

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 340  
5380398

BETWEEN BEN FATUPAITO  
Applicant

A N D HHGC LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Scott and Anamika Singh, Counsel for Applicant  
Graham Rodgers, Advocate for Respondent

Investigation Meeting: 4 September 2012 at Hamilton

Submissions Received: 5 September 2012 from Applicant  
7 September 2012 from Respondent

Date of Determination: 01 October 2012

---

**DETERMINATION OF THE AUTHORITY**

---

- A Mr Fatupaito's employment ended on 1 May 2012 because HHGC Limited dismissed him.**
- B HHGC's dismissal of Mr Fatupaito was unjustified.**
- C HHGC is ordered to pay Mr Fatupaito:**
- (a) \$10,170 lost remuneration; and**
  - (b) \$5,500 distress compensation.**

**Employment relationship problem**

[1] From August 2010 until 01 May 2012 Mr Fatupaito worked for the strip club *Hush Hush* in Hamilton as a security guard. When he started at Hush Hush it was owned and operated by Hamilton EET Auto Trust (the Trust).

[2] The Trust sold Hush Hush to HHGC Limited with effect from 27 March 2012. At the time of the sale Dean Williams was the manager of Hush Hush. Mr Williams is recorded by the Companies Office as the sole director and shareholder of HHGC Limited but his evidence was that did not give a true picture of the ownership of the club.

[3] Mr Williams and Martin Schuitemaker both told me that Mr Schuitemaker had put money into the business and was a co-owner of Hush Hush but that his interest had not yet been registered with the Companies Office pending the finalisation of a Shareholders' Agreement.

[4] Mr Schuitemaker said he intended to be a silent partner with Mr Williams taking responsibility for managing the business. He said he only became involved in issues relating to Mr Fatupaito because Mr Williams had a long standing friendship<sup>1</sup> so did not want to deal with such matters.

[5] After purchasing Hush Hush HHGC continued to employ all of the existing staff on their same terms and conditions. Mr Fatupaito continued working as a security guard at Hush Hush after HHGC purchased the business but he was not provided with a new employment agreement.

[6] Although Mr Fatupaito did not raise a penalty claim in his Statement of Problem for the failure to provide him with a written employment agreement, in closing submissions Mr Scott seeks a penalty be imposed on HHGC for failing to provide Mr Fatupaito with a written employment agreement.

[7] I decline to deal with this penalty claim because it was not a matter before the Authority for investigation. It is too late to raise a penalty claim for the first time in closing submissions because to allow that to occur would be contrary to natural justice.

[8] The only claim before the Authority for investigation was a claim by Mr Fatupaito that he was unjustifiably dismissed by HHGC on 1 May 2012.

[9] The background to the dismissal claim is that Mr Schuitemaker met with Mr Fatupaito at the latter's home at around 8.30pm Tuesday 24 April 2012. This

---

<sup>1</sup> Mr Fatupaito was best man at Mr Williams' wedding.

meeting was arranged by Mr Schuitemaker with Mr Fatupaito's wife so Mr Fatupaito did not know what it was about and had no opportunity to take advice or otherwise prepare for it.

[10] Mr Schuitemaker could not satisfactorily explain why the meeting could not have been held when Mr Fatupaito attended work the following day.

[11] The outcome of the 21 April meeting was an immediate and unilateral reduction to Mr Fatupaito's days and hours of work. Prior to the meeting Mr Fatupaito worked from 8pm Tuesdays–Saturdays. Subsequent to the meeting he was told he was not required at all on Tuesdays or Wednesdays and his start time was pushed back by two hours to 10pm for Thursdays - Saturdays. These changes reduced Mr Fatupaito's hours of work from 37.5 hours per week down to 16.5 hours per week, a reduction of 21 hours per week.

[12] Mr Fatupaito says Mr Schuitemaker told him he was not required to work on Tuesdays or Wednesdays because they were going to close Hush Hush those days. Mr Schuitemaker denies telling Mr Fatupaito Hush Hush would be closed Tuesdays and Wednesdays but accepts he told Mr Fatupaito there was no work for him on those days, effective immediately.

[13] Mr Fatupaito asked Mr Schuitemaker who the licensed bar manager would be when he was not at work because he held the only bar manager licence and he did not want it used when he was not at work. Mr Schuitemaker replied that Mr Williams already had a bar manager's licence that he would use so he did not need to worry about misuse of his bar manager licence. Evidence produced to the Authority established that Mr Williams applied to obtain a temporary bar manager licence on 27 April, three days after this meeting.

