

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 11
5300172

BETWEEN LOUIS HUTCHINSON
Applicant

AND LA BELLA ITALIA
DISTRIBUTORS LTD
Respondent

Member of Authority: G J Wood

Representatives: Jasmine Brown for the Applicant
Lois Gilmore for the Respondent

Investigation Meeting: 18 November 2010 at Wellington

Submissions Received: 18 November 2010

Determination: 28 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Hutchinson, claims that he was constructively dismissed from his job as a waiter with the respondent (La Bella) at its Terrace restaurant. The particulars he relies on, which he also claims for separately as unjustified actions to his disadvantage, were that he was bullied and harassed by his manager, that La Bella did not adopt a fair process when dealing with disciplinary issues, that it unilaterally varied the terms of his employment without genuine reason, and that it failed to communicate properly with him, including suggesting that he resign.

[2] Mr Hutchinson also claims \$686.33 for unpaid holiday pay, which La Bella set off against his final payment for alleged abandonment of his employment.

[3] La Bella denies all of Mr Hutchinson's claims.

Credibility

[4] In my view each witness came to the Authority and gave evidence to the best of his recollection. Much of the areas of dispute related to perception rather than any clear actions taken by La Bella. The Authority's task is to determine what happened in the relevant events in this case, by reference to the balance of probabilities (i.e. what is more likely than not) from an objective perspective. Because matters of perception are so subjective it is difficult to do so in this case. However, in areas of dispute I have usually relied on the evidence of three former employees of La Bella (two former managers and a former chef), over the evidence of Mr Hutchinson and La Bella's principal, Mr Antonio Cacace, principally because of the first group's relative independence compared to the latter.

Factual Discussion

[5] Mr Hutchinson was appointed as a waiter at La Bella's deli/restaurant on The Terrace, Wellington in February 2009. He was employed under an individual written employment agreement. There were no issues with his employment until the appointment of a co-worker (a Mr Marco Giorgi) as the new manager of the restaurant, following the departure of the person who had employed Mr Hutchinson. The relationship between the two was never a positive one thereafter.

[6] I conclude that Mr Hutchinson resented the different style of Mr Giorgi compared to his predecessor. However, in many respects Mr Giorgi was merely following the direction of the principal of La Bella, Mr Cacace, who wanted him to get the Terrace restaurant to work more in line with the methods of his Petone restaurant. As a result Mr Giorgi started managing Mr Hutchinson more closely. Therefore, as observed by the chef, Mr Giorgi raised a number of issues with Mr Hutchinson over and over about specific ways of dealing with customers, wine sales and table service methods in particular.

[7] I accept the chef's evidence that there were major issues between Mr Giorgi and Mr Hutchinson. Whether they were for reasons of language difficulties, as suggested by the chef (Mr Giorgi being an Italian immigrant), or for reasons of a different approach by Mr Giorgi, as required by Mr Cacace, or a simple personality clash, is not important. The fact remains that there was a significant clash between the two young men. This meant that while Mr Giorgi felt that he was never getting

any improvement from Mr Hutchinson over matters he raised on several occasions, from Mr Hutchinson's perspective he was being picked on and bullied. I accept the evidence of the chef that Mr Hutchinson was not being picked on or bullied, but rather a new and different regime had been implemented and he was having difficulty accepting that, particularly as he felt picked on.

[8] One significant area where Mr Hutchinson believed he was being picked on was when he was informed by Messrs Giorgi and Cacace that there had been shrinkage at the bar and that cameras were being installed. A week or so earlier Mr Giorgi had questioned him about the till not balancing. Mr Hutchinson took this as evidence that he was being targeted as the person responsible for the shrinkage. I accept La Bella's management's evidence that all staff were told of the cameras being in place and that Mr Hutchinson was never suspected of being responsible for the shrinkage. This is consistent with Mr Cacace telling Mr Hutchinson at the same time that he was doing a great job, as I find he often did. While Mr Hutchinson said in his first written statement that Mr Cacace would often tell him that he was doing a great job, in his second statement he said he only exchanged general pleasantries with Mr Cacace when he came in, which was not often until Mr Giorgi was appointed manager. I also accept that Mr Giorgi raised with Mr Hutchinson the importance of entering his security code when using the till. No doubt Mr Hutchinson also felt this meant that he was being targeted, but I accept that it was appropriate for La Bella to raise this as it is good business practice, particularly where shrinkage is occurring. Unfortunately Mr Hutchinson's perception of what was happening to him most likely coloured his view of subsequent events.

