

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 150
3001532

BETWEEN

MARIA CAVANAGH
Applicant

AND

THE PIHA MEMORIAL RSA
INCORPORATED
Respondent

Member of Authority: Vicki Campbell
Representatives: Applicant in Person
No appearance for Respondent
Investigation Meeting: 19 May 2017
Oral Determination: 19 May 2017
Record of Oral
Determination: 19 May 2017

**RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms Cavanagh has established a personal grievance.**
- B. The Piha Memorial RSA Incorporated is ordered to pay to Ms Cavanagh the following remedies within 28 days of the date of this determination:**
- a) lost wages of \$5,400 gross under section 123(1)(b) of the Employment Relations Act 2000; and**
 - b) \$7,000 under section 123(1)(c)(i) of the Employment Relations Act 2000.**

Employment relationship problem

[1] Ms Cavanagh claims one or more conditions of her employment were affected to her disadvantage by the unjustified actions of The Piha Memorial RSA Incorporated (the RSA). I am satisfied that during Ms Cavanagh's employment the RSA conducted itself in a way that in all the circumstances was not what an employer acting fairly and reasonable could have done.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence received from Ms Cavanagh but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Procedural background

[3] The statement of problem was served on the RSA at 1.08pm on 9 January 2017 and signed for by "PIHA RSA".

[4] The statement in reply was due to be lodged on 23 January 2017 but an extension was granted to require the statement in reply to be lodged by no later than 10 February 2017. The application for an extension was made by Ms Maureen Cousins on behalf of the RSA.

[5] Despite the extension the RSA failed to lodge a statement in reply within the required timeframe and it was advised that it would now require the leave of the Authority to respond or reply to the matter.

[6] On 12 April 2017 the Authority officer received a call from a person only known as "Greg" asking what needed to be done and if all the documents could be sent again. Greg was advised that the RSA needed to apply for leave. The Authority forwarded to him copies of the statement of problem, the supporting documents and a statement in reply template.

[7] On 2 May 2017 the Authority officer received an email from Mr Matt McMillan, President of the Titirangi RSA, advising the Authority that he had been asked assist the RSA to sort out its financial and staffing problems. Mr McMillan advised that he would appear at the investigation meeting.

[8] The Authority Officer emailed Mr McMillan advising him that the RSA had not applied for or been granted leave to reply or respond to the matter. Mr McMillan was advised of the steps needed to be taken to apply for leave and was requested to lodge a statement in reply including any documents he wished the Authority to take into account.

[9] On 18 May 2017, the day before the investigation meeting into Ms Cavanagh's claims, Mr McMillan advised the Authority that he will not be attending the investigation meeting. He advised the Authority that the RSA's bank accounts were closed on Tuesday, 16 May 2017 and the future of the RSA is uncertain.

[10] No representative of the RSA attended the investigation meeting. As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act fully in the matter as if the RSA had attended or been represented at the investigation meeting.

Unjustified disadvantage

[11] Ms Cavanagh claims one or more conditions of her employment has been affected to her disadvantage by the unjustified actions of the RSA by not providing her with a healthy and safe working environment, failing to support Ms Cavanagh when she was enforcing the legal requirements and behaviour required of a Bar Manager Licence holder, being singled out for disciplinary action and the unilateral change to her hours of work.

[12] Ms Cavanagh bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. If Ms Cavanagh discharges that onus then the burden of proof moves to the RSA to establish on the balance of probabilities that any disadvantage Ms Cavanagh may have suffered was justified.

[13] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether the RSA's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

Failure to provide a healthy and safe working environment

[14] Ms Cavanagh told me the bar area was unsanitary and that in quiet times during her shifts she began cleaning the area. Ms Cavanagh was concerned that one cupboard in particular had insulating tape covering the pipes to the beer taps and the pipes were slimy with grime. She says that other staff failed to clean broken glass.

[15] Ms Cavanagh said that leading up to the Anzac Day celebrations in 2015 she noted that the venue had not had any cleaning in preparation for the celebrations. In order to bring the club up to some form of standard, she polished shields, awards, photos and the display cabinet. She says she cleaned walls, moved furniture and in particular moved two broken television sets that had been left in the seating area.

