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Drake v The Pub Limited CA229/10 (Christchurch) [2010] NZERA 925 (13 December 2010)

Last Updated: 23 December 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 229/10 5285350

BETWEEN

HAYLEY LOUISE DRAKE Applicant

A N D

THE PUB LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

Helen Doyle

Kieran Edward Tohill, Counsel for applicant Maxine L Knowler, Counsel for respondent

17 August 2010 in Cromwell

13 September 2010 from Applicant 4 October 2010 from Respondent

Date of Determination:

13 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Drake lodged a statement of problem on 6 November 2009 with the Employment Relations Authority whilst still employed by The Pub Limited.

[2] In her statement of problem Ms Drake referred to the problem or matters that she wished the Authority to resolve as restructure issues, new contract, loss of wages, bullying and humiliation. Ms Drake wanted the problem resolved by compensation for the debt incurred from loss of wages, her old contract honoured and to be treated properly and with respect.

[3] Between lodging that statement of problem and the lodging of the statement in reply Ms Drake resigned from her employment from 19 November 2009 giving three weeks notice in circumstances that she alleges amounted to an unjustified constructive dismissal.

[4]

Ms Drake seeks the following remedies:

- \$2,000 for a bonus in accordance with her employment agreement [The Pub Limited accepts that this amount is owed];
- \$4,000 for what Ms Drake claims is the loss of salary for three months when she was paid on an hourly rate;
- \$5,000 for stress and humiliation.

As she obtained a position after the notice period the claim for three months lost wages was withdrawn.

[5] The statement in reply was lodged after a grievance had been raised on Ms Drake's behalf with respect to the allegation of unjustified constructive dismissal.

[6] In its statement in reply lodged with the Authority on 10 December 2009 The Pub Limited ("The Pub") say that Ms Drake resigned of her own accord in November 2009 and denies that it dismissed her, bullied her and/or in the alternative say that if actions were found to be unjustified that Ms Drake contributed significantly towards them and remedies should accordingly be reduced.

[7] The parties attended mediation in March 2010 but the matter remained unresolved.

[8] On setting the matter down for a telephone conference the Authority was advised that the original representatives for both parties had changed and Mr Tohill and Ms Knowler were now representing the parties.

[9] During the first telephone conference with the Authority on 17 May 2010 counsel asked for time to continue discussions with a view to resolving the problems before the Authority. The Authority duly adjourned the telephone conference until 2 June 2010.

[10] On 2 June 2010 the matter was set down and an exchange for statements of evidence timetabled.

Issues

[11] The issues before the Authority are as follows:

Restructure

- Was there a genuine need to restructure the business of The Pub?
- Was there consultation with Ms Drake in relation to the restructuring?
- Did Ms Drake accept the position within the restructured business and the change from a salary to a wage worker, notwithstanding there was no written employment agreement entered into?
- If Ms Drake did accept the position within the restructured business, from what date was there such acceptance?
- If Ms Drake did not accept a position within the restructured business then is Ms Drake entitled to recover money for the period that she continued working before she resigned.

Constructive dismissal

[12] The issues that the Authority is required to determine in this matter with respect to the allegation of constructive dismissal are:

- Whether The Pub followed a course of conduct with the deliberate and dominant purpose of coercing Ms Drake to resign?
- Whether there was a breach or breaches of duty that caused Ms Drake to resign.
- If it is found that there was either a course of conduct with the deliberate or dominant purpose of causing Ms Drake to resign or a breach or breaches of duty on the part of The Pub, then were those breaches sufficiently serious or the course of conduct existed so as to make a resignation reasonably foreseeable.
- If it is found that Ms Drake was unjustifiably constructively dismissed then what remedies is she entitled to and are there issues of contribution.

The Employment Agreement

[13] Ms Drake commenced her employment at The Pub as a head chef in early August 2008. The exact start date, although not agreed, is not material for my purposes.

[14] Ms Drake signed an individual employment agreement on 3 August 2008 that had been provided to her before that time under cover of letter dated 25 July 2008. The Pub traded at that time as The Pub Ale House Bar and Bistro Cromwell.

[15] Graham McDowell and his wife Jan-Marie McDowell are the directors of The Pub Limited. The employment agreement provided to Ms Drake stated that she was to be employed as a salaried employee on a salary of \$38,000. Hours and duties were described in clause 6 of the individual employment agreement as follows:

6.1 Salaried employee

A "salaried employee" is one employed on an annual salary basis and whose hours shall be those required to complete the duties and responsibilities relevant to the position held. It is agreed that the normal hours of work would be a minimum of 45 hours per week.

