

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kevin Richard Jenkins (Applicant)
AND Crater Brewing Company Limited (Respondent)
REPRESENTATIVES Mr Jenkins in person
No appearance for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 3 February 2005
DATE OF DETERMINATION 16 February 2005

DETERMINATION OF THE AUTHORITY

- [1] In his statement of problem Mr Jenkins claims he was unjustifiably dismissed. As remedies Mr Jenkins has asked the Authority to make awards against his previous employer including a requirement to furnish a written apology and a written reference, reimbursement of wages lost as a result of his grievance, payment of overtime worked but not previously paid, compensation for hurt and humiliation, and costs. At the investigation meeting I advised Mr Jenkins that the Act did not allow the Authority to require his employer to furnish a written apology and reference.
- [2] The respondent did not respond to the statement of problem. After attempts to contact Crater Brewing Company Limited (CBCL) failed, the Authority set the date for the investigation meeting and required the applicant to serve the notice of investigation meeting on the Directors of Crater Brewing Company Limited.
- [3] The Authority is satisfied that Mr Twyford of Twyford and Associates served the notice of investigation meeting on Mrs Brown who confirmed she was a Director of CBCL. The notice was served at 5.31pm on Tuesday 21 December 2004.
- [4] The consequences of non-attendance at the investigation meeting are set out in the notes to the Notice of Investigation Meeting.
- [5] The respondent did not attend the investigation meeting. I adjourned the meeting briefly at 10.10am and made enquiries of the Authority Support staff as to whether any contact had been made by the respondent to advise that the respondent was attending but was perhaps running late. No such contact had been made.
- [6] I considered the matter in terms of clause 12 of Schedule 2 of the Act which is as follows:

"12. Power to proceed if any party fails to attend-

If, without good cause shown, any party to a matter before the Authority fails to attend or be represented, the Authority may act as fully in the matter before it as if that party had duly attended or been represented.”

- [7] I did not consider that the Respondent had shown “good cause” for its failure to attend the investigation meeting. Accordingly I proceeded to act as fully in the matter as if the respondent had attended.
- [8] As at the date of the investigation meeting CBCL was no longer operating as a company and is about to be removed from the Companies register.

Background

- [9] As the name of the company suggests the business of CBCL was brewing beverages such as beer, ready-to-drink mixers, spirits, water, and sports/energy drinks.
- [10] Mr Jenkins had been employed by “U-Brew” when the business had been owned by Mr Ian Bedford.
- [11] In September 2003 Mr Noel and Mrs Wendy Brown took over ownership of the business under their registered company of CBCL. Mr Jenkins had left his employment with Mr Bedford, but Mr and Mrs Brown sought him out and asked him to work for them.
- [12] Mr Jenkins was employed on 23 September 2003 under the terms of a written individual employment agreement. The agreement provided for a three month trial period.
- [13] Work progressed through the three month trial period without incident and on 22 December 2003 Mr Jenkins employment was confirmed with a further written employment agreement between the parties. There were no changes to the written terms and conditions of employment.
- [14] The terms and conditions of employment relevant to this matter are:
- Termination: One month in writing by either party
 - Remuneration: Hourly rate of \$10.50 per hour gross for 40.5 hours per 5-day working week totalling \$425.25 gross (341.87 net) payable weekly on each Tuesday following each week worked. Payment for wages was to be made by direct debit into the Employee’s nominated account. ACC and superannuation contribution to be paid as per industry standards.
 - Working hours: 9am-6pm Tuesday – Friday inclusive and Saturday 9am-4pm, or otherwise by arrangement.
- [15] On 1 January 2004 Mr Jenkins worked after being asked by Mr Brown to work. Mr Brown and Mr Jenkins discussed the matter of payment for overtime. Mr Jenkins told the Authority that Mr Brown suggested to Mr Jenkins that rather than pay him money for overtime, he would pay for an overseas holiday for Mr and Mrs Jenkins. Mr Jenkins agreed with this proposal.
- [16] Mr Jenkins told the Authority that everything was going well until Monday 9 February 2004. Mr Jenkins had been experiencing some health difficulties and had an appointment with his Doctor. He worked during the day as usual and left at about 2.30pm. Mr Jenkins said that when he left he noticed that Mrs Brown was in the office and was drinking.

