

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Kerry Davis (Applicant)
AND Harbour Inn Fisheries Limited (Respondent)
REPRESENTATIVES Paul Brown, Advocate for Applicant
Michael Guest, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 12 July 2006
SUBMISSION RECEIVED 16 July 2006 from the applicant, 27 July 2006 from the respondent
DATE OF DETERMINATION 18 September 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kerry Davis worked for Harbour Inn Fisheries Limited from about March 2004 until his employment ended on Sunday, 1 May 2005. Mr Davis is an experienced fish filleter, having worked in the same business some years prior to March 2004 when it was owned by his parents. In his statement of problem, Mr Davis says his employment was terminated by his employer for the alleged theft of fish. He says that the dismissal is procedurally and substantively unjustifiable. To remedy his grievance, Mr Davis seeks compensation for distress and lost remuneration. Harbour Inn Fisheries, in its statement in reply, says that Mr Davis is a thief, that he stole fish from his employer and that he resigned in the face and acceptance of his own guilt.

[2] The statement of problem identifies the respondent as Aaron Cooper. However, at the investigation meeting both Mr Davis and Mr Cooper agreed that the correct identity of the employer is the company, Harbour Inn Fisheries Limited, which owns and operates the business. Mr Cooper is a director of that company. By consent, I amend the proceedings to reflect the name of the company.

[3] Mr Davis was represented but his representative did not attend the investigation meeting because of a flight cancellation. I offered Mr Davis the opportunity to adjourn the meeting but his preference was to proceed without his representative being in attendance. By agreement, written submissions were lodged after the meeting by the representatives for both parties.

[4] The key points for determination are whether Mr Davis was dismissed or resigned on 1 May 2005 and if he was dismissed, can the employer justify a dismissal?

Dismissal or resignation?

[5] Harbour Inn Fisheries operates a wet fish shop in Port Chalmers. Fish is prepared for retail sale through the shop and trade sale to restaurants. The fish is purchased from various commercial sources. Mr Davis worked as a filleter so needed to start work early to prepare fish for retail sale. Koya Lee Klop-Toker is a student who works part-time for Harbour Inn Fisheries as a shop assistant. She was at work on Saturday, 30 April and Sunday, 1 May 2005.

[6] Mr Cooper was at the shop between 6.30 and 7am on the Saturday, then left. When he left, there were two tubs of headed and gutted blue cod left for filleting, a total of 57kgs of fish. Mr Davis started work about 7.30am. He was on his own until 9am when Ms Klop-Toker started work. Mr Cooper returned to the shop about midday or a little later. He checked the chiller and saw only one and a half trays of blue cod fillets rather than the three trays or more of fillets he expected the fish to yield. Mr Cooper asked Mr Davis where the fish was. Mr Davis said he had filleted all the fish from the two tubs which had produced two trays of fillets.

[7] Mr Cooper weighed the full tray. His evidence is that the tray was *almost overflowing*. The tray held 8.66kgs of fillets. Mr Cooper doubled that weight to conclude that the two trays of fillets prepared by Mr Davis totalled 17.32kgs. That weight was significantly less than the expected yield from the two tubs of blue cod left for Mr Davis to fillet. Actual yields do vary, depending on factors such as the size of the fish (which affects the flesh-to-offal ratio) and the skills of the filleter. Some of the evidential conflicts centred on this, but for present purposes it is sufficient to say that Mr Cooper became concerned that fish was missing because there was less filleted fish than he would have expected.

[8] Next, Mr Cooper spoke to Mr Davis and Ms Klop-Toker. None of the usual cautions about potential disciplinary outcomes were given. Mr Cooper outlined the weights to explain his concern. Ms Klop-Toker told Mr Cooper about the fillets she had put in the window for sale and the restaurant orders she had made up and placed in the chiller. Mr Davis confirmed that he had filleted two tubs of fish to produce two trays of fillets. He also confirmed that the half-full tray had contained as much fish as the still full tray. In his written statement, Mr Davis says that he told Mr Cooper that some fish had already been sold so his recovery calculations might not be right. However, when I questioned Mr Davis about the Saturday exchanges, he told me that he could not actually recall what he had said to Mr Cooper. In any event, with the matter still unresolved, Mr Cooper left the shop.

[9] Ms Klop-Toker's evidence, which I accept, is that she and Mr Davis talked about the shortfall after Mr Cooper had left. Mr Davis weighed some offal and said that there was not any fish actually missing. Mr Davis' evidence is that he wrote out some calculations on a piece of paper and left that at the shop before leaving for the day. Ms Klop-Toker finished later than Mr Davis that day. She was not able to recall whether Mr Davis did or did not do that. Mr Cooper's evidence is that no such note was found at the shop. There is no reason to doubt Mr Cooper's evidence.

[10] Mr Cooper returned to the shop at about 11pm. He sorted through the offal which is kept in bins rather than thrown away. He separated out the blue cod offal from other species. It weighed 33kgs. Taking the weight of the offal from the original 57kgs of blue cod gave an expected 24kgs of fillets against the one full tray (weighing 8.66kgs) and the estimated total of 17.32kgs of fillets for the two full trays that Mr Davis said had been produced. That confirmed Mr Cooper's suspicions that some fish was missing. I accept Mr Cooper's evidence about weighing the offal since it is mentioned in a statement given by him to the Police on Sunday, 1 May 2005.

[11] Ms Klop-Toker was at work the next day (Sunday, 1 May 2005) at 9am. Her evidence which I accept is that Mr Davis was not there but he should have been. Mr Cooper attended at the shop

and he had organised a representative to be present, intending to dismiss Mr Davis. Mr Davis did not arrive until 9.45am. It is common ground that Mr Davis had existing warnings for lateness.

