

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 104
5391097

BETWEEN STEPHEN PAUL CROSS
 Applicant

A N D ONERAHI HOTEL LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Alice Hyndman, for Applicant
 Victor Hill, Advocate for Respondent

Investigation Meeting: 14 March 2013 at Whangarei

Date of Determination: 27 March 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Cross' dismissal was unjustified.**

- B. Mr Cross wholly contributed to his dismissal and therefore no remedies are payable.**

- C. Costs are reserved.**

Employment relationship problem

[1] Mr Victor Hill is the director of the respondent, Onerahi Hotel Limited (Onerahi Hotel). The Onerahi Hotel is a pub in Onerahi which also has a licence to operate a TAB and pokie machines. Mr Hill does not take a hands on role in the operation of the Onerahi Hotel which was at the relevant time being managed by Mr Peter Gardner.

[2] The applicant, Mr Stephen Cross, was employed in July 2010 at the Onerahi Hotel as a barman and duty manager. Mr Gardner spoke to Mr Cross about his

drinking two or three times during his employment. Mr Gardner was concerned that Mr Cross' drinking was affecting his ability to do his job and was trying to assist him. Things did not improve and in February 2012, Mr Cross' drinking at work had got to a point where staff were complaining about working with him and Mr Hill was not prepared to allow the situation to continue.

[3] Mr Gardner felt compelled to speak with Mr Cross. As a result of that discussion in February 2012, Mr Cross resigned. Subsequently, Mr Cross withdrew his resignation. Mr Gardner then initiated a disciplinary process in order to deal with the issue of Mr Cross' drinking. Mr Cross says it was during the disciplinary process that his employment was terminated. Mr Gardner and Mr Hill say Mr Cross failed to participate in the disciplinary process and abandoned his employment.

Issues

[4] The Authority must determine the following issues:

- (a) Was Mr Cross dismissed or did he abandon his employment; and
- (b) If Mr Cross was dismissed, was his dismissal unjustified?

First issue

Was Mr Cross dismissed or did he abandon his employment?

[5] A number of months after Mr Cross was employed he was provided with an individual employment agreement (the agreement) which was signed by Mr Gardner and dated 20 April 2011. Mr Gardner asked Mr Cross about signing the agreement on a number of occasions. Mr Cross says he did not sign the agreement because he disputed many of its provisions. Mr Cross was asked by Mr Gardner to remove the parts of the agreement he was unhappy with. Mr Cross never did so and never signed the employment agreement.

[6] During the course of his employment, Mr Cross drank before and while working and this was noticed by patrons and by other staff members who became increasingly frustrated that he was not pulling his weight at work. Mr Cross was spoken to about it by members of the staff, patrons, Mr Gardner and Mr Hill. Mr Gardner decided he must raise the issue with Mr Cross because he was concerned

about Mr Cross' drinking and the effect on him. Mr Gardner was also concerned about Onerahi Hotel's licence and his own reputation with staff, patrons and Mr Hill.

[7] Mr Gardner tried to take a softly, softly approach to the problem but by early February 2011, felt the situation could not continue. Mr Cross had lost his driver's licence due to drinking and driving and Mr Gardner drove him home after work on several occasions. Also, Mr Gardner was concerned that Mr Cross' behaviour was putting Onerahi Hotel's licence at risk and his own position as Manager in jeopardy. Mr Gardner felt that he had done all he could to help Mr Cross but to no avail.

[8] Mr Gardner wrote a letter to Mr Cross dated 13 February asking for a meeting about "*...consuming alcohol during work hours.*" Mr Cross was invited to bring a representative and was informed that the matters were serious and his continued employment may be in jeopardy. Mr Cross denies ever receiving the letter. Mr Cross cannot remember if he sent the letter but says he did prepare it. Both parties agree that they met in February 2011 and discussed the issue of Mr Cross drinking at work. As a result of the conversation, Mr Cross took a week off in order to sort the problem out. Things seemed to improve for a short while but by the second half of 2011, Mr Cross was back drinking and it was affecting his work.

[9] Mr Gardner's daughter got married on 18 February 2012 and Mr Hill decided he would go to Onerahi Hotel to observe Mr Cross who was the duty manager for the weekend. Mr Hill did not see Mr Cross drinking but felt that was only because he was in the hotel observing. Mr Hill told Mr Gardner things needed to be sorted out with Mr Cross, the current situation could not continue.