[16] Employee protection provisions and redundancies were dealt with in clause 18 of the employment agreement that provided:

18.1 Where the employee's position becomes surplus to the employer's staffing requirements due to changes in the employer's business operation with no alternative position available to the employee, the employer may determine, following consultation with the employee, that the employee's position is redundant.

18.1.1 Where the employee's position becomes redundant under clause 18.1, the employee shall receive four weeks notice of termination.

[17] Clause 20 of the employment agreement provided that any variation to the agreement was to be in writing and no variation would be effective unless signed by both parties.

[18] The provision with respect to what was called a bonus was set out in Schedule E of the individual employment agreement as a staff incentive scheme whereby at the end of a year of continued service with The Pub Limited, Ms Drake would be paid the dollar amount for hours worked held in a nominated bank account for each hour she worked.

Was there a genuine need to restructure the business of The Pub Limited?

[19] Ms Drake was away from the work place because she had suffered an injury to her wrist from 7 May 2009 until she was declared fit to return to work from 17 August 2009. During that period Ms Drake agreed to return to work over a three week period in what is known as active rehabilitation. ACC continued to pay Ms Drake during this period until she was fully fit to return on 17 August 2010.

[20] On 6 August 2009 all staff, including Ms Drake, were given a letter from Mr and Mrs McDowell advising that there would be a restructure. The nature of the restructuring as described in the letter affected Ms Drake's position to the extent that it was proposed to have all three kitchen positions of chef/cook employed in a part-time capacity with flexible hours to suit each individual person. The reason for this was expressed to be due to the current economic position at the time and seasonal nature of the business.

[21] The letter advised that each staff member would be spoken to individually regarding their present position and the proposed new position would be offered to them within the next fortnight.

[22] Mr McDowell in his evidence said that there was a need to cut costs and have some flexibility around the seasonal demand for food. It was proposed that the times the kitchen was open would be reduced and the food purchased and served would be cut back. Mr and Mrs McDowell asked the Hospitality Association to assist them through the restructuring.

[23] I accept in the absence of any evidence to satisfy me otherwise that there was a genuine need to restructure for financial reasons. Mr Tohill recognised in his submissions the right of an employer to determine its own business affairs subject to issues of fairness in terms of consultation and process.

Was there consultation with Ms Drake in relation to the restructuring?

[24] Ms Drake was spoken to about the reason for the restructuring and the new agreement. She had time to take the new agreement away and consider it.

Did Ms Drake accept the position within the restructured business and the change from a salary to a wage worker, notwithstanding there was no written employment agreement entered into?

[25] On 17 August 2009 Ms Drake was fit for full work duties and active rehabilitation had been completed. Mr McDowell explained that he had already completed that week's roster and therefore Ms Drake only worked 15.5 hours for which she was paid \$18 per hour. Ms Drake was not happy with this and considered she should have received her usual salary. Mr McDowell said that this arrangement had been agreed to by ACC. By this time ACC was no longer paying Ms Drake. The payment therefore had to be on the basis agreed between Ms Drake and The Pub Limited in her employment agreement.

[26] I find in all likelihood on 18 August 2009 Mr McDowell met with Ms Drake at the commencement of her shift. He talked to her about the proposed restructure as it was indicated would occur in the letter dated 6 August 2009. Mr McDowell handed Ms Drake a letter headed *offer of employment* dated 18 August 2009 that had attached a new individual employment agreement, house rules and a draft roster that illustrated the new kitchen hours. The offer was expressed to be subject to Ms Drake signing it. The position was described as a Chef/Cook commencing from 24 August 2009. It was part time with flexible hours as decided by the employer and that set hours could not be guaranteed. The hourly rate was \$18 per hour.

[27] Ms Drake took the letter and agreement away with her. Mr McDowell asked her about the agreement on 23 August 2009. It was agreed that there would be a meeting on 24 August 2009.

[28] On or about 24 August 2009 there was a meeting between Mr McDowell and Ms Drake at which time there were some questions about how many hours she would be working and about some other matters. At that stage I think it likely Mr McDowell indicated to Ms Drake that as the other worker was happy to take 30 hours per week that would leave approximately 35-40 hours per week for Ms Drake.