[14] Mr Fatupaito first informed his wife of the reduction in his work hours then immediately called Ken Smith to discuss his concern about his hours being reduced and to inform him Hush Hush was going to be closed on Tuesdays and Wednesdays.

[15] On Wednesday 25 April Mr Fatupaito contacted his colleague, Sam Hewitt to tell him his hours had been reduced only to be told by Mr Hewitt that he was working at Hush Hush that evening. Mr Fatupaito also received a call from Mr Smith who said he had seen Hush Hush open on Wednesday evening when it was supposed to have been closed.

[16] When Mr Fatupaito arrived at Hush Hush at 10pm on Thursday 26 April his bar manager licence was still being displayed so he asked Mr Williams to remove it whenever he (Mr Fatupaito) was not at work. Mr Fatupaito was upset that Mr Schuitemaker's assurance that his bar manager licence would not be used if he was not at work had not been honoured.

[17] On Friday 27 April Mr Fatupaito approached the Hamilton City Council Liquor Licensing Agency and asked for his name and licence to be removed from the premises of Hush Hush in order to avoid any confusion about who was responsible for the management of the bar. Mr Williams told me he was angry at Mr Fatupaito for doing that because it could have put Hush Hush's business in jeopardy.

[18] Mr Fatupaito saw his doctor on 27 April and was signed off work for three days. His wife advised Mr Williams via a voice message that Mr Fatupaito was sick so would not be working the rest of that week but would return to work his next rostered shift on Thursday 3 May and would bring his medical certificate with him.

[19] Mr Fatupaito was concerned about his work situation so he arranged a meeting for 01 May in order to clarify his employment situation. Mr Schuitemaker and Mr Shane Rose attended on behalf of HHGC and Mr Fatupaito attended with Mr Smith and Mr Ken Marcum Junior.

[20] Mr Rose is a bankrupt and former Chartered Accountant who was struck off the Institute of Chartered Accountants register in July 2010 for bringing the profession into disrepute after he was found guilty of conduct unbecoming an accountant.

[21] Mr Rose's wife owns Cambridge Accountants Limited which is listed on the Companies Office website as HHGC's registered office and address for service. Mr Rose allegedly introduced himself at the 01 May meeting as HHGC's accountant but when challenged about that in light of his bankruptcy said the official assignee had given him permission to act for Hush Hush.

[22] Mr Rose told me he was only at the meeting in his capacity as Mr William's friend and that he is not HHGC's accountant.

[23] Mr Fatupaito claims HHGC dismissed him because it ended his employment at the 01 May meeting when it told him a number of times that he did not have a job and that his services were not required at all.

[24] HHGC denies Mr Fatupaito has been dismissed or that he was told his services were no longer required. In its Statement in Reply HHGC says Mr Fatupaito's *position has been kept open waiting for him to return to work following doctor's clearance.*

### **Issues**

[25] The following issues require determination:

- (a) Did HHGC dismiss Mr Fatupaito?
- (b) If so, was dismissal justified under s.103A of the Act?
- (c) If not, what remedies should be awarded?

### **Did HHGC dismiss Mr Fatupaito?**

[26] Mr Fatupaito, Mr Smith and Mr Markum Jr all say that Mr Schuitemaker and Mr Rose clearly stated numerous times that there was no job for Mr Fatupaito and his services were no longer required. Mr Schuitemaker and Mr Rose both deny saying that. This conflict is to be resolved on the balance of probabilities.

[27] I prefer the evidence given by Mr Fatupaito and his witnesses. Mr Fatupaito impressed me as a truthful witness. Mr Marcum and Mr Smith were also both credible witnesses. Neither were shaken in cross-examination. Both of them were able to clearly relate in their own words the fact that Mr Rose and Mr Schuitemaker had each made it clear that the business was not viable so they had concluded they had no choice but to end Mr Fatupaito's employment. Their evidence was consistent but not identical.

[28] The meeting was called specifically to address Mr Fatupaito's employment status. They had taken advice about the sorts of questions they should ask so I consider it likely they specifically asked if Mr Fatupaito still had a job. Their evidence had a ring of truth to it because they expressed concern that over the course of a week Mr Fatupaito had gone from a full time employee, to a part time employee, to not being required at all. I consider it likely they raised that concern on 01 May.