[16] Ms Cavanagh raised concerns with her manager that fire exits were blocked by recycling bins and that during a walk around the site one day she noticed the collection of rubbish, drainpipes and a skateboard all along the fire exit path. Ms Cavanagh pointed out to her manager that the emergency evacuation plan stated that the patrons are to be instructed to move outside to the carpark area but the RSA did not have a carpark area.

[17] In relation to the fire exit door, Ms Cavanagh had been advised that a switch automatically opened the fire exit door when the alarm is activated. However, when the alarm was activated, the release action on the door failed to release.

[18] Ms Cavanagh says she requested a trolley to assist moving crates and boxes of beer into the chiller from the storeroom and until she was provided one she was using the manager's rolling chair as a preventative measure for her back issues. She said the trolley was provided but its tyres were flat. This created difficulty moving the stock and she requested about four times over three months that the tyres be filled with air.

[19] Ms Cavanagh says that on 26 April 2015 the EftPos machine was not working properly and this caused significant delays for the patrons, some becoming frustrated and others leaving early due to the inconvenience. Ms Cavanagh says she attempted three times to contact the manager to request her assistance in resolving the matter and even though she was given instructions on how to rectify the problem, the problem did not resolve. On requesting the manager's presence at the bar to assist

with the issues they were experiencing and the patrons who were becoming impatient she was told “*it will be fine, you don't need me*”.

Failure to support Ms Cavanagh when enforcing legal obligations

[20] Ms Cavanagh takes her responsibilities as a bar manager seriously and had challenged patrons' level of intoxication, questioned how they were travelling home from the bar and confirmed their membership status in order to be able to serve them in the bar. Ms Cavanagh says most people responded in a civil manner but some had been offended and shocked to be challenged about their level of intoxication, transport options, or if they were driving their children home.

[21] While undertaking her training for the bar manager's licence, Ms Cavanagh says that she had identified questionable processes and behaviours regarding the way patrons behaved in the bar and the bar staff itself. Ms Cavanagh says despite her efforts, management and the patrons refused to comply with legislated requirements. She also dealt with regular messages from the community about the noise level in the bar. In addition she says there was no security to deal with non-compliant patrons and no accountability between the general manager and the executive committee.

[22] On 26 April 2015 Ms Cavanagh had received a complaint that a member, who was also the manager's husband, was intoxicated. Ms Cavanagh said that when he approached the bar, she advised the patron of the complaint and he became defensive and suggested that she ring his wife, the manager.

[23] Ms Cavanagh told me she completed a report in the incident book and made a complaint with the Police. She said the managers' husband refused to leave the premises when he was asked to leave and a Committee member refused to escort him off the premises. When the manager's husband did eventually leave, he returned twice. Ms Cavanagh says she was issued with a written warning for contacting the Police in relation to this incident.

[24] Ms Cavanagh says she was singled out to do work that other employees were not required to undertake. By way of an example Ms Cavanagh told me she received emails instructing her to stack the chiller four crates high. Ms Cavanagh said she began taking photos when she came to work each day of the state of the chiller and it was apparent to her that she was the only staff member given those instructions.

[25] On 6 June 2015, Ms Cavanagh sent an email to her manager setting out a number of incidents that had occurred the previous night, on 5 June 2015 for example:

- a) A number of annoyed customers had been asked to slow down or declined to be served alcohol. Ms Cavanagh says most of these people were guests including a gentleman who stumbled on his approach to the bar for beers. She says he and his friend had been drinking for around two or more hours and she advised that he would need to wait for a wee while before she could serve him another beer to make sure he was not intoxicated. Ms Cavanagh says the member he was with, approached the bar to buy the beer for his guest. Ms Cavanagh advised the member that she had already declined beer for this guest and there was a brief discussion about the sale and supply of beer.
- b) A visitor to the RSA from France was offered a light beer after a few hours because he became more talkative, focused on Ms Cavanagh's chest, used expressive body language and began to slur his words which became difficult to distinguish because of his strong accent.
- c) Another patron became very vocal when he arrived at the RSA and was speaking in a derogatory manner about a female member in the bar and her granddaughter. Ms Cavanagh reported that the member stood to leave shortly after his arrival and as she left he called her name and got down on his knees. A number of the men in the bar found that amusing. When this gentleman's friend approached the bar to purchase another beer, he was declined because his speech was slurred, he was loud and he was swearing. Ms Cavanagh reported that the patron's body language indicated that he was almost above the limit of moderately impaired by alcohol. The patron accepted this but when another patron approached the bar to purchase beer for that patron, she saw him drinking a beer and the patron was then declined further drinks. The three men who had been drinking together then became very loud. Ms Cavanagh says she tried to interact with one of them and the other men joked about reopening the bar but was told that that would not be happening. The three men left with the two remaining females and only one of them appeared to be influenced by alcohol but he was polite in his interaction with her.