[29] Mr McDowell said that at this meeting Ms Drake seemed happy with the changes and was happy to sign off on them. Ms Drake said that although she thought that the agreement was initially satisfactory she wanted to have something in the individual employment agreement to guarantee her a minimum of, at that stage, 35 hours per week.

[30] The agreement was never signed and Ms Drake advised Mr McDowell in late August that she was going to talk about it with her solicitor.

[31] On 4 September 2009 Mr McDowell asked Ms Drake what the outcome of the meeting was with her lawyer and Ms Drake advised Mr McDowell that her lawyer advised her not sign the agreement unless she was guaranteed 35 hours per week of work. Mr McDowell advised Ms Drake that the company was not able to do that and I find that at that stage Mr McDowell advised Ms Drake that he was at the point of adopting the restructuring and essentially Ms Drake was to be paid an hourly rate.

[32] The dates were difficult to read on the wage and time records I was provided with but they reflect that Ms Drake had in fact been paid at the rate of \$18 per hour for the last two pay periods in August, including the week she returned as fully fit to work.

[33] After that Ms Drake was simply rostered on for and paid for the hours she worked.

[34] I am satisfied that the issue of the restructure continued to be of concern for Ms Drake and this was apparent from letters that she wrote to Mr McDowell on 28 August 2009 on which she asked for an extension on the pending contract to seek advice. In that letter she also asked to be paid her salary until the new contract was signed.

[35] Ms Drake said that because her pay was reduced from August onwards she took days in lieu and annual leave days to increase her weekly wage. It was during this time that Ms Drake said she forwarded her statement of problem to the Employment Relations Authority.

[36] When the anniversary date, taking into account the period Ms Drake had been on ACC, arrived on 3 November 2009, Ms Drake asked for her bonus. It is common ground that Mr McDowell made a statement to her to the effect that she would not receive her bonus until she signed her new employment agreement.

[37] Mr McDowell explained to me that he thought if he paid the bonus to Ms Drake at that time then it would be acknowledging that her old agreement was still in existence. Mr McDowell said that he did this on advice from a solicitor. Mr McDowell also said that Ms Drake had led him to believe that she agreed with the new proposed changes.

[38] The evidence does supports that Ms Drake was initially satisfied with the new employment agreement provided she could receive 35-40 hours per week as Mr McDowell indicated she would.

[39] Ms Drake then wanted a guarantee of at least 35 hours put into the agreement. Mr McDowell was not prepared to agree to this. It seemed to me that the point at which it was clear to Mr McDowell that Ms Drake did not accept the new agreement was on or about 4 September 2009.

[40] I do not find that Ms Drake ever agreed to the new position and a change to her existing terms and conditions of employment. I am not satisfied that Ms Drake accepted the position within the restructured business and a change from her previous contract as a salaried worker to a waged worker.

[41] As at 4 September 2009 there was a path open to The Pub. I accept that Ms Drake was consulted in relation to the proposed changes and that there was a genuine need to restructure the business. Ms Drake did not seriously challenge those matters.

[42] Under the employment agreement Mr McDowell could have as at 4 September 2009 advised Ms Drake that her position was redundant. Ms Drake would then have been entitled to four weeks notice.

[43] This step however was never taken and Ms Drake simply continued to work the hours she was rostered. Some of these hours it is apparent from the timesheets and wage and time records were over 30 per week. However towards the latter part of her employment before she resigned her hours had been fairly substantially reduced to low to mid 20 hours per week. Mr and Mrs McDowell said that sometimes Ms Drake would leave early or not complete a shift.

[44] The terms and conditions of the original employment agreement remained on foot throughout this period and the

change to Ms Drake's employment in particular her pay could not be unilaterally imposed on her without agreement. That is in effect what occurred in this case.

[45] Ms Drake has asked as one of her remedies that she be reimbursed for a shortfall in her wages for the period from which she was paid as a wage worker. The Authority has not received a copy of the workings as to how Ms Drake arrived at the \$4,000 sum that she now claims but understands from her evidence when she was a salaried employee she received \$600 net per week.

[46] Mr and Mrs McDowell will have to check whether that was the net sum that she received. If so then it is a matter of taking from that net sum the sum which Ms Drake received each week until her resignation.

[47] In terms of the week when Ms Drake was fit to return to work on 17 August 2009, I find that she should have been paid a proportion of her usual salary and not on the basis of \$18 per hour. There was no basis on which to make a unilateral change to her usual method of payment.

