

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 370  
3111655

BETWEEN

OLIVER FOXTON  
Applicant

AND

METRO SOUTH LIMITED  
Respondent

Member of Authority: David G Beck

Representatives: Lawson Davison, counsel for the Applicant  
Jeff Smith, for the Respondent

Investigation Meeting: 5 May 2021 in Dunedin

Submissions Received: 14 May and 7 July 2021 from the applicant  
14 May 2021 from the respondent

Date of Determination: 23 August 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Oliver Foxton was employed by Metro South Limited (Metro) as a cook in a Dunedin public house from early September 2019 until 13 November 2019 when his employment ended in disputed circumstances.

[2] Mr Foxton who was eighteen years old at the time, claims he was the subject of unreasonable treatment amounting to a disadvantage claim that led to his decision to involuntarily resign after he was suspended on 13 November 2019.

[3] By contrast, Metro contest their awareness and degree of unreasonable treatment and maintain that after legitimately sending Mr Foxton home as unfit for work on 19 November which did not constitute a suspension, Mr Foxton failed to engage with them further to discuss concerns and that he resigned by not returning to work.

[4] Mr Foxton has claimed that he was disadvantaged by what he saw as abusive and threatening discourse initiated by his manager towards him, that the suspension was unwarranted and he claimed overall that he has been constructively dismissed. The latter claim is based upon an assertion that Mr Foxton had no confidence in Metro providing him with a safe working environment to return to, once he was suspended.

[5] The parties attended mediation but the matter remained unresolved.

### **The Authority's investigation**

[6] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant.

[7] The following parties provided written briefs and gave evidence at the investigation meeting: Oliver Foxton, Bernard Sabonadiere (a non-work friend of Mr Foxton), Jeff Smith and Steven Smith (Metro directors/shareholder), Graeme Duke (Bar Manager), Andrew Randell and Christopher Smith (the latter two being friends of Jeff and Steven Smith).

### **Issues**

[8] Did the 'sending away' from work of Mr Foxton on 13 November 2019 amount to a suspension and was this action justified and enacted in a procedurally fair manner?

[9] Prior to leaving the workplace on 13 November was Mr Foxton the subject of actions and omissions by Metro that caused him detriment sufficient to establish a disadvantage grievance.

[10] Did Metro breach terms of employment or duties owed to Mr Foxton and if so, was it reasonably foreseeable that he would resign and the ending of his employment be categorised as a constructive dismissal rather than a resignation?

[11] If any of Mr Foxton's claims are established what remedies should follow?

[12] If Mr Foxton is successful in all or any element of his claims should the Authority reduce any remedies granted as a result of contributory conduct?

[13] An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[14] Metro took over the licence of the historic Dunedin public house, Bransons, in March 2018 leasing the premises it occupied. They initially did not serve food until they engaged Mr Duke as bar manager in April 2019. Mr Duke engaged Mr Foxton in September 2019 as a cook to assist in the kitchen.

[15] Mr Foxton said for the first couple of weeks he was paid cash then placed on the payroll and then he signed an employment agreement (that both parties acknowledged the existence of but could not produce). Mr Foxton was paid \$20 per hour for working a minimum of 30 hours during a four day working week with each day split into hours for lunch (11-2) and dinner (4-9). Timesheets provided for the period 22 September-11 November indicated average hours he worked were of just over 31 per week. Mr Foxton also rented accommodation at the pub from Metro's building owner.

[16] Mr Foxton said all went well in his job until Mr Duke complained in a derogatory manner to Jeff Smith about changes to the menu Mr Foxton had made claiming he had copyright on some items that Mr Foxton could not transgress. Mr Foxton said he overheard this conversation that he described as Mr Duke yelling at Jeff Smith and thereafter tension arose between Mr Foxton and Mr Duke. This included allegations that Mr Duke was openly dismissive of his cooking to customers and that Mr Duke acted in a threatening and demeaning manner towards him. Mr Foxton said this included on at least five occasions, in front of customers, asking him to splay his hand on a table top and Mr Duke striking the table with a bottle opener in close proximity to Mr Foxton's hand. Mr Foxton also alleged Mr Duke made several derogatory comments concerning his sexuality to customers.