[29] I therefore consider on the balance of probabilities Mr Fatupaito was told there was no longer a job for him. I am assisted in that view because Mr Williams had previously told both Mr Smith and Mr Marcum Jr he had a problem with Mr Fatupaito. He had previously told Mr Marcum Jr he *was going to get rid of Ben*. Mr Williams was also angry about Mr Fatupaito going to the Liquor Licensing Agency.

[30] It was also obvious that neither Mr Schuitemaker nor Mr Rose understood the legal obligations HHGC had towards Mr Fatupaito so I consider that it is likely they did not fully understand the consequences of advising Mr Fatupaito a number of occasions during that meeting that there was no job for him going forward.

[31] I find that HHGC's advice to Mr Fatupaito on 01 May that he no longer had a job amounted to a sending away, so it was a dismissal. Mr Fatupaito's employment therefore ended on 01 May by reason of his dismissal.

#### **Was dismissal justified under s.103A of the Act?**

[32] Justification falls to be determined in light of the justification test set out in s.103A of the Act.

[33] I find that HHGC did not comply with any of the four tests in s.103A(3) of the Act. It also failed to comply with well established procedural fairness obligations and it failed to meet the basic requirements of natural justice.

[34] HHGC bluntly told Mr Fatupaito he no longer had a job. That was not the actions of a fair and reasonable employer nor could a fair and reasonable employer have dismissed Mr Fatuipato in all the circumstances. His dismissal was substantively and procedurally unjustified.

#### **What remedies should be awarded?**

*Did Mr Fatupaito mitigate his loss?*

[35] In his personal grievance letter dated 2 May 2012 Mr Fatupaito initially sought reinstatement. HHGC's response to his personal grievance invited him to return to work, provided he first signed a new employment agreement with it.

[36] Mr Fatupaito says he declined that offer because he lost trust in HHGC given its markedly different account in the response to his grievance about what was and was not said to him during the meeting on 1 May. These discrepancies meant that Mr Fatupaito no longer trusted HHGC.

[37] I consider that was a reasonable view based on his dealings with Mr Schuitemaker on 24 April and 1 May. I therefore find that his failure to return to work after he raised his dismissal grievance was not a failure to mitigate his loss.

[38] Mr Fatupaito gave evidence about the steps he took to obtain new employment. He had one evening's work at a bar in town prior to obtaining permanent employment on 26 July 2012. I consider Mr Fatupaito did properly mitigate his loss so is entitled to lost remuneration.

#### *Lost remuneration*

[39] I am satisfied Mr Fatupaito lost remuneration of \$10,170<sup>2</sup> from 02 May-26 July 2012 so he is entitled to be compensated for that loss which resulted from his unjustified dismissal.

[40] HHGC is ordered to pay Mr Fatupaito \$10,170 lost remuneration under s.128(2) of the Act.

#### *Distress compensation*

[41] I accept Mr Fatupaito's evidence that he was very distressed by his unjustified dismissal. His evidence of distress was supported by his wife. I acknowledge that Mr Fatupaito's unjustified dismissal had an adverse effect on his self esteem which was compounded by his previous close relationship with Mr Williams.

[42] I consider that \$5,500 compensation under s.123(1)(c)(i) of the Act is appropriate in order to compensate Mr Fatupaito for the humiliation, loss of dignity, and injury to feelings he has suffered.

#### *Contribution*

---

<sup>2</sup> \$23 per hour x 37.5 hours per week = \$862.50 x 12 weeks less \$180 he earned.

[43] Under s.124 of the Act I am required to consider whether Mr Fatupaito contributed towards the situation which gave rise to his dismissal grievance, and if appropriate reduce remedies. I find he did not, so not reduction to remedies is required.

### **Costs**

[44] The parties are encouraged to resolve costs by agreement. If that is not possible, costs will be dealt with by way of an exchange of memoranda. Mr Fatupaito has 14 days within which to file a costs memorandum, HHGC has 14 days within which to respond.

[45] The Authority is likely to adopt its usual notional daily tariff based approach to costs. The current notional daily tariff of \$3,500 will be adjusted to reflect the particular circumstances of this case so the parties are invited to identify any factors which they submit should result in an adjustment to that tariff.

**Rachel Larmer**  
**Member of the Employment Relations Authority**