[9] I also accept that before 15 January Mr Giorgi had raised with Mr Hutchinson that he had observed him indulging in an unacceptable practice when tasting new wines. While the tasting of new wines was acceptable, Mr Hutchinson was taking more than the sip required, being closer to half a glass in Mr Giorgi's opinion. I accept that when told of this Mr Hutchinson never drank more wine than was necessary for tasting it.

[10] Mr Hutchinson claims that he was employed for a minimum 20 hours per week at The Terrace only. His employment agreement does provide for his principal place of work to be The Terrace, but his terms and conditions of employment also provided for hours and days of work to be set by the employer on a roster (on any

seven days of the week) and that *flexibility is essential to providing staff to cover variable demands*. Under the previous manager Mr Hutchinson was provided a minimum of 20 hours a week, except when he wanted to work less, which was often, due to university study commitments.

[11] Problems between Messrs Hutchinson and Giorgi heightened greatly during the January holiday period. Mr Hutchinson acknowledged having been told in October by Mr Cacace that business was slow (which he already knew) and that staff hours may have to be reduced. Furthermore, when Mr Hutchinson applied for his position in December 2008 he was told by the then manager to come back in mid-to-late January as there was no work at that time, which he did around the end of January.

[12] I conclude that all parties were aware that this type of restaurant would not be busy in January, and particularly so in 2010, given the state of the local restaurant market in 2009/2010.

[13] Matters came to a head on 15 January 2010 when Mr Cacace asked how things were with Mr Hutchinson, who said they were fine. He was then told of the installation of security cameras and that he was doing a great job. Later that day Mr Hutchinson found that his days of work for the next week had been reduced from five the week before to three. I accept the evidence of the chef that the hours of other staff had also been reduced because of the lack of work. Furthermore, a number of other staff took the opportunity to retain or increase their hours by taking up shifts at the Petone restaurant. Two staff at the end of their working visas, who would soon be leaving (one of whom was a waiter like Mr Hutchinson), had however kept their hours. At the investigation meeting Mr Giorgi also explained that this waiter was malleable when it came to finishing early if the restaurant was quiet, in contrast to Mr Hutchinson. I also accept that he was paid less.

[14] Mr Hutchinson confronted Mr Giorgi about being given fewer days of work than expected, but the latter did not give the full explanation as provided above. He simply told Mr Hutchinson that that was the way it was and that he could take it up with Mr Cacace.

[15] On 20 January Mr Cacace met with Mr Hutchinson. Mr Hutchinson thought that the conversation would deal only with his issues, including harassment by Mr

Giorgi. However Mr Cacace had been informed by the chef and Mr Giorgi that Mr Hutchinson had been drinking wine at work, that he was not following instructions and that he was taking too long breaks, so he raised them with him. Mr Hutchinson denied the allegations.

[16] Mr Cacace then stated that he would investigate the reduction in hours but that business was very slow and had been declining over several months. Mr Giorgi later told Mr Hutchinson that his hours still had to be reduced.

[17] Later that night Mr Giorgi and Mr Hutchinson had a major confrontation. Mr Giorgi informed Mr Hutchinson that he had failed to do three tasks correctly in the last five minutes. Mr Hutchinson took offence at the way Mr Giorgi raised the matter, particularly as it was in front of patrons. Mr Giorgi believed that he had to raise the matter repeatedly because Mr Hutchinson appeared to be ignoring him.