[10] Mr Cross lived in a camping ground at a beach nearby and was not contactable. On Tuesday 21 February Mr Gardner drove out to talk to Mr Cross about his drinking. Mr Gardner and Mr Cross talked in Mr Gardner's car for some time about the situation. Mr Gardner suggested Mr Cross consider resigning as the situation could not continue. Mr Cross agreed to do so and Mr Gardner told him he did not need to worry about repaying a loan of \$300. Mr Cross was to work out his 2 week notice period.

[11] Mr Gardner recorded in his diary on 21 February the meeting with Mr Cross at the beach and the agreement reached.

[12] On Friday, 24 February, Mr Cross indicated to Mr Gardner that he may not be resigning after all and on Saturday, 25 February, while at work, he informed Mr Gardner that he was withdrawing his resignation. Mr Gardner told Mr Cross that in those circumstances they would need to go through a formal process to discuss his drinking and the impact on his job. Mr Gardner and Mr Cross agreed to meet about this on Thursday, 1 March at 2pm at the Onerahi Hotel. Mr Gardner told Mr Cross that he would prepare a letter and, because Mr Cross had no postal address, would leave the letter behind the bar for him to collect on Monday, 27 February. The letter stated:

Dear Steve,

Last night you notified me that you had withdrawn an agreement with me that you would resign your position at the Onerahi Tavern. Accordingly the only option available for me now is to officially stand you down, forthwith, as per my discussion with you last night. I have scheduled a meeting with you at 2pm, Thursday 1 March at the Onerahi Tavern to discuss the following:

- (1) Arriving at work in an impaired state.*
- (2) Putting your work mates in a position whereby they find they have to consistently cover for you.*
- (3) As this meeting could result in the termination of your employment with the Onerahi Tavern, you may, and in fact are encouraged to have someone in attendance.*
- (4) At the meeting, you will be given every opportunity to have your say in response to the issues raised. Your responses will then be considered and investigated.*

*Yours faithfully,
Peter T Gardner
General Manager
Onerahi Tavern*

[13] Mr Cross did not collect the letter on 27 February as arranged. Mr Gardner drove out to the camp ground on Tuesday 28 February to look for Mr Cross to give him the letter. Mr Gardner was unable to find him. Mr Gardner returned to the camp ground on Wednesday, 29 February but was again unable to find Mr Cross.

[14] On Friday, 2 March Mr Cross came to work and was told by Mr David Jones, the duty manager, that there was a letter for him behind the bar and he did not believe Mr Cross was working that evening. Mr Cross became angry and told Mr Jones that

he would not be accepting a letter from him and that it would have to be personally delivered to him by Mr Gardner. Mr Jones rang Mr Gardner who then drove to the Onerahi Hotel and hand delivered the letter dated Monday, 27 February to Mr Cross.

[15] Even though in my view Mr Gardner's letter was very clear the next day, Saturday, 3 March, Mr Cross handed a letter to Mr Gardner as follows:

Dear Sir,

Thank you for your letter dated 27/2/12 and delivered by yourself 2/3/12. As the Collins New English Dictionary defines "impaired" as "to damage or weaken in strength or quality" then I fail to see the meaning of your second point. I therefore refute any and all accusations against me per your letter. I have yet to find where the Employment Relations Act 2000 definition of "stand down" and can only assume I am suspended on full pay and you may wish to clarify this conundrum with me. I therefore assume I will continue working my rostered shifts until these matters are addressed.

*As always your loyal employee
Steve Cross
Duty Manager*

[16] Mr Gardner responded in a letter dated 6 March stating that as the previous meeting had not occurred, he was available to meet *"to discuss our 'conundrum', as per my letter to you, dated 27 February 2012"*.

[17] Mr Gardner did not make contact with Mr Cross and Mr Cross did not make contact with Mr Gardner to discuss the *"conundrum"*.

[18] Mr Cross attended the Onerahi Hotel on Friday 9 March to work his shift even though he had been told by Mr Gardner on 2 March he was not working his shifts while the investigation continued. Mr Jones told Mr Cross he was not to work. Mr Jones contacted Mr Gardner who came to the Onerahi Hotel to talk to Mr Cross. Mr Cross says he was told by Mr Gardner he no longer worked at the Onerahi Hotel and to come back on Monday 12 March to return his key and pick up his holiday pay. Mr Cross says this amounts to a dismissal.