[48] I have calculated on the basis of the wage and time records that I have received that Ms Drake is owed approximately \$2,484.50 net in lost wages over this period. I accept that I have not had the benefit of Mr Tohill's workings and I am not sure whether that accords with his calculations or not. The parties are therefore to see if they can reach agreement about the lost wages over that period, failing which leave is reserved for either party to return to the Authority if further assistance is required.

[49] The other matter that I accept would be fair to take into account in making the calculation is the odd time as reflected in the time sheets that Ms Drake left early. Rather than this causing further argument and delay I suggest that four hours at \$18 per hour simply be deducted for the final figure. I think that is fair.

Bonus

[50] There is no dispute that Ms Drake is owed her bonus. It is unfortunate that she was not paid it at the time that it was owing and I find that she is entitled to interest on the bonus outstanding at the rate of 5 % which is not more than the 90 day bank bill rate at the date of this determination plus 2% from 3 November 2009 until the date of payment.

Did The Pub Limited follow a course of conduct with the deliberate and dominant purpose of coercing Ms Drake to resign or were there breaches?

[51] It is clear from the evidence that this employment relationship had its difficulties. There was no dispute that a meeting was held in March 2009 with Ms Drake to talk about some issues about the performance of the kitchen, time keeping and I accept Mr and Mrs McDowell's evidence about cell phone use.

[52] There was then an issue with a stolen glass which Ms Drake accepted she removed from the premises to show the McDowells what it was like to have something taken from them after there had been a deduction from her salary.

[53] There was also some dissatisfaction on the part of Mr and Mrs McDowell after Ms Drake broke her wrist in terms of her organising a replacement. I accept that Mr and Mrs McDowell were entitled to raise any concerns in this regard with Ms Drake. Ms Drake felt that the timing of the letter raising the dissatisfaction and, the fact that her view was not sought before it was issued, was of concern.

[54] Ms Drake had written a letter to Mr McDowell on 28 August expressing her concerns with the fact that she had received her full pay for her first full week back at work after ACC payments were completed. That letter dated 28 August 2009 was sent to Mr McDowell and then on 29 August 2009 Ms Drake was provided with the warning letter from Mr McDowell dated 17 August 2009. It may have been that the timing was simply coincidental but rather unfortunate. Ms Drake then wrote to Mr and Mrs McDowell on 1 September 2009 advising that she did not accept the letter of warning and setting out in some detail the attempts she had made to organise cover for shifts.

[55] From that date there was, it is clear, some frustration on the part of Mr and Mrs McDowell because Ms Drake would not sign her new employment agreement. The relationship did not improve during that period and the McDowells had further concerns about Ms Drake on occasion finishing work earlier than her rostered finish time. For example, on 29 September 2009, Ms Drake was advised that the kitchen had to remain open until 9.30pm and then there would be clean up, but she left at

9.26pm.

[56] On or around 6 November 2009 Mr and Mrs McDowell were aware by Ms Drake that she had lodged some proceedings with *the Court*.

[57] On 16 November 2009 Mr McDowell gave Ms Drake a final written warning for using her cell phone and for leaving early.

[58] On 18 November 2009 Ms Drake and her partner arrived at The Pub for a drink. Another staff member telephoned Mr McDowell concerned for her safety because of comments allegedly made by Ms Drake and her partner because they thought she was a *nark*.

[59] The evidence is to the effect that there was no discussion about this incident directly with Ms Drake but on 19 November 2009 Mr McDowell wrote a trespass notice for Ms Drake and her partner to prevent them entering the bar as patrons and delivered it to the Police for them to serve on Ms Drake.

[60] On 19 November 2009 Ms Drake gave three weeks notice of her resignation. Ms Drake explained that prior to handing in her notice she had felt she had no option but to look for another position because she was stressed out and felt pushed out and that her health had become affected and she was suffering from stress. She was unhappy at the change in her terms and conditions and her hours had reduced considerably.

[61] On 26 November 2009 Ms Drake was served with the trespass notice and 27 November 2009 Ms Drake advised Mr McDowell that she was on stress leave until 9 December.

[62] On 27 November 2009 Ms Drake's then solicitor Tim Cadogan wrote to Mr McDowell and advised that the notice of trespass made it impossible for Ms Drake to continue to work and she would not be able to use the toilet facilities whilst employed without breaching the trespass notice.