[18] Neither man was prepared to give an inch. In the end Mr Hutchinson, being frustrated at not being able to give a full explanation or have it accepted, told Mr Giorgi to *go f... himself* while walking away towards the fridge. This did not improve matters. Mr Giorgi then followed Mr Hutchinson to the fridge, where Mr Hutchinson was getting a bottle of wine out. Mr Giorgi told Mr Hutchinson to go home. Mr Hutchinson argued the point as he was still on shift. Mr Giorgi told him that he needed to cool off and go home. Mr Hutchinson then repeated his previous abuse, telling Mr Giorgi again to *go f... himself*.

[19] Mr Giorgi at this point closed the sliding door of the fridge on Mr Hutchinson's arm, in order perhaps to control Mr Hutchinson, as he thought Mr Hutchinson may have been a threat to his own safety. He did not do so strongly, as Mr Hutchinson was not injured and was able to withdraw his arm from the fridge when he chose to do so.

[20] Mr Giorgi again told Mr Hutchinson to go home, which he then did. Mr Hutchinson was only paid for the two hours he worked. He was also told not to come back to work the next day which he did however do, as he was rostered on.

[21] There were no issues the next day, despite what had happened the previous evening. The next week, however, Mr Hutchinson was only rostered on for two days, rather than the three of the week before. I accept that Mr Hutchinson had not been informed by Mr Giorgi of this fact, as he could have expected to have been.

[22] Later on 27 January Mr Hutchinson had a meeting with Mr Cacace and Mr Giorgi, where Mr Hutchinson complained about his treatment by Mr Giorgi. Mr Hutchinson was told that Mr Giorgi's job was to manage and that Mr Hutchinson had to follow his instructions and work better. In particular the issue of Mr Hutchinson swearing at Mr Giorgi was raised with him. While Mr Hutchinson claimed that he was being harassed by Mr Giorgi, Mr Cacace did not agree. He told Mr Hutchinson *if I called you an arsehole would that be harassment, you can come and work for me out in Petone and I see if you are an arsehole*. I accept that Mr Cacace's comments were made in the context of demonstrating to Mr Hutchinson why he could not go around swearing at management.

[23] Mr Cacace denied that he was trying to get rid of Mr Hutchinson. He offered Mr Hutchinson work in Petone to make up for his reduced hours at The Terrace. I accept that the offer was a genuine one and that Mr Hutchinson did not respond to it at the time, as Mr Hutchinson did not wish to travel from central Wellington to Petone to undertake work at that restaurant, which he was not required to do anyway.

[24] While Mr Cacace may not have explicitly said that he would investigate Mr Hutchinson's concerns further, the fact is that he then took matters up with his staff and marketing co-ordinator, who arranged for a meeting between him, her and Mr Hutchinson the next week. Thus the staff and marketing co-ordinator wrote to Mr Hutchinson on 29 January inviting him to a *performance review*. It was stated:

It is my understanding that there have been some problems between you and your supervisor/management and I believe that this is of such urgent nature that we need to organise this meeting. In my role as staff co-ordinator I often become involved when the relationship between supervisor/management and staff is no longer solvable between themselves.

I have been advised of some serious offences against your supervisor by you, which needs to be addressed straightaway. It is also my understanding that you yourself have some issues with your supervisors and during this meeting I would like to give you the opportunity to tell me your side of the story. ...

[25] The meeting took place as planned between the co-ordinator, Mr Cacace and Mr Hutchinson on 1 February. After a full introduction detailing the issues from La Bella's point of view, Mr Hutchinson was given the opportunity to raise his concerns. Mr Hutchinson raised his issues, in particular harassment and bullying by Mr Giorgi and the recent reduction in his hours.

[26] It was made clear to Mr Hutchinson that Mr Giorgi was not the only one to have complained about him, and that therefore might be some truth in the concerns raised about Mr Hutchinson's behaviour. Mr Hutchinson was advised to think about that and change his approach. He was also told that the co-ordinator would discuss his complaints with Mr Giorgi to see if a different style of management could be worked out that would make Mr Hutchinson feel less harassed. She also agreed to talk to Mr Giorgi about the cut back of his hours.

