

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Peter Hamilton (applicant)
AND	Taradale Tavern Limited (respondent)
REPRESENTATIVES	Megan Williams for the applicant David McLeod for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Napier, 21 December 2004
DATE OF DETERMINATION	6 January 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The applicant, Peter Hamilton, says he was unjustifiably dismissed and sexually harassed – statement of problem received on 16 August 2004. He seeks compensation for humiliation, etc of \$5,000, lost wages and costs. He also claims a “*good reference*” (statement).

2. The respondent (the Company) says Mr Hamilton's dismissal was procedurally fair and substantively justified. It denies the claim of sexual harassment – statement in reply received 30 August.
3. The parties underwent mediation but their employment relationship problem remained.

Investigation

4. During a telephone conference held on 24 September the parties agreed to a one-day investigation in Napier commencing at 9.30 a.m. on Tuesday 21 December. The parties usefully provided written statements and relevant documentation to the Authority in advance of the investigation.
5. Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.
6. During the investigation Mr Hamilton accepted that, as he was on ACC compensation from the date of his termination on 11 June 2004 until 11 October of the same year when it ceased, he was not fit to work and therefore withdrew his claim for lost wages. He also accepted that the Authority probably did not have the jurisdiction to direct the respondent to provide him with a "*good reference*" (above); as it happened, the respondent's advocate, Mr David McLeod, helpfully anticipated the Authority's approach and offered the applicant a certificate of service and the undertaking that the Company would confirm its veracity and make no further comment.
7. Closing submissions were provided by the parties.

Background

8. Key background details are largely not in dispute and can be summarised as follows.
9. As its name makes clear, the respondent company operates a tavern. Thomas ("Tom") and Lesley McLinden are the company's two shareholders.

10. Peter Hamilton began his employment as a bar manager in the tavern on 1 January 2003.
11. During the investigation the respondent made some claims by way of background detail about performance issues and other matters involving the applicant. Mr Hamilton disputes those claims. The Company accepts that at the time it dismissed the applicant there were no live warnings relating to his performance and the termination itself was effected in respect of a specific or 'stand alone' fact situation.
12. Tom McLinden says that on Tuesday 25 May a staff member, Ms Jacqueline Wright, approached him about a conversation she said she had with the applicant that day. She said that Mr Hamilton had told her he was going to have a bad back because he was sick of working and he was going to go on ACC. She had asked the applicant what he intended to do. She said Mr Hamilton told her that he was going to slip over a broken tile by a chiller. Mr McLinden said he had trouble believing what he had been told, that he asked Ms Wright to put it in writing which she did on the following day. Mr McLinden said he thought little more about the conversation preferring to believe that Mr Hamilton would not be that silly and that the other staff member had got it wrong.
13. On the following Saturday Mr McLinden says he was at home when received a phone call from another staff member who said that Mr Hamilton had told her he had slipped and hurt his back. He instructed the caller to tell the applicant to go home. Mr McLinden then went into the workplace and asked what had happened. The worker told him that Mr Hamilton had told her that he had fallen over. Mr McLinden asked if the accident had been caused by the broken tile beside the chiller: according to Mr McLinden the worker wondered how he knew.
14. Mr McLinden recalled what had been reported to him earlier that week. He says he "*immediately became suspicious regarding the honesty of this incident*" (par 25 of his statement).
15. Mr Hamilton provided a medical certificate on the following Tuesday. The applicant next reported to Mr McLinden on Monday 7 June. The parties differ in their accounts of what happened at their meeting on 7 June. Mr McLinden says he advised the

applicant that a meeting was required to discuss his situation at work, that a discussion then took place during which Mr McLinden advised Mr Hamilton what he had been told on 25 May about the applicant. He asked for the applicant's explanation. He says Mr Hamilton denied having a conversation about faking an accident and of faking the accident. Mr Hamilton says these matters were not raised and he was assured instead that his job was safe and waiting for him.