[63] The legal adviser for the Hospitality Association New Zealand wrote to Mr Cadogan and advised amongst other matters, including that the company did not accept that Ms Drake had been constructively dismissed, she could use alternative toilet facilities three doors down from The Pub or alternatively the company would be agreeable to her using the toilet in the bar without exercising their rights to seek the enforcement of the trespass notice.

[64] I am not satisfied that the reason for Ms Drake's resignation was the trespass notice. This was served on Ms Drake after she had made a decision to resign. It is clear that in the latter part of her employment her hours had significantly reduced to her being rostered on for hours between 20 and 25. It is clear that she had reached a decision that the position for her was untenable and evidence is that she had become quite stressed with the difficult working environment.

[65] I accept that Mr and Mrs McDowell were likewise concerned about Ms Drake's attitude and her performance during this period.

[66] In my view many issues arose because of the way the restructuring was handled. Rather than Mr and Mrs McDowell trying to resolve the matter they did not deal with what was clearly an impasse about the new agreement. There were options available to them, including termination of employment if Ms Drake was not prepared to accept the position offered. I find it likely that they became somewhat defensive as supported by the failure to pay the bonus. Other issues arose as Ms Drake became more and more dissatisfied in her employment and there were times when Ms Drake's conduct was unacceptable.

[67] I find that the resignation resulted primarily from the reduction of hours, and a growing dissatisfaction on the part of Ms Drake. Ms Drake on several occasions attempted to resolve the matter of the reduction in her hours.

[68] I do not find that by continuing to work Ms Drake affirmed the position with respect to the change to her payment. She took a number of steps, including writing, discussing and finally lodging proceedings in the Employment Relations Authority to try to resolve the matter. I do think that matters may have somehow come to a head after the events at The Pub on 18 November 2009. It is clear the decision to resign was only made after Ms Drake had been able to secure some alternative employment which would support that this event was not the primary cause of the resignation.

[69] I find that there were breaches on the part of the company by unilaterally changing Ms Drake's employment from that of a salaried employee to a wage worker, failing to pay her bonus payment when it fell due and failing to resolve her issues in a sensible and timely manner when they were set out.

Were the breaches serious?

[70] I find that these breaches were serious enough to make it foreseeable that Ms Drake would not be prepared to work in the conditions as they existed at the time.

[71] I find that Ms Drake was constructively dismissed. There was no justification put forward for the unilateral change in her terms and conditions of employment, aside from the fact that initially she seemed happy with the changes. It is apparent however from the correspondence that by 28 August 2008 Ms Drake was seeking legal advice and that she was unhappy with the changes thereafter. It was also obvious that Ms Drake would not agree to sign her new employment agreement.

Determination

[72] Ms Drake was unjustifiably constructively dismissed from her position. **Remedies**

[73] As Ms Drake was able to secure alternative employment she does not seek any lost wages but seeks compensation of \$5,000.

[74] In terms of any contribution I accept that as Ms Drake became dissatisfied with her employment, there was a change in her attitude and that ultimately the relationship may not have continued for a long period. I shall take this into account in awarding compensation.

[75] In all the circumstances I am of the view that an appropriate award for compensation is the sum of \$3,500.

[76] I order The Pub Limited to pay Hayley Louise Drake the sum of \$3,500 without deduction being compensation under s.123 (1) (c) (i) of the Employment Relations Act 2000. **Costs**

[77] I reserve the issue of costs. Mr Tohill has until 28 January 2011 to lodge and serve submissions as to costs and Ms Knowler has until 18 February 2011 to lodge and serve a response.

Summary of orders made

• I have found that Ms Drake is entitled to be paid in terms of her original employment agreement for the period she worked from August 2009 until her resignation. I have indicated what I have calculated to be an approximate amount owing and I have left it to the parties to calculate the sum. I have reserved leave if there is difficulty in that respect to return to the Authority. I have also found it fair four hours at \$18 per hour should be deducted for the times Ms Drake left early over that period or otherwise did not work hours available.

- I have ordered payment of a bonus of \$2000 and interest from 3 November 2009 thereon until payment at the rate of 5%.
- I have found that Ms Drake was unjustifiably constructively dismissed and have awarded \$3500 compensation without deduction under [s. 123 \(1\) \(c\) \(i\) of the Employment Relations Act 2000](#).
- I have reserved the issue of costs and have timetabled for memorandum.

Helen Doyle

Member of the Employment Relations Authority

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