[27] Mr Hutchinson was then told that no matter how frustrated he was, it was a serious offence to tell his manager to *go f*... himself and that any such remarks in the future would be regarded as serious misconduct giving reason for dismissal.

[28] Mr Hutchinson was also told (wrongly) that under his contract he was expected to work in both The Terrace and Petone restaurants. Mr Hutchinson responded that he did not want to work in Petone, which Mr Cacace stated was frustrating to him. It also meant that 20 hours could not necessarily be provided in the future, particularly as the roster changes that had been made would make this difficult in the future.

[29] Finally, Mr Hutchinson was told to think about what had happened in the meeting and to make a decision on what he would like to do. He was then told that if he was not happy with management and/or the hours offered he had the opportunity to end his employment at La Bella. If he intended to stay he could only be guaranteed a minimum of 20 hours if he was flexible with his days and place of work. The co-ordinator also told Mr Hutchinson that in return she would talk to Mr Giorgi about his management style and how he could improve his working relationship with Mr Hutchinson. The co-ordinator finished the meeting by saying she would be in touch with him on her return from annual leave in about two weeks time.

[30] Mr Hutchinson decided that he had had enough and would not be returning to work. The main reasons for this were that he didn't feel safe, that things would be worse for him because he had complained and because La Bella was not going to do anything about matters for two weeks at least. His lawyer then wrote to La Bella the next day (2 February) stating that La Bella was not a safe working environment and that his employment had been unilaterally altered *in such a way as to make his ongoing employment pointless*.

[31] The letter stated (amongst other things):

We are doubtful that the situation can be redeemed given your position on matters raised at our meeting with Louis and previous actions. Louis is considering what options to take in respect to these matters, however, we suggest that matters may be best resolved by discussion on terms of resignation that would be satisfactory to all those involved.

I hope to hear from you in this regard.

[32] Attached was a timeline prepared by Mr Hutchinson over his treatment.

[33] La Bella instructed its lawyers, who wrote back on 10 February, asking for more details and noting that Mr Hutchinson had not returned to work and had handed back work items through another staff member. It was noted that absence of two or more working days constituted abandonment and La Bella asked Mr Hutchinson to confirm whether he had decided not to return to work.

[34] In response it was stated that it was unreasonable and unlawful to expect him to return to work to such an unsafe working environment and that his holiday pay was overdue.

[35] In response La Bella's solicitors stated that Mr Hutchinson had still not provided sufficient details of his concerns and that it was still unknown whether Mr Hutchinson had resigned or abandoned his employment, but that he was required to give two weeks notice and that if proper notice had not been given an equivalent amount to the notice period could be deducted.

[36] While it is now claimed that the letter of 2 February was designed to initiate the conversation and to provide La Bella with an opportunity to consider matters, I conclude that in actual fact it constituted notice of resignation with immediate effect, together with a claim later clarified as constructive dismissal. La Bella decided that Mr Hutchinson had not given two weeks notice and therefore deducted that sum from his final pay accordingly.

[37] Further correspondence followed, but matters were unable to be resolved despite subsequent mediation. There has since been no resolution between the parties, despite discussions during the course of the investigation process. It therefore falls to the Authority to determine the matter.

Determination

Safe Working Environment

[38] I do not accept that Mr Hutchinson was forced to work in an unsafe working environment for which the responsibility lies with La Bella. First, I have already noted the serious personality clash and difficulties between Mr Hutchinson and Mr Giorgi. I conclude that the facts do not allow for any finding of bullying and harassment.

[39] Second, the only event on which an unsafe working environment could be sheeted home against La Bella (through Mr Giorgi) were his actions in closing the fridge door on Mr Hutchinson. In the particular circumstances of the case, where there was a major argument between Mr Hutchinson and Mr Giorgi, where Mr Hutchinson (whatever provocation he may have been under) swore viciously at Mr Giorgi on two occasions, where he would not follow Mr Giorgi's instructions to go home, and where Mr Giorgi felt concerned about his own personal physical safety, Mr Giorgi's actions in closing the fridge door on Mr Hutchinson, although not justifiable on the grounds of self defence, were not so serious as to constitute an ongoing threat to Mr Hutchinson's safety. He was not hurt and this was very much a on-off, with the parties working in close contact subsequently without incident. Furthermore La Bella took the matters up with Mr Hutchinson and Mr Giorgi, albeit not as thoroughly as it might have, through meetings on 27 January and 1 February.