- [17] Mr Jenkins attended his Doctors appointment and returned home at about 4.30pm. On his arrival Mrs Jenkins told Mr Jenkins he had better return to work "...*pronto*..." as he had been sacked.
- [18] Mrs Jenkins advised her husband that Mrs Brown had rung Mrs Jenkins while Mr Jenkins was at his appointment and told Mrs Jenkins that Mr Jenkins was sacked and that she [Mrs Jenkins] should pick up his final pay.
- [19] Mr Jenkins returned to work immediately. He entered into a discussion with Mrs Brown (who was still drinking) who accused Mr Jenkins of being too slow. Mr Jenkins explained to Mrs Brown that his speed was dictated by the speed of the machinery as everything is machine driven. Mrs Brown accepted this explanation. When asked by the Authority to describe more of the conversation he had with Mrs Brown Mr Jenkins told the Authority that a lot of what Mrs Brown was saying did not make sense. In any event, Mrs Brown withdrew the dismissal.
- [20] The next day Mr Jenkins returned to work as usual. Mr Noel Brown also attended and asked Mr Jenkins to explain what had happened the day before. Mr Brown was very apologetic. The following day, 11 February 2004, Mrs Brown also apologised to Mr Jenkins for the incident on 9 February 2004.
- [21] Mrs Brown wrote to Mrs Jenkins on that same day apologising for her outburst and asking for forgiveness.

Events leading to termination

- [22] Work continued normally for Mr Jenkins until 14 April 2004. During this period Mr Jenkins began working regularly on a Monday even though it was not a normal day of work for him. Mr Jenkins told me he needed to work on the Mondays as the work was getting behind. Mrs Brown would periodically attend work on a Monday. According to Mr Jenkins Mrs Brown never questioned why he was there.
- [23] On Wednesday 14 April 2004 Mrs Brown approached Mr Jenkins and asked him to take a week off the following week to think about where he was going. Mr Jenkins told me that at the time he didn't think anything of it, he never questioned Mrs Brown as to why she felt it necessary for him to take a week off, neither did he ask Mrs Brown how or even if, the week would be paid for.
- [24] As events transpired, Mr Jenkins did take the following week off work. He was paid his usual wages for the week. During the week Mr Jenkins attended work for 7 hours after Mrs Brown rang him and asked him to come into work to complete some jobs for her.
- [25] On 21 April 2004 Mr Jenkins had completed his days work. Both Mr and Mrs Brown were in the office that day. As he was leaving Mrs Brown suggested that Mr Jenkins reduce his hours to part-time. As Mr Jenkins was about to attend a specialist regarding his medical condition Mr Brown suggested the decision be left until a diagnosis had been made.
- [26] On 11 May 2004 at about 3.30pm Mr Jenkins was carrying out his usual duties when Mrs Brown, who was on her way out of the office, asked to see him. Mrs Brown advised Mr Jenkins that she and Mr Brown had had discussions over the weekend and had decided Mr

Jenkins should become a part-time employee. No reasons were provided to Mr Jenkins at the time. Mr Jenkins requested and was granted some time to discuss the situation with his wife.

- [27] Following discussions with both his wife and his parents, Mr Jenkins decided not to accept the part-time option.
- [28] On Thursday 13 May 2004 Mrs Brown came into work at about 9.40am at which time Mr Jenkins advised Mrs Brown that he would not become a part-time employee. Mr Jenkins told me Mrs Brown advised him that he knew the consequences of that decision and that Mr Jenkins was to finish up on the following Saturday. Mr Jenkins asked for Mrs Brown to confirm that in writing. Mr Jenkins continued to work through the day as usual.
- [29] On Saturday 15 May 2004 after completing his duties for the day and as both Mrs Brown and Mr Jenkins were leaving, Mrs Brown handed Mr Jenkins a letter. Mr Jenkins read the letter after he got into his car.
- [30] The letter purported to accept a resignation from Mr Jenkins with a stated regret that Mr Jenkins did not wish to work part-time.
- [31] Mr Jenkins was annoyed at the contents of the letter and went to seek advice from his parents. The following week Mr Jenkins raised a personal grievance for unjustified dismissal.