16. Another meeting occurred on the morning of 8 June. Mr and Mrs McLinden were present as was the applicant. Mr Hamilton says the allegations were first put to him on this occasion, and that he was asked to explain. He denied deliberately faking an accident. Mr McLinden says he told the applicant, but not as a threat, that there were two options, that he resign or face the possibility of dismissal – statement in reply and par 32 of the witness' statement.
17. A further meeting was scheduled for Friday 11 June. Mr Hamilton had with him a support person as did the McLinden's. The applicant was asked if he had any further thoughts. Mr Hamilton again denied the allegation. After reflecting on the situation Mr McLinden reached the decision to terminate the applicant's employment as he could no longer trust Mr Hamilton.
18. The broken tile was fixed sometime after the accident.
19. Mr Hamilton says he first slipped on the tile on either the 21st or 22nd of May, before his accident on Saturday 29 May. No one witnessed his 29 May accident. He says he was unable to continue working and went home and rested. He says there was no doctor's appointment available to him until the following Tuesday morning. He was issued with the first of a number of medical certificates, all of which he delivered to his work place. He says that during his interviews with the respondent he was in considerable pain and unable to sit for any significant periods.
20. Mr Hamilton subsequently sought and received a letter setting out the grounds of his termination (letter dated 21 June and attached to statement of problem). Dismissal was effected under clause 16 of the applicant's employment agreement. As was explained by Mr McLinden during the Authority's investigation, that clause provides

for a definition of serious misconduct which includes dishonesty. Mr McLinden said he regarded the applicant's actions as dishonest.

21. Mr Hamilton also received advice from the ACC that the respondent was disputing his claim. In a subsequent letter dated 2 July the ACC advised the respondent that it accepted Mr Hamilton's injury did in fact take place while he was in its employment (copy attached to statement of problem). The ACC advised the Company of its view that it was the respondent's role to satisfy the ACC that their version of events should be preferred over that of the claimant. The Company was invited to talk further with ACC if it had any further information or ongoing concerns; the respondent did not do so. It appears that while the applicant and Ms Wright had an opportunity to provide ACC to file affidavits setting out their respective positions, apparently only the applicant did so within the period stipulated by ACC.
22. Mr Hamilton also gave evidence to the Authority in support of his claim that he had been sexually harassed during the time he was employed by the Company. He alleges that Mr McLinden grabbed at his testicles and penis, humped his body while pinning him in a corner and sat on him. Mr Hamilton says he did not confront his employer about this matter at the time as he was not confident of retaining his job. A witness for the applicant, Mr Graham Singer, gave evidence in support of these claims. In particular he says he saw, in the company of others, Mr McLinden behaving toward the applicant in the way described by Mr Hamilton. The McLinden's vehemently deny these claims.

Discussion and Findings

Unjustified Dismissal Claim

23. I am satisfied for the following reasons that the respondent unjustifiably terminated Mr Hamilton.
24. The dismissal is admitted. The onus is therefore on the employer to justify its action. The Authority has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken: *W & H Newspapers v Oram*, [2000] 2 ERNZ 448.

25. In this instance I do not accept that the decision reached by the respondent was one it could have taken. This is because the respondent's decision at the time was based on two matters: it preferred Ms Wright's account of the conversation she says she had with the applicant prior to his accident, and (as was explained during the Authority's investigation) dissatisfaction with what it termed the applicant's varying accounts of how the accident happened.
26. The basis of the respondent's preference for Ms Wright's account is that she had nothing to gain from reporting on her conversation. The applicant says that is not so as Ms Wright now has his job. This is a highly speculative area which I am not prepared to enter into except to observe what is already well-established, that an employer has an obligation to consider serious allegations at a commensurate level, and to proceed with particular care in the contentious area of one person's word against another.
27. What the Authority's investigation made clear was a failure by the respondent to reasonably and fairly assess the applicant's consistent denial of faking an accident and the objective evidence in support of his position. The respondent has failed to make out why it preferred Ms Wright's account over that of the applicant's **and** that the subsequent accident was not genuine. To reach a serious conclusion, that Mr Hamilton acted dishonestly by faking an accident, required a corresponding serious level of evidence. That evidence is conspicuous by its absence. The Company cannot point to any clearly recorded employment events or history that might support an adverse finding, whereas the respondent did know for over two years that the tile was broken and loose. In fact it accepted that the tile should be fixed as it had made some effort to have the tile repaired sooner, but was unable – it says – to find a service person with the requisite level of skill. The Company clearly regarded the broken tile as sufficiently dangerous to arrange for the problem to be fixed shortly after Mr Hamilton's accident.
28. The Company did not take issue with the medical evidence then available to it, in support of Mr Hamilton's claim. This is because, Mr McLinden explained, any doctor faced with Mr Hamilton's complaint would be obliged to accept what he said, i.e. it could not be measured objectively. The same reasoning or approach applies equally to an employer – this is a good faith exercise unless there is good reason to adopt a