[12] Mr Davis' evidence is that he said *I suppose you won't be happy with me* referring to being late again. He says that Mr Cooper then told him he could no longer work in the shop, asked for the keys and also said that his business partners did not Mr Davis working there any more either. Mr Davis said *Is that right?* and he was told to get his belongings and leave, which he did. On his account, Mr Davis was dismissed without any reference to the reasons for that dismissal.

[13] Mr Cooper's account differs somewhat. His evidence is that Mr Davis said *You won't be happy with me. I suppose you don't want me to work here any more.* Mr Cooper responded by saying *Yes, give me your key* and Mr Davis returned the keys and left. Mr Cooper says that this amounted to a resignation, not a dismissal.

[14] In his representative's letter dated 7 July 2005, Mr Davis acknowledged that he had said *I suppose you don't want me to work here any more.* Accordingly, I accept Mr Cooper's evidence that this was said. In a statement taken by Police at about 10am on Sunday, 1 May, Mr Cooper gave the following account:

He said you won't be happy with me, I said no give us your key, I said that's it with what's gone on in the last few days and prior. I have spoken to the other partners and we don't want you here. I instructed him to take his personal belongings and leave which he did. Kerry looked at me and said sorry mate and left. He did not question why I terminated his employment.

[15] I find that the account given by Mr Cooper to the Police soon after the exchange is the best evidence of what actually happened but it must be read subject to Mr Davis' concession from the 7 July 2005 letter. I also find that it amounts to a dismissal.

[16] Dismissal is a sending away at the initiative of the employer: see *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965. It was Mr Cooper's intention having spoken with his business partner to dismiss Mr Davis. That is why he had the representative with him. Mr Cooper understood at the time that he had terminated Mr Davis' employment – that is what he told the Police almost straight after it had happened. In a letter dated 31 May 2005, the representative who was present with Mr Cooper said that Mr Cooper had dismissed Mr Davis. On the basis of this evidence, I reject Mr Cooper's more recent assertion that he did not dismiss Mr Davis.

Justification

[17] Whether a dismissal is justifiable must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[18] A fair and reasonable employer would have given Mr Davis a better opportunity to explain or mitigate. Mr Davis did not know that Mr Cooper had weighed the offal overnight and had no opportunity to contest that information or explain his own attempts to test Mr Cooper's assumptions. It is apparent from Mr Cooper's statement to the Police that he had for some time suspected Mr Davis of taking fish. That suspicion and Mr Cooper's belief based on turnover figures for the past year that a substantial amount of fish had gone missing, was never raised with Mr Davis. I accept also that Mr Cooper and his business partners had made up their minds about Mr Davis' culpability before the brief exchange on Sunday. In these ways, Harbour Inn Fisheries fell below the minimum requirements set out in *NZ Food Processors etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35. In that case the Labour Court held that the minimum requirements

were notice of the specific allegation and its likely consequences, a real opportunity for explanation and an unbiased consideration of any explanation. It follows that the dismissal is unjustifiable and Mr Davis has a personal grievance.

Remedies

[19] Section 124 of the Employment Relations Act 2000 requires the Authority to consider the extent to which the employee's actions have contributed towards the situation that gave rise to the personal grievance. Mr Davis says that there is no evidence that any fish was missing or that he took any fish whereas Harbour Inn Fisheries says that Mr Davis did take the missing fish.

[20] I accept Mr Cooper's evidence that there were 57 kgs of blue cod in two tubs for Mr Davis to fillet when Mr Davis arrived at work on 30 April 2005. He worked for the first 1½ hours on his own. I accept the evidence that the offal produced by Mr Davis filleting these fish weighed 33 kgs. There should have been 24 kgs of fillets. It is not in dispute that there were two trays of fillets produced and available in the shop. I accept the evidence that the one remaining full tray weighed 8.66 kgs. Because two trays were produced, that means that approximately 6.68 kgs (or about ¾ of a tray) of fish is unaccounted for.

[21] Ms Davis says that Mr Cooper took headed & gutted blue cod to sell at a market on the Saturday morning. He also says that neither tub was completely full when he started work on Saturday. The inference is that there was less than 57 kgs of blue cod for him to fillet. However, I accept Mr Cooper's evidence that the fish he took to the Saturday market was blue cod fillets from fish delivered and processed before Saturday. It follows that this does not explain the discrepancy. It is said for Mr Davis that he had no opportunity to take the fish without being seen but that it not correct. Mr Davis worked alone for about 1½ hours on Saturday morning. There is conflicting evidence about the yield one can expect but that makes no difference in the present case because the only estimate in the figures just mentioned is the assumption that the second tray of fillets originally weighed as much as the full tray seen by Mr Cooper. It is undisputed that the full tray was almost overflowing and it follows that the second tray must have weighed about the same before any fillets were sold or packaged for delivery. It is said for Mr Davis that the employer cannot establish that any fish let alone 10kg of blue cod fillets was missing. The point is correct as far as 10 kgs is concerned. That is the figure given by Mr Cooper to the Police. However, it is clear that over 6 kgs was missing.

[22] In the circumstances, only Mr Davis could be responsible for the missing fish. In that way he contributed to the situation giving rise to the grievance in a blameworthy manner. As a result, he is disentitled to any compensation for the effects of his personal grievance.

Summary

[23] Mr Davis was unjustifiably dismissed but is not entitled to any compensation because of the extent to which his own actions contributed to the circumstances giving rise to the grievance.

[24] Costs are reserved.