

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Lawrence Baker (Applicant)
AND Dawson's Catering (N.Z.) Limited (Respondent)
REPRESENTATIVES Dylan Marriott, for Applicant
Andrew Swan, for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 4 July 2005
19 July 2006
**ADDITIONAL
INFORMATION RECEIVED** 5 September 2006
**SUPPLEMENTARY
SUBMISSIONS** 16 October 2006 from Applicant
17 October 2006 from Respondent
DATE OF DETERMINATION 6 November 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Baker claims he has been actually or constructively unjustifiably dismissed. Dawson's Catering (N.Z.) Limited (Dawson's Catering) denies Mr Baker was dismissed and says he went on a period of sick leave after having certain duties removed from him to assist him with his health, and has not returned to work.

[2] Mr Baker was employed by Dawson's Catering in August 2002 as a functions supervisor. It was common ground that in March 2003 Mr Baker was given additional functions to his role, which included managing the Maritime Room.

[3] Mr Baker spent approximately half of his time in the Maritime Room and the other half of his time was taken up working on functions off-site as a functions supervisor. The evidence shows that for the months of March, August, November and December of 2003, Mr Baker worked, on average, 18 events per month. On some occasions Mr Baker would work two functions on one day.

Approximately 18% of Mr Baker's time was spent on Maritime Room administrative and maintenance duties.

Nature of Employment Relationship

[4] Mr Alex Ross, General Manager, says Mr Baker was employed as a casual employee on a temporary basis. Mr Ross says that this means there was no guarantee or obligation for Dawson's to provide work and nor was there any obligation for Mr Baker to accept work.

[5] In answer to questions at the investigation meeting Mr Baker said that he understood he was employed on a job-by-job basis and that each new job was a new assignment. He says he had to give 2 days notice if he didn't want a job or couldn't do the job. Mr Baker also told me that he never needed permission to take time off for sickness, he just took it. Mr Baker's evidence was that he would know about a week in advance the functions he would be working on the following week and that if there were no functions then he would not be required to work. Mr Baker was also receiving 6% holiday pay each time he was paid for the hours he had worked.

[6] I have concluded that the nature of Mr Baker's employment relationship was that of a casual employee. He was free to accept or reject work with the respondent as he pleased.

The Wages Review

[7] In August 2003 Mr Baker approached Mr Ross and asked him to review his wages. At that meeting Mr Ross raised with Mr Baker issues relating to the performance of his duties. Mr Ross told Mr Baker he was not performing his duties to an adequate standard and that there were issues relating to the compliance with the job description. Mr Ross told Mr Baker that because of these issues his wages would not be increased.

[8] At the investigation meeting Mr Baker told me that he wasn't able to complete all his jobs as his supervisor Mr Mark Swanson, would interfere and do some of his jobs before he [Mr Baker] had an opportunity to. By way of example he told me that Mr Swanson would complete a stock-take sometimes 2-3 days before it was due to be done. Mr Baker implied that Mr Swanson was trying to hide unethical conduct by completing the stock-take early. In response to that Mr Ross (whose evidence I accept) says that Mr Swanson was doing a fortnightly stock-take which Mr Baker should have completed much earlier, and which would need to be completed again 3-4 days hence. I have concluded that Mr Baker's allegation about Mr Swanson's conduct was completely without foundation and not supported by any evidence.

[9] Mr Swanson says that while the functions being supervised by Mr Baker were being done well, the Maritime Room wasn't being maintained and was untidy. Mr Swanson says he would take Mr Baker through the room and discuss what needed to be done, but that there was no improvement in the tidiness or maintenance.

[10] The meeting in August was a meeting arranged by Mr Baker to seek a pay review. Mr Ross gave him reasons why that would not be happening. There was nothing out of the ordinary in this meeting.

November 2003 Meeting

[11] During November 2003, Mr Ross approached Mr Baker while he was working at a function and invited him to meet with him the following day at 10.00am. At the meeting Mr Ross explained to Mr Baker that he was unhappy with the state of the Maritime Room and remarked about the condition of the carpet (which had some black spots on it), a mark on a chair and a mark on the skirting board. Mr Baker says he was surprised that these issues were raised with him because he had already mentioned them to Mr Swanson and they had agreed on a plan to address and fix the problems. Mr Baker says that Mr Ross raising these issues with him in November 2003 took him by surprise and he felt belittled and it left him with shame and embarrassment.

[12] I have considered Mr Baker's evidence on this meeting and I have concluded that Mr Ross raising the issues with Mr Baker in the way he did, came as a bit of a surprise to Mr Baker because he considered the issues to be very minor and had already been dealt with. Also, he believed before going into the meeting that the discussion was to be about something very serious.

[13] However, I do not regard that Mr Ross raising the issues as he did was outside the boundaries of what an employer is entitled to do with its employees. It was not done in a way that would lead me to conclude that Mr Baker's reaction as he described it, was reasonable. No action was taken as a result of the meeting.