more critical position. Whereas the respondent possessed a troubling report of a conversation, it also knew the tile was broken and – as admitted by Lesley McLinden during the investigation – that the applicant had an extensive medical history of back problems.

29. It was open to the Company to dispute Mr Hamilton's accident claim with both his doctor and ACC, but it elected not to do so.
30. The respondent's dissatisfaction with Mr Hamilton's varying accounts withstands little scrutiny. The McLinden's took issue with Mr Hamilton saying he slipped or fell, because the tile was wet or broken, and that the applicant could not clearly account for being in that part of the workplace but were unable to coherently account for why these modest variations were significant. Unfortunately for the McLinden's, their concession that – as early as 8 June – they offered the applicant the option of resigning or being dismissed (par 17 of the statement in reply) is strongly suggestive of predetermination by the respondent and the absence of a proper investigation objective consideration of the relevant facts.
31. Without coming to any conclusion on the matter there is also the strong suggestion, because of its good faith obligations and the reliance placed on them by the respondent, that the employer failed in its duty to advise Mr Hamilton of Ms Wright's report of their conversation and to provide him with a copy of her statement at the time, or shortly thereafter, that both were received by Mr McLinden. To ignore a matter as "silly" (Tom McLinden) in the first instance, but then rely on it in reaching a decision to dismiss is seriously prejudicial to the affected employee.
32. The applicant was denied an opportunity to respond when the matter first emerged; he was also disadvantaged by not seeing Ms Wright's statement at the point of his termination. As it happened, Mr Hamilton did not see the statement before the parties underwent mediation. This was further reason for the Company to hesitate in coming to its serious conclusion that it could no longer trust Mr Hamilton.
33. I am not satisfied that a reasonable and fair employer, after having proper regard to the above in the context of a potentially serious outcome, could come to the conclusion that dismissal was open to it as a correct response.

Sexual Harassment Claim

34. At this point in the investigation I am not prepared to reach any conclusion in respect of Mr Hamilton's claims he was sexually harassed. This is because it is a serious allegation and there is an absence of adequate evidence to determine the competing claims. I am therefore unable at this point to find in favour of one account any more than I am the other.
35. In the event that it is necessary to do so I would need to hear further evidence from the patrons of the tavern in order to substantiate the claims of the applicant and his witness, Mr Graham Singer that Mr McLinden behaved in the way they claim and that he did so in front of others.

Remedies

36. The only remedies now effectively sought by Mr Hamilton in respect of this employment relationship problem are compensation of \$5,000 for humiliation, etc and costs. I am satisfied from the evidence he presented at the investigation that the effect of his unjustified summary dismissal was strongly negative. The amount he now seeks to make good the damage done is modest and I am satisfied that it should be granted in full.

Contributing Behaviour

37. The investigation disclosed no evidence of any action by Mr Hamilton that contributed towards the situation that gave rise to his personal grievance: s. 124 of the Act applied.

Determination

38. For the reasons set out above I find in favour of Peter Hamilton's claim that he was unjustifiably dismissed by the respondent, Taradale Tavern Limited.
39. I therefore direct the respondent to pay to the applicant \$5,000.00 (five thousand dollars) compensation for humiliation, etc.
40. At the request of the parties costs are reserved.

Denis Asher
Member of Employment Relations Authority