Disciplinary Processes and Communication

[40] I do not consider that La Bella failed in its duties to Mr Hutchinson by failing to adopt due process in respect of disciplinary issues. La Bella in fact never pursued any formal disciplinary issues against Mr Hutchinson, despite clearly having grounds to do so in relation to his swearing twice at Mr Giorgi and not following his direction to go home immediately thereafter. Mr Hutchinson was appropriately told later that if he did swear again it would be considered serious misconduct and could lead his dismissal. He can have expected nothing less.

[41] In relation to La Bella's other concerns a fair and reasonable employer would be adopting quite appropriate practice by questioning staff if they knew anything about shrinkage, and informing them of the existence of security cameras following losses. That approach simply does not mean that those staff were being targeted as

potential suspects. Indeed if Mr Hutchinson had not been told of the existence of the surveillance cameras that could have in fact implied that he was under suspicion. I therefore do not accept there was any breach of duty by La Bella in telling Mr Hutchinson of the existence of cameras because of losses at the bar. Finally, I note that an employer is entitled to raise performance issues such as the drinking of wine at work with its staff.

Unilateral Variation of Employment

[42] I conclude that La Bella's offering of lesser hours to Mr Hutchinson in January was not in breach of its employment agreement with him. As analysed above, his employment agreement does not guarantee a minimum number of hours to Mr Hutchinson. Mr Hutchinson had not been provided with what he claims is the minimum number of hours on many previous occasions, although I accept that that was predominantly at his own request. Mr Hutchinson had not worked in January before, but had been told that there was no work at the restaurant in January 2009 and he knew that it was not busy in January 2010.

[43] Therefore there was no restriction on La Bella reducing hours of work for Mr Hutchinson to cover the lesser availability of work. I accept, however, that it would have been more prudent to share the reduced hours around more evenly, even though La Bella was acting within its discretion to offer greater hours to another waiter for a short period.

[44] La Bella did, however, offer Mr Hutchinson additional hours at its Petone restaurant, which was a genuine offer and which would not have inconvenienced Mr Hutchinson too much to accept. However, he was not required to do so and I make no adverse finding in that regard. Rather it is simply that in determining the responsibilities between the parties I have concluded that La Bella did not unilaterally vary the agreement when it reduced his hours, during what may have only been a temporary period in January.

Constructive dismissal

[45] In *Auckland Shop Employees Industrial Union of Workers v. Woolworths (New Zealand) Ltd* [1985] ACJ 963, the Court of Appeal held that there were essentially three categories of constructive dismissal, two of which are relevant here, namely: that an employer has followed a course of conduct with a deliberate and

dominant purpose of coercing an employee to resign and where a breach of duty by the employer leads a worker to resign.

[46] It is clear from the findings of fact in this case that La Bella had not followed a course of conduct with the deliberate and dominant purpose of coercing Mr Hutchinson to resign. While it suggested on 1 February that resignation was an option open to him if he did not want to work with its management, that is not the same as trying to coerce his resignation. Indeed, had La Bella wished to do so it had the perfect opportunity to provide for the end of Mr Hutchinson's employment in response to his twice telling his manager to *go f... himself*.

[47] The Authority is therefore required, in assessing the final category, as discussed in *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168, to determine whether any proven breach of duty was of sufficient seriousness to make it reasonably foreseeable by La Bella that Mr Hutchinson 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.

[48] First, I have already found on the facts that there have been no serious breaches of duty by La Bella against Mr Hutchinson, even though I accept the genuineness of Mr Hutchinson's perception that he was singled out for unfair treatment by Mr Giorgi. For instance, while it may have been possible for La Bella to have better allocated the roster, but in so allocating it in the way it did it breached no contractual obligation to Mr Hutchinson.