[17] Mr Foxton said he approached Jeff Smith about Mr Duke's aggressive behaviour several times and related the bottle opener incident and Mr Duke's attitude about the menu. Mr Foxton recalled Jeff Smith agreed to 'sort it out' but Mr Foxton claimed it was not resolved. Jeff Smith could not recall this conversation.

[18] Mr Foxton recalled shortly afterwards he was apprised by the building owner's agent who did not give evidence, that Jeff Smith wished to end his employment as the business was struggling (a fact all agreed was evident). This led to a meeting with Jeff Smith and Stephen Smith (who was visiting from Australia where he resides) on 30 October that cleared the air and focussed upon a concern Mr Smith had around the flexibility of Mr Foxton's hours of work and a suggestion Mr Foxton get trained to work behind the bar (as a bar manger had had her licence suspended). Mr Foxton acknowledged that Jeff Smith apologised to him at the meeting and that he was willing to be more flexible with his working hours start and finish times.

[19] At the 30 October meeting Mr Foxton did not raise any specific concerns about Mr Duke's behaviour towards him. Jeff Smith said at the close of the meeting he asked Mr Foxton if there were there any other issues and nothing was forthcoming.

[20] Mr Foxton said after the aforementioned meeting Mr Duke's negativity to him 'toned down a wee bit' but Jeff Smith seemed more stressed as the business struggled and that he was terse with Mr Foxton and swore and shouted at him. Jeff Smith denied shouting at Mr Foxton but acknowledged a few times having to give him specific instructions.

[21] Mr Foxton did not specifically confirm that he had raised with Jeff Smith that Mr Duke had been derogatory about his sexuality.

[22] Mr Duke who engaged Mr Foxton on a recommendation for his work at a food business, said he presented well was polite, well dressed and quietly spoken. Mr Duke claimed all was well in his relationship with Mr Foxton until around a month into his employment when issues of lateness and poor performance manifested. Generally however, Mr Duke suggested he had a close and confiding relationship with Mr Foxton and he only acknowledged getting annoyed over menu changes. He did recall overhearing Mr Foxton talking with the property manager about possibly raising a personal grievance and reported this to Jeff Smith. I note however, that the timing of this suggested it was in regard to the

conversation that had been related to Mr Foxton, that Jeff Smith was contemplating dismissing him unless he was more flexible in his hours rather than issues with Mr Duke.

[23] I note Mr Duke advanced comment around Mr Foxton's personal lifestyle that was designed to place him in the worst light possible – Jeff Smith did not engage in comment of a similar nature.

#### **Assessment of whether Mr Foxton had been disadvantaged by the action of Mr Duke?**

[24] Essentially, Mr Foxton is alleging that Mr Duke was bullying him and that Metro took insufficient steps to rectify the situation. In considering the evidence I am not wholly convinced that Mr Foxton raised the specific allegations of Mr Duke questioning his sexuality and belittling him. I do consider he raised the issue of Mr Duke's overbearing behaviour and it is likely that Jeff Smith took steps to resolve this as Mr Foxton acknowledged Mr Duke toned down his behaviour. Given the lack of corroborating witnesses to Mr Duke's behaviour I have to carefully examine the evidence and draw inferences from such.

[25] My impression of Mr Duke as a witness was that he was quick to react to being pressed on issues and he conceded he had been heated with Jeff Smith in the discussion of menu issues. He denied all other allegations but was at times quick to disparage Mr Foxton. I also had to consider the age and experience difference between the parties.

[26] I conclude it is more likely than not that Mr Duke acted in an overbearing and sometimes threatening manner towards Mr Foxton who struck me as a vulnerable, inexperienced young man.

[27] I cannot however, conclude the claim that Metro caused Mr Foxton disadvantage prior to the period of suspension as Mr Foxton did not sufficiently detail his concerns to Jeff Smith and when he did partially describe matters bothering him he appears to have minimised issues and left out the most serious allegations. This could be seen as understandable but it did not allow Metro to obtain a 'full picture' of what was going on. Jeff Smith appears with limited knowledge, to have tried to modify Mr Duke's approach to Mr Foxton with what Mr Foxton acknowledged was with some impact.