February 2004 meetings

[14] In early February 2004 Mr Ross again approached Mr Baker and invited him to attend a meeting which eventually took place on Monday 10 February 2004. Mr Baker says that he inquired as to the reasons for the meeting but that he was told to wait and see. Mr Ross however says that he did not say that at all, that what he said to Mr Baker was that he wished to have a meeting to discuss his performance with him.

[15] Mr Baker says he was fearful of the meeting because there were rumours floating around about him. When I asked him to tell me more about this, he was unable to provide any examples or give me any further information. He told me he had spoken to a colleague and that she had advised him that she was to do the administrative tasks associated with the maritime room. Mr Baker told me he had concluded from that, that if she knew about this then every one else would know.

[16] At the meeting on 10 February 2004 Mr Ross told Mr Baker that he was still unhappy with his performance and that Mr Swanson had also expressed unhappiness with the way in which Mr Baker was performing his job. Mr Baker responded that Mr Swanson could not possibly have issues with his performance as he had always told him he was doing a good job. Mr Ross adjourned the meeting in order for him to talk further with Mr Swanson and collect further information.

[17] Following Mr Ross and Mr Swanson's discussions, Mr Swanson contacted Mr Baker by telephone and advised him that a further meeting would take place the following day, 11 February 2004.

[18] On 11 February 2004 Mr Ross again advised Mr Baker that he was not satisfied with his performance. There were issues raised in relation to Mr Ross's lack of confidence in Mr Baker's ability to perform in accordance with the job description which had been provided to Mr Baker in 2003.

[19] It was common ground that at that meeting Mr Baker's health, which had not been particularly good, was discussed. Mr Baker told me he had been suffering from a fair amount of stress at that time as his father's closest sister had died and his father had taken it particularly badly and so had he. He also told me that his father had just had a pacemaker put in and that he looked like he was about to pass away himself and that this was also of very serious concern to Mr Baker.

[20] In addition to that Mr Baker had an ongoing infection and this impacted on his ability to recover quickly from more minor infections. Mr Ross told me that he believed by removing the Maritime managing functions from Mr Baker it would put him in a less stressful situation. This suggestion was put to Mr Baker at the meeting. Mr Ross says that during the discussions Mr Baker was assured that his position as a functions supervisor would not be diminished and he would retain the same level of hours to ensure that his income did not decrease.

[21] Mr Baker told me that it was at this meeting that he was dismissed. He said that he felt Mr Ross had demoted him and that action had the effect of dismissing him.

Sick Leave

[22] On 12 February 2004 Mr Baker attended the offices of Mr Dylan Marriott who referred Mr Baker to a counsellor. In his referral letters Mr Marriott refers to the family events which had occurred in Mr Bakers life as well as the employment situation as contributing to non-specific anxiety symptomology. Mr Marriott recommended a period of leave to allow some respite and a sensible response to his employment relationship issues.

[23] Mr Baker advised Dawson's that he would be away sick for the next two weeks. Mr Ross says that when Mr Baker advised about his time off he was asked to contact him as soon as possible after the two week period as it was a very busy time of year. Both Mr Ross and Mr Swanson gave evidence that they attempted to contact Mr Baker to offer him work but Mr Baker never responded.

[24] On 17 February 2004, during a telephone conversation with Mr Marriott, Mr Ross confirmed his earlier advice to Mr Baker and told Mr Marriott that Mr Baker should contact him at the end of his sick leave in order for them to offer him more work. No further contact was made by either Mr Marriott or Mr Baker until the filing of Mr Baker's statement of problem.

Actual or constructive dismissal

[25] I am satisfied that on the balance of probabilities Mr Baker was aware from August 2003 that there were issues relating to his performance of the administrative and maintenance functions of the Maritime Room. I am also satisfied that the respondent, Dawson's Catering had a right to raise these performance issues with Mr Baker in an effort to try and resolve them and to have Mr Baker perform to the required standard.

[26] Mr Baker was clearly suffering from stress relating to his personal situation. Mr Ross attempted to reduce the impact Mr Baker's work may be having on that stress by suggesting the administrative and maintenance duties of the Maritime Room be done by another employee. Mr Baker was not dismissed through these actions.

[27] From 12 February 2004 Mr Baker was not available to accept work due to his illness. During the telephone conversation with Mr Marriott on 17 February 2005, Mr Ross confirmed his earlier advice given to Mr Baker on 12 February 2005, that he was to make contact after his recovery so that work could be offered to him. Even though Mr Ross and Mr Swanson left messages for Mr Baker to contact them he chose not to. I am satisfied that Mr Baker knew that if he did not make contact with the respondent no new work would be offered to him.

[28] I have already found that Mr Baker was employed on a casual basis. This means that he was offered work and was free to accept the work or not. Given the nature of the employment relationship and Mr Baker's failure to make any contact with his employers I can not find an actual or constructive dismissal.

Costs

[29] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Vicki Campbell
Member of Employment Relations Authority