[49] Again while it was not the best thing to ask Mr Hutchinson if he intended to resign, I accept that La Bella was doing its best to make it clear to Mr Hutchinson that his attitude needed to change if he was to continue to work for it. This was the context in which Mr Cacace questioned whether Mr Hutchinson was an *arsehole*. In particular, it was appropriate to make it clear to Mr Hutchinson on 1 February that things could not continue as they were, particularly after he had told Mr Giorgi to *go f... himself* on two occasions.

[50] Second, Mr Hutchinson was simply not prepared to wait for two weeks for the co-ordinator to return from leave, to attempt to sort matters out. That was clearly part of her role, she was a new person on the scene as far as Messrs Giorgi and Hutchinson

were concerned, and was part of the management team of La Bella. Mr Hutchinson had no reasonable grounds to consider that the co-ordinator would be unable to assist him, and he gave her no opportunity to do so. Given that this was a reasonable and genuine approach by La Bella, Mr Hutchinson jumped the gun in not waiting for this to happen. I do not doubt the genuineness of his belief that nothing would occur, but the fact is that given the relatively minor breaches of duty that had occurred (with the possible exception of the fridge incident, which Mr Hutchinson himself had in some ways had a fundamental part in), it was not reasonably foreseeable that he would resign with immediate effect. This is particularly so in the situation where a new person was being inserted into the conflict, which was a very positive initiative.

[51] Thus while I accept that Mr Hutchinson did resign because of his perception of the way he was treated by La Bella and its management, I do not accept that these were serious breaches of duty, if breaches at all, on the part of La Bella. Where there may have been a breach of duty was in Mr Giorgi's response to Mr Hutchinson's apparent refusal to return home when instructed during the argument, that was not repeated and the parties worked together without any further such blow ups. It was also not a fundamental issue that led to Mr Hutchinson resigning because he carried on work for a number of shifts thereafter.

[52] For all the above reasons I therefore dismiss the claim for constructive dismissal. Even if I were wrong, Mr Hutchinson would not be entitled to any lost wages, because he failed to mitigate his loss by promptly looking for alternative employment. Furthermore, any other compensation would be reduced by his contributory actions around his actions of 20 January and his failure to wait two weeks for the co-ordinator to help address his working environment.

Deductions from Holiday Pay

[53] Clause 11a of the employment agreement provides that either party will give the appropriate notice period in writing. This was two weeks in Mr Hutchinson's case. I accept that he did not give two weeks notice in writing, in fact he effectively gave no notice. If he had given proper notice, however, Mr Hutchinson would only have had to work the one shift he was rostered on for, as I accept Mr Hutchinson's undisputed evidence that in the next two weeks he had only been rostered on for one shift, namely 2 February. It therefore follows that any forfeiture would be limited to

payment for one shift and therefore he is entitled to be paid the sum of \$686.33 claimed, less \$97.25 for the shift on 2 February, totalling \$589.08 net, and I so order.

Summary

[54] There were serious issues which needed to be addressed by La Bella between Mr Giorgi and Mr Hutchinson, for which fault lay on both sides. Had La Bella not decided to insert the staff and management co-ordinator into the situation to try and put things on an even keel, then Mr Hutchinson may well have been right to leave and claim that he had been unjustifiably dismissed. However, Mr Hutchinson never gave this co-ordinator any opportunity to resolve matters and therefore it was not reasonably foreseeable that he would resign when he did.

[55] I have concluded that Mr Hutchinson was not unjustifiably disadvantaged or unjustifiably constructively dismissed due to the issues between him and his new manager, the latter in particular because steps were being taken by La Bella to address his concerns.

[56] La Bella was however quite wrong to deduct a full two weeks pay from Mr Hutchinson's holiday pay due to the absence of notice given, and therefore I have concluded that he be paid the sum of \$589.08 net.

Costs

[57] Costs are reserved.

G J Wood
Member of the Employment Relations Authority