## The Suspension

[28] On 13 November 2019 Mr Foxton returned to work after being absent sick for two days (having texted Jeff Smith each day explaining reasons for his absence). There were two starkly different accounts of what then occurred and no corroborating witnesses for either account:

- Mr Foxton said upon arriving at work Mr Duke confronted him and remonstrated with him about why was intending to pursue a personal grievance (thinking it pertained to Mr Duke's interactions with him) and when Mr Foxton would not respond Mr Duke became aggressive and loudly said: "Alright then, fuck you, you're gone, gone I am putting you on suspension".
- Mr Duke by stark contrast claimed Mr Foxton arrived at work in a dishevelled state and walked into the kitchen. Mr Duke followed him into the kitchen and says he found him slumped over the kitchen counter and incoherent and unable to stand up straight. Mr Duke said he proceeded to ask Mr Foxton to just go home but he ignored him and tried to start the fat fryer. At this point Mr Duke said he had no option but to stand him down as being unfit for work and a possible danger to himself and as he was leaving Mr Foxton became abusive.

[29] Mr Foxton then at 9:54 am on the next day (14 November) texted Jeff Smith:

Hi Jeff

I'm just letting you know I will not be in today as I do not feel comfortable coming into work post suspension it has put me in a really uncomfortable spot. I would also like to know if my wages are being withheld intentionally as I have not received these or a payslip. I feel I am being punished for sticking up for myself. I will be following this message up with an email drafted by myself and my solicitor.

[30] Later in the morning Mr Foxton texted a co-worker in response to her indicating she knew "shits gone to shit at work" and that "something happened between you and Jeff", by saying

Yeah ur not wrong haha Graeme suspended me yesterday for no reason at all pg is gonna be moving quickly now and I wasn't paid for last week so I'm sick of it. And thanks.

[31] Jeff Smith responded to Mr Foxton at the same time as the co-worker asking him to fill out his timesheet in order to get paid for the previous week (he did not mention the suspension). Mr Foxton responded the next day to Jeff Smith:

As my previous text I do not feel comfortable coming in to work for this week until things are resolved. My hours last week were 2 days work making 15 hours in total. Please advise of a time next week where we can have a meeting.

[32] Jeff Smith responded that afternoon 3pm (15 November) offering to meet at 4:30 pm at the bar with Mr Duke present “so we can go over what is happening with the kitchen”. Mr Foxton promptly responded declining the offer, indicating that he wished to wait until the following week when he could have a lawyer present. Jeff Smith responded identifying three days he would be available the following week. Mr Foxton agreed to get back to him and asked about his pay for the last week “along with holiday pay and pay for suspension as soon as possible”.

[33] Further texts culminating in one from Mr Foxton of 21 November confirmed the 15 hours for the last week worked had been paid but not holiday pay or pay for the day he was suspended. Mr Foxton ended his text with “I won’t be in until we can arrange a meeting with my lawyer, should hopefully be able to get back to you with a time later today”.

[34] Further texts in the evening of 21 November between Mr Foxton and Jeff Smith ensued as Mr Foxton had not been able to confirm a meeting time – Mr Foxton said I feel I am being bullied out of my job”, he was still waiting for advice and was “raising a personal grievance against Bransons and I wish to discuss this further” before “taking proceedings”. Mr Foxton then reiterated a request for his holiday pay and the suspension pay. Jeff Smith texted back on 23 November and indicated Mr Foxton had to come in and sign for his holiday pay before it could be paid and in regard to the suspension: “

You were sent home that day as I understand it, because you were not fit for work and because of that we believe we don’t have to pay you for that day but we can sort that out at the meeting once you have arranged it”.

[35] Mr Foxton responded on 23 November contesting the reason for the suspension and asking for the reasons to be set out in writing.

[36] No meeting took place in the interim with Mr Foxton explaining at the investigation meeting that he had difficulty in getting his lawyer to attend as she was on leave but he did not communicate this fact to Jeff Smith.

[37] On 16 December Mr Foxton texted Jeff Smith thanking him for paying his holiday pay and Mr Foxton reiterated he was entitled to be paid the day he was suspended and to get

an explanation in writing setting out the reasons why they thought he was unfit for work. In a response of the same day Jeff Smith indicated Mr Duke had prepared a letter a couple of weeks ago and they had nowhere to deliver it and Mr Foxton should come in and collect it from Mr Duke. Mr Foxton indicated it could simply be left with his mail. In the event the letter was not delivered.