[19] Mr Gardner says Mr Cross asked for his holiday pay and they agreed that he would get this when he returned his key on the Monday. Mr Gardner and Mr Hill deny dismissing Mr Cross, they say Mr Cross failed to attend a meeting on 2 March to discuss issues with his drinking, that Mr Cross abandoned his employment and at his suggestion, he was paid out his holiday pay.

[20] It is my view Mr Cross was dismissed. Mr Gardner had tried to organise a meeting with Mr Cross about his drinking and had gone to some lengths to do so. However, no meeting took place. Mr Gardner told Mr Cross he was available to discuss the issue but took no further step. When Mr Cross came to work his shift, he was not allowed to do so. A meeting was arranged for 12 March, not to discuss issues with Mr Cross but rather to finalise his employment. Mr Cross returned his key and Mr Gardner paid him his final pay. It is my view this action amounted to a dismissal by Onerahi Hotel of Mr Cross.

Second issue

Was the dismissal unjustified?

[21] Pursuant to s.103A of the Act, the question of whether a dismissal is justifiable must be determined by the Authority on an objective basis. On an objective basis was Mr Cross' dismissal justified?

[22] Mr Gardner had raised the issue of Mr Cross' drinking with him on a number of occasions. In the days leading up to Mr Cross' dismissal Mr Gardner had gone to a great deal of trouble to set up a meeting with Mr Cross to discuss his drinking, hear his explanation and resolve matters. Mr Gardner tried to do the right thing and have a meeting but ultimately was not able to do so. The meeting with Mr Cross was never held. In my view this was largely because Mr Cross made it difficult. Mr Cross failed to pick up the letter which Mr Gardner had told him would be left behind the bar for him. The letter clearly set out the process to be followed including that a meeting was to be held on 2 March to discuss the issues of concern. Mr Cross did not attend the meeting because he had not picked up the letter of 27 February. After receiving Mr Gardner's letter inviting discussion about the "*conundrum*", Mr Cross took no steps to do so.

[23] Section 103 A(3) requires the Authority when applying the test of justification as set out in Section 103 A (2) to consider whether the employer;

- sufficiently investigated the allegations,
- raised its concerns with the employee before dismissal,
- gave the employee the opportunity to respond, and

- genuinely considered the employee's explanations before dismissal.

[24] Mr Gardner had attempted to follow this process but had not been able to for the reasons above. Without going through such a process, a fair and reasonable employer could not dismiss Mr Cross. The dismissal was unjustified.

Remedies

[25] Section 124 of the Act requires the Authority when considering remedies to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if those actions so require reduce the remedies that would otherwise have been awarded accordingly.

[26] Mr Cross' drinking had been an ongoing problem throughout his employment. He had been spoken to about it a number of times and following a meeting with Mr Gardner in February 2011 had taken a week off to try and resolve it. Unfortunately Mr Cross was not able to resolve problems with his drinking and the effect it was having on his ability to do his job.

[27] Mr Gardner raised the matter again with Mr Cross in February 2012. Mr Cross resigned, then decided to withdraw his resignation. When asked to participate in a disciplinary process so that the issue of his drinking could be properly dealt with by the employer, Mr Cross was difficult in my view. Mr Cross agreed to pick up a letter from Mr Gardner which set out the process Onerahi Hotel wanted to follow to deal with its concerns about Mr Cross' drinking. Mr Cross failed to pick up the letter. Mr Gardner tried but was unable to hand deliver the letter to Mr Cross. Mr Cross received the letter when he came to work his shift on 2 March. The letter set out clearly what was required of Mr Cross. However, rather than attending a meeting to discuss issues Mr Cross wrote an unhelpful letter to Mr Gardner. Mr Gardner invited Mr Cross to meet with him but Mr Cross took no steps to do so.

[28] For all these reasons, I find Mr Cross wholly contributed to the situation. Any remedies that would have been awarded would be reduced by me by 100%. In those circumstances no remedies are payable.

Costs

[29] The parties are invited to agree on costs. If they are unable to do so the applicant has 14 days from the date of this determination in which to file and serve a written memorandum as to costs. The respondent has a further 14 days to file and serve its reply.

Anna Fitzgibbon
Member of the Employment Relations Authority