and also that, Mr Chubb had felt concerned enough to put his complaints in writing and was compelled to leave work early on 4 February 2011, it was necessary to have a meeting with Mr Allen to formally discuss the issues further.

[19] Accordingly, Mr Holloway wrote to Mr Allen on 15 February 2011:

It has become necessary to meet with you about some issues regarding your employment at the Harbour View Hotel. Please advise whether you will be available to meet on Thursday 17 February 2011 at 2pm or suggest an alternative time more suitable. The issues that I would like to discuss at the meeting are:

The main complaints raised in sous chef Chubb's memos dated 4th and 5th February 2011. Namely,

Refusing to comply with reasonable instructions from supervisor.

Being disrespectful and argumentative with senior staff.

Not following kitchen procedures generally and in particular relating to the cooking of steak.

Behaving in an aggressive and confrontational manner towards other staff.

I refer specifically to the letter received from Mike Chubb enclosed with this letter. It is the contents of this letter that I would like to discuss further with you. You are welcome to have a representative present at this meeting and are encouraged to do so. This person may be a lawyer, union rep or other advocate. Copies of all correspondence previously given to you and your written response is attached. At the meeting you will be given every opportunity to have your say in response to the issues and no disciplinary action will be considered or taken until your responses and explanations have been considered and investigated. However the matters are serious and your continued employment may be in jeopardy.

Meeting 28 February 2011

[20] A meeting with Mr Allen took place on 28 February 2011. He was represented by a solicitor and in addition to Mr Holloway, Mr Chubb was present. The proceedings were recorded and the Authority has had the opportunity to listen to a CD production. The matters set out in Mr Chubb's letters of complaint were discussed as well as the intentions of the parties, set out in the memorandum of understanding that had been arrived at during the mediation in December 2010.

[21] The recording of the meeting reveals that there was considerable discussion about Mr Allen deep frying steaks and the further requirement to wash steak, and for him to accept reasonable instructions from Mr Chubb. In regard to Mr Chubb's version of events, as set out in his complaint letters, Mr Allen accused Mr Chubb of lying on four occasions during the meeting. Mr Allen also made reference to Mr Holloway's "boys" – meaning Mr Chubb and Marcus the head chef.

[22] It was the view of Mr Allen that not only did he have some issues about how the kitchen was managed by Mr Chubb and the head chef; other staff also had some concerns. Mr Holloway indicated that he would investigate the matters further by talking to other employees.

[23] Mr Holloway spoke to other hotel employees and subsequently provided Mr Allen with written statements provided by two employees. The statements portray a generally unsatisfactory working relationship with Mr Allen.

Meeting 4 March 2011

[24] Another meeting was held with Mr Allen on 4 March 2011. Mr Holloway has produced the notes that he prepared. The evidence of Mr Holloway is that he had lost trust and confidence in Mr Allen. Mr Holloway says that while Mr Allen was capable of all the duties required of him, he could not be relied upon to carry out reasonable instructions. Mr Holloway also says that Mr Allen was continually speaking disparagingly of other staff, particularly those who were senior to him. Mr Holloway told the Authority that: “... *it appeared to us that every day he came to work he was trying to upset the apple cart in some way or form*”.

[25] The outcome of the meeting is summarised in the following letter from Mr Holloway to Mr Allen:

On Monday 28 February 2011 you attended a formal meeting at which I was present along with your solicitor Christine Pidduck and sous chef Mike Chubb where we discussed some matters surrounding your employment at the Harbour View Hotel. We discussed the main complaints made against you:

1. Refusing to comply with reasonable instructions from your supervisors;
2. Being disrespectful and argumentative with senior staff;
3. Not following kitchen procedures generally and in particular relating to the cooking of steak;
4. Behaving in an aggressive and confrontational manner towards other staff.

You were provided with an opportunity to explain your actions and comment on these matters. You were also informed that termination of your employment was being considered as a result and that before any decision was made your comments would be considered by us and a further meeting held with you regarding dismissal. On Friday 4th March I again met with you and Mike Chubb. You were invited to bring your solicitor or a representative however you elected to record the meeting and not have support present. I informed you that after careful consideration of all the circumstances surrounding the incident that we intended to proceed with your dismissal. You had at this meeting, an opportunity to make final representations. Having considered your responses and final representations regarding dismissal, this letter now constitutes formal notice that you are dismissed from your employment with the Harbour View Hotel, notice effective from 4 March 2011.

Analysis and conclusions

[26] Mr Allen says that his dismissal was unjustifiable but he has provided little of substance to support this claim. The question of whether a dismissal is justifiable must

be determined by the Authority on an objective basis. The test is whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances the dismissal occurred.¹ The test of justification was amended by the introduction of the Employment Relations Amendment Act 2010. The statutory amendment cannot be strictly applied to the circumstances pertaining to Mr Allen, as his dismissal occurred before 1 April 2011. However, the new s.103A(3) provides what can be seen as a codification of various common law principles that apply to dismissals and it is useful to set them out below:

In applying the test in subsection (2) the Authority or the Court must consider:

- (a) Whether having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[27] I find that all of the above criteria were met by the employer before reaching a decision to dismiss Mr Allen. I can find no fault in the procedure adopted by Mr Holloway.

[28] In regard to the dismissal of Mr Allen, it is transparently clear that his cumulative actions and behaviour were such that the workplace environment and the essential relationships with his colleagues, particularly his supervisor Mr Chubb, had become dysfunctional. It is established to my satisfaction that the bond of trust and confidence deemed to be essential to the employment relationship was strained to breaking point by Mr Allen. In the circumstances of this case, it cannot be put more clearly than it was by Judge Horn in *Wellington etc IUOW v. Hawthorne* [1988] 1 NZILR:

¹ Section 103A of the Employment Relations Act 2000, as it was then.

Was the dismissal justified? There may be a time when a clash of personalities between an employer and an employee not only disturbs the harmony for the time being but may render a continuance of the relationship unworkable. A point may be reached where someone must go. If the cause of severe disharmony lies at the door of management, a dismissal of a worker may be unjustified. Sometimes an employer's words and actions are at fault and are the cause of the disharmony resulting in dismissal or resignation. Conversely, if it is the words or actions of an employee which cause or continues the severe disharmony (whatever the original cause) dismissal may not only be justified but necessary.

Determination

[29] The evidence reveals that it was the continual and cumulative words and actions of Mr Allen that caused severe disharmony within the operation of the kitchen and this left Mr Holloway with no option but to dismiss him. The proven misconduct of Mr Allen is also recognised by the provisions of the *Harbour View Hotel House Rules* in that, if there is continued contravention, in regard to unacceptable behaviour towards customers or other staff (among other things), dismissal may result. Also within the house rules, there are certain acts that may result in summary dismissal; including: insubordination and threatening or abusive behaviour.

[30] In summary, I find that the actions and general behaviour of Mr Allen was such, that termination of his employment was an action that a fair and reasonable employer would have taken in all the circumstances. It follows that I find that the dismissal of Mr Allen was justified. He does not have a personal grievance and his claims are dismissed.

Costs

[31] Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions. The applicant has a further 14 days to file and serve submissions in reply.

K J Anderson

Member of the Employment Relations Authority