[38] Inexplicably, no contact was made by Mr Foxton's solicitor, Jenny Beck, until a personal grievance letter of 8 January 2020 was emailed to the general business email address. The letter advanced claims of unjustified disadvantage and unjustified dismissal. The latter claim was prefaced with a comment:

As far as the unjustified dismissal is concerned, there appears to be some uncertainty as to how Oliver's employment ended. The "dismissal" part of it is either constructive dismissal (i.e. forced resignation) or deliberate dismissal, in that the suspension was not brought to a close and attendance at work was not allowed.

[39] The PG letter also went into some detail of Mr Foxton's allegations of bullying by Mr Duke and the circumstances of the suspension. It ended with no suggestion of a meeting but with a proposal of a financial settlement or agreement to attend mediation.

[40] I make an observation on the facts that a claim that Metro actually dismissed Mr Foxton cannot possibly be sustained. The text exchanges demonstrate Mr Foxton was 'sent away' for a day and that Metro attempted to engage with him soon thereafter with Mr Foxton failing to set up a timely meeting. Whilst Mr Foxton tried to blame counsel for the delay, that is a matter he needs to pursue separate to these proceedings – I observe he took inadequate steps to obtain alternative representation when it became obvious that haste was required if he wished to maintain his employment.

[41] I surmise that Mr Foxton's request for his holiday pay and non-return to work were acts that brought the employment to an end of his own volition but that he did not clearly communicate his intention to resign. Metro in response, acted reasonably in being willing to meet but could be criticised for not getting legal advice and not setting out their concerns in writing.

[42] Jeff Smith and Mr Duke tried to persuade me during the investigation that they had no intention of pursuing any disciplinary action against Mr Foxton if he had returned to work. I am frankly sceptical of this but acknowledge that Mr Foxton's failure to engage or

specifically set out the nature of his concerns was not in accord with his good faith duty to be communicative and it is fairly evident viewing the exchanges that he had no intention of returning to work.

[43] Jeff Smith claimed he did not access the PG letter until 25 January and without obtaining any legal advice Stephen Smith responded on 25 February. It is clear from the response and was conceded in evidence, that Jeff Smith made no inquiry into the specific concerns raised other than to respond to the grievance. A further email to Mr Foxton's lawyer of 28 February unhelpfully requested information that was ostensibly already in their possession and a less than timely, first request for a medical certificate from Mr Foxton to cover his absences on 8 and 9 November 2019. A response from Mr Foxton's lawyer of 12 March expressed concern about a lack of response and indicated Mr Foxton was legally aided.

[44] The matter was filed with the Authority on 18 June 2020.

### **Assessment of the suspension**

[45] In assessing the genuineness of the suspension I simply must decide which account of either Mr Foxton or Mr Duke is likely to be credible. On the basis of tension evidently existing between the parties, Mr Duke's view of Mr Foxton's lifestyle, him knowing that he was contemplating a PG against the business or himself and the struggling nature of the business I tend towards a view that Mr Foxton's account is more credible. This is supported by Mr Smith's failure to properly detail his concerns and Mr Duke's serious allegations yet he did not proceed with a disciplinary approach. I have taken into account Mr Smith's timely offer of a meeting but judge that to be in response to Mr Foxton indicating he wished to raise a PG.

[46] I find the suspension was inappropriate and enacted in a procedurally unfair manner including the lack of a follow up letter setting out concerns and a failure to offer to pay Mr Foxton up until a meeting could be hastily arranged (although on the latter I acknowledge Mr Foxton over time frustrated the offer to meet).

[47] Mr Foxton's disadvantage claim is successful.

[48] However the matter does not end there I now have to consider whether Mr Foxton's not wishing to return to work after 13 November was a reasonable response to his suspension and preceding events.