[26] Ms Cavanagh says that during the evening of 5 June 2015 there was a lot of discussion about the legal requirements and changing of a drinking culture and host responsibility. Ms Cavanagh says she attempted in each case to give a clear understanding of the reason for the change in the way alcohol was consumed. She said there was a healthy discussion around the changes and a comment made in regard to the impact such changes would have on members and staff who drink at the RSA.

[27] Ms Cavanagh says there was no follow up to her concerns about the conduct of the patrons.

Disciplinary action

[28] Ms Cavanagh says that when she arrived for her shift on Sunday 19 July 2015 a representative of the Committee and the manager were waiting for her in the bar area. The bar was open and there were people in the bar and a co-worker was also in the bar. Ms Cavanagh says that the manager and Committee member advised her that she was facing a serious misconduct investigation for selling two bottles of wine to an ex-president of the RSA. She says she was advised that she would be stood down for that shift and the Committee required a written reason for selling the wine.

[29] Ms Cavanagh says no proper investigation was undertaken in respect to this allegation and it resulted in the unilateral reduction of her hours of work.

Unilateral variation to rostered hours of work

[30] The rosters were usually in the bar on Mondays but Ms Cavanagh found that often on a Thursday it would be changed without notice and believed this was unreasonable. She says when she questioned the manager about the change in her roster she was told, "*well don't work it then*".

[31] Ms Cavanagh claims that her rostered hours of work suddenly decreased from 40 plus hours to 23 hours each week after she had achieved her bar managers licence and that this was a unilateral variation to her employment agreement.

[32] Further when Ms Cavanagh arrived for her usual shift on Wednesday 22 July 2015, the alarm code had been changed without notification to her. When she inquired of the manager why the alarm code had been changed, Ms Cavanagh was told to leave the building as she had no right to be inside.

[33] A co-worker then arrived and showed her the rosters for the following three weeks. Ms Cavanagh was not on any of the rosters. The co-worker explained that she had received a phone call that day requesting that she work Ms Cavanagh's shift. Ms Cavanagh was asked to return her keys and advised she was no longer employed by the RSA.

Conclusion and remedies

[34] I am satisfied one or more conditions of Ms Cavanagh's employment was affected to her disadvantage through the failure of the RSA to address Ms Cavanagh's concerns regarding health and safety, its failure to support her decisions when she had taken appropriate steps to enforce the legal obligations she had under her Bar Managers license, when it singled her out for disciplinary action without undertaking a full and thorough investigation and when it unilateral reduced her hours of work removing her from the roster. I find the RSA has not conducted itself, in all the circumstances of this case, in the way it could have, if it were acting as a fair and reasonable employer.

[35] Ms Cavanagh seeks payment for wages lost as a result of her personal grievance and compensation for loss of dignity, hurt feelings and humiliation. The unilateral variation to the rosters which effectively removed Ms Cavanagh from working any hours for at least a month was unjustified.

[36] Ms Cavanagh because she had been removed from the roster. She was out of work until 15 September 2015. But for being removed from the roster I am satisfied it is more likely than not that Ms Cavanagh would have continued in her employment. Ms Cavanagh has lost eight weeks wages as a result her personal grievance.

[37] The Piha Memorial RSA Incorporated is ordered to pay to Ms Cavanagh lost wages of \$5,400 gross under section 123(1)(b) of the Act within 28 days of the date of this determination.

[38] Ms Cavanagh has given compelling evidence that Piha, is a small community in which gossip and rumours become fact and the unjustified disciplinary action was well known in the community. Ms Cavanagh has since moved from Piha and is now residing in Christchurch.

[39] Based on the evidence an appropriate award for distress and humiliation is \$7,000. Accordingly The Piha Memorial RSA Incorporated is ordered to pay to Ms

Cavanagh \$7,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Costs

[40] Ms Cavanagh was unrepresented so there is no issue as to costs.

Vicki Campbell
Member of the Employment Relations Authority