Discussion and Determination

- [32] The employment agreement required notice in writing of one month. Neither Mr Jenkins nor CBCL provided any such notice.
- [33] Mr Jenkins suffers from Parkinson's disease. This diagnosis was made on 22 June 2004, more than one month after the termination of his employment.
- [34] Mr Jenkins says he does not know why the Browns wanted him to work part time, although it is apparent from the evidence provided to the Authority that Mr Jenkins had been suffering the effects of Parkinson's since about January 2004 and possibly before that.
- [35] One of the effects of Parkinson's is that it may take longer for a person to carry out ordinary tasks. If his condition was affecting Mr Jenkins ability to perform his duties then CBCL had the right to discuss this with him. However, the Human Rights Act 1993 prohibits discrimination on the basis of disability and requires employers to accommodate disabilities where practicable. There is no evidence that CBCL discussed Mr Jenkins performance with him or that they tried to reasonably accommodate him to enable him to carry out his tasks fully.
- [36] What Mrs Brown did, was to offer Mr Jenkins part time work, which Mr Jenkins was free to accept or not. Mr Brown also provided Mr Jenkins the opportunity to put any decision off until such time as he had received a diagnosis of his condition. Mrs Brown acted prematurely when she dismissed Mr Jenkins in May. The diagnosis was not made until June 22.

- [37] The authority is satisfied that Mr Jenkins did not resign from his employment as contended by Mrs Brown in her letter of 15 May 2004. The Authority finds that Mr Jenkins was dismissed by Mrs Brown on 13 May 2004 with only two days notice.
- [38] It is well known that if an employer wishes to dismiss an employee for performance related problems an employee is entitled to know what aspects of his performance are not up to standard and to be provided with an opportunity to bring his performance up to the required standard. No such opportunity was provided to Mr Jenkins.
- [39] It is also well known that before an employer can take the ultimate decision to dismiss an employee, the employer is required to follow due process which requires the employer to put their concerns to the employee and seek a full explanation, giving the employee notice that such a discussion is to take place, that the employee is entitled to representation, and what the possible consequences of the meeting may be. No such process was followed in this case.
- [40] It is the finding of the Authority that the decision to dismiss was both substantively and procedurally unfair.

Remedies

Arrears of wages claim

Overtime

- [41] Mr Jenkins seeks payment of overtime worked by him with the knowledge of the employer and payment for days in lieu where he worked on a public holiday. Mr Jenkins told the Authority that while he agreed to an alternative arrangement for the payment of overtime, that agreement was never fulfilled and he therefore seeks payment for the time worked and days in lieu.
- [42] Mr Jenkins provided a list of all the days and hours he worked as overtime. Mr Jenkins ordinary days of work were Tuesday to Saturday inclusive. The overtime hours he claims relates to work carried out on 13 Mondays between 5 January 2004 and 5 April 2004 and one Sunday on 11 January 2004.
- [43] The Authority is satisfied on the evidence provided, that Mr Jenkins worked each of the days he claims.

Crater Brewing Company Limited is ordered to pay arrears of wages for overtime worked in the amount of \$1002.75 gross.

Days in lieu for working public holidays

- [44] Mr Jenkins seeks payment for days in lieu for two public holidays worked on Thursday 1 January 2004 and Friday 6 February 2004.
- [45] The Authority is satisfied that Mr Jenkins worked on each of the two days as claimed.

Crater Brewing Company Limited is ordered to pay arrears of wages for days in lieu in the amount of \$183.75 gross.

Annual Leave

- [46] Mr Jenkins claims that CBCL miscalculated his annual leave entitlement at the end of his employment. Mrs Brown's letter of 15 May 2004 shows that from the calculation of 6% of gross earnings a deduction was made for one week's annual leave taken in advance. Mr Jenkins believes this is the week he agreed to spend at home, but during which time he worked 7 hours at the behest of his employer.
- [47] The Holidays Act 2003 at section 18(3) requires agreement between the employer and the employee when annual holidays are to be taken.
- [48] Mr Jenkins evidence was that there was no discussion about the time being taken off as annual leave, nor did he or Mrs Brown discuss whether he was to be paid for the time off.
- [49] The Authority is satisfied that the requirements of the Holidays Act 2003 were not met and therefore Mr Jenkins can not be said to be on annual leave during that week. The Authority is supported in this view by the fact that Mr Jenkins was required to attend work during the week to undertake duties. If Mr Jenkins had been on annual leave, then the employer could not require him to attend work.
- [50] The money deducted from Mr Jenkins final pay was an incorrect deduction. Mr Jenkins is entitled to be reimbursed for the deduction.