### **Was Mr Foxton constructively dismissed?**

[49] A 'constructive dismissal' can be found if an employer's conduct compels an employee to resign in circumstances where although on the surface the employee appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this doctrine is where the resignation is caused by a breach of a duty owed to the employee and the employer could reasonably foresee that rather than put up with the breach, the employee resigns - effectively signalling a belief that their employment agreement has been repudiated by the employer. The Court of Appeal has stated the legal test as:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. <sup>1</sup>

[50] The overarching and well recognised duty that is now statutorily recognised as a component of 'good faith' <sup>2</sup> is that an employer should not without proper cause, act in a manner calculated to or likely to, destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship. <sup>3</sup>

### **Mr Foxton's claim regarding a potential breach of duty**

[51] Counsel for Mr Foxton suggested his client had been placed on "indefinite suspension". I have not found that to be a credible premise. As explained I have found that Mr Foxton in requesting his holiday pay, eschewing an opportunity to meet and pursuing a

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<sup>1</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

<sup>2</sup> Section 4 (1A)(a) and s 4(1A)(b).

<sup>3</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

personal grievance are actions that brought the employment to an end. The email to his co-worker of 14 November reinforces my view that as from that date Mr Foxton had no intention of returning to work.

[52] Whilst I have not found sufficient evidence that Mr Foxton brought his serious concerns about threats and personal abuse to Metro's attention in specific terms, I nevertheless conclude he was genuinely uncomfortable in his relationship with Mr Duke and given my finding that Mr Duke suspended him inappropriately I consider there is just enough for the employer to have reasonably foreseen a resignation. In a sense Jeff Smith was wilfully blind to Mr Foxton's concerns and he displayed a partiality towards Mr Duke's account of his contribution without investigating such with other workers. The Smiths also failed to seek legal advice.

[53] Whilst Mr Foxton failed to explicitly communicate his resignation other than his signalling an initially vague personal grievance and requesting his holiday pay it was evident that the employment relationship was over at the point he was sent away on 13 November.

### **Finding**

[54] I objectively conclude from limited and sometimes starkly conflicting evidence that Mr Foxton was constructively dismissed.

### **Summary**

[55] Having obtained a finding of unjustified disadvantage related to an unjustified suspension and an unjustified constructive dismissal, Mr Foxton is successful in his personal grievance and is entitled to remedies.

### **Remedies**

#### **Compensation for hurt and Humiliation**

[56] Mr Foxton gave distressing evidence of the impact of the unpaid suspension and dismissal on his personal life and the stress and fear he suffered from dealing with Mr Duke that has led him to abandon any notion of working in the hospitality sector.

## **Finding**

[57] Taking into account the evidence proffered and awards made by the Authority and Court in similar situations and surveying cases brought to my attention in submissions, I find that Mr Foxton's evidence warrants the compensation his counsel sought of \$8,000 under s 123(1)(c)(i) of the Act.<sup>4</sup>

## **Lost wages**

[58] Having found that Mr Foxton was unjustifiably dismissed he is entitled to a consideration of lost wages. Mr Foxton indicated that he relocated out of Dunedin and found alternative employment in late February 2020 but only for a short period and he had difficulty securing alternative ongoing work during the 2020 Covid lockdown. In the circumstances I award Mr Foxton three months lost wages pursuant to s 123(1)(b) of the Act in the amount of \$7,800.

## **Contribution**

[59] Section 124 of the Act states that I must assess the extent to what, if any, Mr Foxton's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>5</sup>.

[60] I find that although Mr Foxton failed to properly articulate his concerns whilst employed this could be put down to his youth and inexperience in a small workplace rather than it being seen as blameworthy. Likewise, his failure to meet and explain his concerns after he had been suspended was partially caused by a lack of timely attention by his lawyer and is not blameworthy. It has to be balanced against the circumstances of his suspension that I have concluded to be wholly inappropriate. On balance, I consider no reduction in remedies awarded is warranted.

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<sup>4</sup> See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

<sup>5</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

## Summary

[61] **I have found that:**

**(a) Oliver Foxton was disadvantaged in his employment and then constructively dismissed by Metro South Limited.**

**(b) In the circumstances, Metro South Limited must pay Oliver Foxton:**

**(i) \$8,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.**

**(ii) \$7,800 (gross) lost wages pursuant to s 123(1)(b) Employment Relations Act 2000.**

## Costs

[62] Costs are at the discretion of the Authority and here Oliver Foxton has obtained compensatory remedies by establishing that he was constructively dismissed following a day long investigation meeting.

[63] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[64] If no agreement is achieved, Oliver Foxton has fourteen days following the date of this determination, to make a written submission on costs and Metro South Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck  
Member of the Employment Relations Authority