

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Andrew Jackson (Applicant)
AND David and Aideen Parker trading as Café 111 (Respondent)
REPRESENTATIVES Andrew Jackson In person
Michaela Stevenson, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 21 December 2005
DATE OF DETERMINATION 7 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] The applicant (Mr Jackson) was employed as a barista and café waiter at Café 111 Queenstown where he was employed by the respondents (Mr and Mrs Parker).
- [2] Mr Jackson says he was unjustifiably dismissed on 20 July 2005 and he had previously suffered disadvantage as a consequence of the unjustifiable actions of the employer in arbitrarily reducing his hours of work.
- [3] Mr and Mrs Parker say that the dismissal was justified on the grounds of serious misconduct in that Mr Jackson failed to obey lawful and reasonable instruction and they deny that his hours of work were arbitrarily reduced.
- [4] Mr Jackson had worked at Café 111 under two separate owners since November 2002. He commenced employment with Mr and Mrs Parker on 3 September 2003.
- [5] Mr Jackson says that he and Mr and Mrs Parker sat down together and agreed that he would work full time as a barista which, according to his evidence, was 37-40 hours a week over five days.
- [6] Mr Jackson's evidence was that he was a full time permanent employee who had agreed to work that span of hours throughout the year.
- [7] Mr and Mrs Parker on the other hand said in their evidence that Mr Jackson was, like all their other staff, only ever employed on a casual basis. Mrs Parker said that she and her husband had agreed with Mr Jackson that his hours would not go below 20 hours per week but that other than that, there were no guaranteed hours as Queenstown businesses of this sort were seasonal.

[8] It seems that the relationship between the parties was initially very good but by the end of calendar 2003, Mr and Mrs Parker's evidence is that they were receiving the odd complaint from customers about Mr Jackson's attitude.

[9] Mr and Mrs Parker say that Mr Jackson had four verbal warnings and one written warning during his period of service with them and that all of these warnings related to issues raised by customers of the café.

[10] Matters came rather to a head on 20 July 2005 when Mr Parker instructed Mr Jackson not to ask customers whether they wanted strong or weak coffee. Mr Parker's evidence (which I accept) was that they had asked Mr Jackson not to ask this question on a number of previous occasions.

[11] Mr Jackson agrees that his retort at the time was something to the effect: *put it in writing*. At the investigation meeting, Mr Jackson wanted me to accept that he meant both that the instruction should be in writing but also that his employer should have the information up on a board so that customers could see what was required of them.

[12] Mr and Mrs Parker point out (quite correctly) that there was no suggestion of the notice to customers in Mr Jackson's brief of evidence and they say that the notice to customers idea is nothing more than after the fact rationalisation.

[13] In any event, the altercation continued with Mr Parker insisting that Mr Jackson not ask the offending question and Mr Jackson repeating his mantra again.

[14] Mr Parker's evidence, which I accept, is that he then satisfied himself that Mr Jackson was refusing to follow his request, in the absence of it being put in writing, and after giving Mr Jackson a number of opportunities to follow that instruction, and Mr Jackson having continued to insist that he wanted the instruction in writing, Mr Parker then dismissed him summarily.

Issues

[15] There are only two issues which the Authority needs to determine. These are:

- (a) Whether the employment relationship between the parties was casual or not; and
- (b) Whether the summary dismissal of Mr Jackson was justified or not.

Casual employment?

[16] I am absolutely satisfied on the basis of the evidence I heard that Mr Jackson was employed casually. It is clear that there was no written employment agreement and that is unsatisfactory, but it does not alter the factual position as I see it.

[17] Mrs Parker gave clear evidence which was not challenged that café work in Queenstown is seasonal in nature.

[18] I accept Mrs Parker's evidence that all the Parkers' other staff had completed casual employment agreements and that the only reason that Mr Jackson's agreement had not been completed was an oversight on her part.

[19] It seems more rather than less likely that Mr Jackson would be employed on a similar basis to the basis that other staff are employed on, and given the evidence of the seasonal nature of the café

trade in Queenstown (which I accept), it seems unlikely that there could have been a promise that Mr Jackson would effectively enjoy full time hours.

[20] As a matter of fact, the wage book records show that Mr Jackson's hours fluctuated dramatically with some weeks showing him working over 40 hours and other weeks considerably less than that. Certainly, the wage book appears consistent with Mr and Mrs Parker's evidence that they endeavoured to ensure that Mr Jackson got a minimum of 20 hours each week.

[21] I am not persuaded that Mr Jackson was ever promised a full time position with guaranteed hours of 37 to 40 hours per week as he claims although the wage book certainly shows that he worked those sorts of hours from time to time.

[22] Given the nature of the business and the nature of the employment relationship as I have found it on the evidence, I do not believe that Mr Jackson has suffered any disadvantage.

The dismissal

[23] Mr Jackson was dismissed summarily for serious misconduct in refusing to obey a lawful and reasonable instruction.

[24] Mr Jackson says that Mr Parker was *wild* with him at the time of the dismissal and that certainly is a troubling aspect, given that Mr Parker admits that he was cross at the time. It is well tried law that a dismissal effected in the heat of the moment by an employer may be unsafe.

[25] However, that is the only aspect about the dismissal which troubles me. Mr Parker's unchallenged evidence was that he gave Mr Jackson a number of opportunities to obey a lawful and reasonable instruction. I find that an instruction to treat a business' customers in a particular way is both lawful and reasonable.

[26] The only issue can be whether dismissal is the appropriate consequence to flow from Mr Jackson's failure to obey that lawful and reasonable instruction. In my opinion, it is available to a fair and just employer to dismiss a worker for serious misconduct on a summary basis when that worker fails to follow a lawful and reasonable instruction after having been given more than one opportunity to follow his employer's direction.

[27] No doubt it is disappointing that the parties were not able to resolve their differences by agreement, but in the end it seems that Mr Jackson's view of what was appropriate was not Mr and Mrs Parkers' view. Mr Jackson seemed to feel his *style was being cramped* by Mr and Mrs Parker and they plainly felt that Mr Jackson was simply not interested in caring for their customers in the way that they wanted. In the result, it is available to Mr and Mrs Parker as the employer to make the rules about the way that their business is to respond to their customers, provided they do it lawfully and having regard to Mr Jackson's legal rights.

[28] In my view, they have done precisely that and I do not think that their summary dismissal of Mr Jackson is unjustified.

[29] While it is regrettable that Mr Parker was cross at the time of the dismissal, I do not think that that aspect outweighs the other factors tending towards justification of the dismissal in all the circumstances.

Determination

[30] I find that the termination of Mr Jackson's employment by Mr Parker on behalf of Mr and Mrs Parker was in all the circumstances justified.

[31] I have also decided that Mr Jackson was a casual employee without fixed hours and that he did not suffer any disadvantage as a consequence of the way that his hours were managed by the employer.

[32] It follows that Mr Jackson's claim before the Authority fails. The Authority is unable to assist Mr Jackson with his employment relationship problem.

Costs

[33] Costs are reserved.

James Crichton
Member of Employment Relations Authority