Crater Brewing Company Limited is ordered to pay arrears of wages for an incorrect deduction for anticipated annual leave from Mr Jenkins final pay in the amount of \$425.25 gross.

Lost remuneration

- [51] Mr Jenkins seeks reimbursement for lost remuneration in accordance with section 123(b) of the Employment Relations Act 2000.
- [52] Mr Jenkins gave compelling evidence of the concerted efforts he took to try and secure alternative employment without success. Since January 2005 Mr Jenkins has once again been working for Mr Ian Bedford who is again, the owner of the brewing business. Mr Jenkins is carrying out the same role for Mr Bedford that he undertook for the Brown's. Mr Bedford took back the ownership of the business after Mr and Mrs Brown failed to meet their financial obligations to Mr Bedford.
- [53] Mr Jenkins was entitled to receive at least one month's notice of his dismissal. He received only two days. Mr Jenkins was out of work for seven months. He claims six months loss. The Act allows the Authority to exercise its discretion to award more than three months lost wages. This is an appropriate case for the exercise of that discretion.

Crater Brewing Company Limited is ordered to Mr Jenkins an amount equivalent to six months loss of wages (\$8,888.62 gross).

Compensation for hurt and humiliation

- [54] Mr Peter Jenkins, brother of the applicant, appeared at the Authority and gave compelling evidence of the impact the dismissal had on Mr Jenkins. The Authority is satisfied that Mr

Jenkins suffered hurt, humiliation and distress as a result of the dismissal and the manner in which it was carried out.

Crater Brewing Company Limited is ordered to pay to Mr Jenkins \$3,500 as compensation for hurt, humiliation and distress.

Contribution

- [55] Section 124 of the Employment Relations Act 2000 requires the Authority to take into account the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if the actions so require, for the remedies to be reduced accordingly.
- [56] I am satisfied that Mr Jenkins has not contributed in any way to the conduct of the respondents which resulted in this unjustified dismissal.

Costs

- [57] Mr Jenkins claims a contribution towards the costs he has incurred in this matter. Although Mr Jenkins was not represented at the Investigation Meeting, up until the investigation meeting Mr Jenkins was instructing and was represented by Counsel who assisted Mr Jenkins in the preparation of his case.
- [58] Mr Jenkins has provided the Authority with copies of the invoices which show that he has paid \$2,362.50 plus disbursements of \$309.45. Mr Jenkins has received a discount of \$600.00 by the firm initially representing him.
- [59] I am of the view this is an appropriate case for an award of costs. The case was important to Mr Jenkins but was not a complex matter and the investigation meeting was concluded within 2 hours with further information provided in writing subsequently. In all the circumstances and taking into account the principles relating to costs as set out in *New Zealand Airline Pilots Association v The Registrar of Unions* [1989] 2 NZILR 550 and *Reid v Fire Services Commission* [1995] 2 ERNZ 38 I am of the view that an appropriate award of costs including disbursements is \$1200.00.

Crater Brewing Company Limited is ordered to pay to Mr Jenkins the sum of \$1200.00 as a contribution to his costs and disbursements.

Summary of Orders

- [60] Crater Brewing Company Limited is ordered to pay the following amounts to Mr Jenkins within 14 days of the date of this determination:
- Arrears of wages for overtime worked in the amount of \$1002.75 gross; and
 - Arrears of wages for days in lieu in the amount of \$183.75 gross; and
 - Arrears of wages for an incorrect deduction for anticipated annual leave from Mr Jenkins final pay in the amount of \$425.25 gross; and
 - An amount equivalent to six months lost wages (\$8,888.62 gross) pursuant to section 123(b) of the Employment Relations Act 2000; and

- \$3,500 as compensation for hurt, humiliation and distress pursuant to section 123 (c)(i);
and
- The sum of \$1200.00 as a contribution to Mr Jenkins costs and disbursements.

Vicki Campbell
Member of Employment Relations Authority