

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Adrienne Joan Knapp
AND Clinkers Ltd trading as "The Old Bill"
REPRESENTATIVES Tony Bamford, Counsel for Applicant
Frank Freeman, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING Nelson 4 September 2006
DATE OF DETERMINATION 27 September 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Knapp) alleges that she was constructively dismissed from her employment as a duty manager with the respondent (Clinkers) on 19 February 2006.

[2] Clinkers resists that claim and says that Ms Knapp tendered her resignation, was asked to reflect on her position but then, when the resignation was tendered a second time, it was accepted.

[3] Ms Knapp commenced her employment with Clinkers on 11 August 2005 and initially worked as a cook and a barmaid but, after obtaining her bar manager's licence, she was rostered on a variety of shifts as a duty manager.

[4] There was a WINZ subsidy in place for Ms Knapp's employment with Clinkers and this subsidy was predicated on Ms Knapp working at least 30 hours a week.

[5] In her brief of evidence, Ms Knapp refers to an issue that arose shortly before the termination of her employment when she was rostered for less than 30 hours a week and she drew the attention of her immediate manager to the fact that the WINZ subsidy would not be payable in those circumstances. In evidence at the investigation meeting, Ms Knapp accepted that this issue was *not relevant* to the termination of her employment.

[6] What she said was relevant to the circumstances of the termination of her employment was an armed robbery and kidnapping at Clinkers which took place in October 2004, that is about nine months before Ms Knapp commenced her employment with Clinkers and roughly 15 months before the termination of her employment.

[7] Ms Knapp's evidence was that, as far as she could tell, *nothing had been done to improve security since the robbery*. It was this belief, she said, that informed her behaviour at the time her employment came to an end.

[8] On 15 February 2006, there was an incident which ultimately led to the employment relationship between the parties being severed. Ms Knapp was the duty manager and at about 2.45am on 15 February, all the patrons of the bar having, she believed, vacated the premises, she set the security alarms, locked up and went home. She was alone at the time, having earlier released her co-worker who left about 1.30am.

[9] Much to the amazement of everybody it seems, it became clear that a patron at the bar (subsequently identified as Chris Adams) had remained in the premises after lock up and had subsequently set off the security alarm a number of times which resulted in two call outs by the security firm.

[10] On the first occasion that the security guard attended the premises, he checked that the building was secure and that the lights were all off and, seeing nothing untoward, departed the scene. The alarm triggered again and he returned to the scene and discovered the individual we now know as Chris Adams exiting the premises. In the meantime, a representative of Clinkers (Mr Barker), had arrived at Clinkers and, having satisfied himself that everything was in order inside, allowed Mr Adams to leave.

[11] Mr Adams' story, which was not tested because he was not called as a witness, was that he had been told by a staff member that he could lie down out the back because he had had too much to drink and he should sleep it off.

[12] Ms Knapp says she knew nothing of these events until she was handed a letter by Mr Brown of Clinkers at around 4pm on 15 February 2006 by which time she was back at work on another shift. That letter summoned Ms Knapp to a meeting on 17 February.

[13] At the 17 February meeting, Ms Knapp read an email of 17 February after distributing copies to the Clinkers' representatives present at the meeting. In that email, she responded fully to the allegations levelled at her by Clinkers in its letter of 15 February. As well as disagreeing with the factual basis for some of the allegations, she absolutely denied any wrongdoing and sought reassurance about security issues at the bar as a consequence of this most recent incident and the earlier historical robbery.

[14] Ms Knapp's evidence (which is denied by Clinkers) is that her concerns about safety were minimised by the employer and that she *wasn't taken seriously and wasn't believed*. That being her position, Ms Knapp said that at the end of the meeting she offered her resignation.

[15] Mr Brown, who is one of the directors of Clinkers, gave evidence for the employer. He was the principal protagonist for Clinkers at the 17 February meeting. He said in his evidence that Ms Knapp verbally offered her resignation at the point at which the discussion between the parties had effectively concluded and at a time when he was planning to adjourn the meeting so that he could talk to Mr Chris Adams, the Police and the other staff member involved on the night in question.

[16] When Ms Knapp offered her resignation, Mr Brown said that his initial instinct was to accept it, but that he was discouraged from that course of action by his colleague, Mr Barker, who apparently thought that Ms Knapp should think about it over the weekend. That is in fact the position that Clinkers adopted.

[17] Ms Knapp did in fact think about matters over the weekend but on Sunday, 19 February, she wrote to Mr Brown by email and confirmed her resignation. The letter is four pages long and it sets out in some detail why Ms Knapp felt it necessary to confirm her resignation. As I mentioned earlier, fundamental to Ms Knapp's feeling that she had no choice but to tender her resignation was the feeling that she was *not believed* by Clinkers. Amongst other things, she advanced the logical proposition that it made no sense for her to have deliberately left an intoxicated patron on the premises and then set the alarm and gone home.

[18] Then, by letter dated 7 April 2006, Ms Knapp's solicitor raised a personal grievance with Clinkers alleging that she had been constructively dismissed.

Issues

[19] The only issue for determination is whether Ms Knapp resigned or was constructively dismissed. In order to determine that issue, I will review the evidence under the following headings:

- (a) The employer's letter of 15 February 2006;
- (b) The meeting of 17 February 2006;
- (c) The resignation letter of 19 February 2006.

The employer's letter of 15 February 2006

[20] The letter of 15 February summoned Ms Knapp to a meeting with her employer so that she could *have the opportunity of responding to the matters detailed below*. Those matters, which are described as *matters of concern* are:

- (a) *That you have jeopardised our liquor licence by allowing a supply to an intoxicated person.*
- (b) *That you have jeopardised our liquor licence by allowing an intoxicated person to remain on the premises.*
- (c) *Left the patron unsupervised in the rear part of the building "to sober up".*
- (d) *That at 2.45am on Wednesday morning on completion of your shift, you set the alarm and locked up leaving this person on the premises.*

[21] It became clear during the investigation meeting that Clinkers had written this letter after taking advice over the telephone from an employment advocate. Mr Brown said in his evidence that he followed the advice he was given as best he could. Mr Brown also claimed that the letter made it clear that the proposed discussion was not disciplinary in nature but simply part of an investigation process. In fact, the letter does no such thing. The letter, on the face of it, appears to state facts about Ms Knapp's conduct rather than allegations and the phrasing of the letter, in my opinion, does rather imply that the information already to hand points the finger firmly at Ms Knapp as a culprit.

[22] Very clearly, that was not the intention of Clinkers in writing the letter, and insofar as it wrote the letter on advice, I can only say that it was very badly advised. In answer to my questions, Mr Brown confirmed that he now accepted, with the benefit of hindsight, that the allegations in particular were determinative in style and did not properly convey the intelligence that these were simply issues that the employer sought to inquire into.

The meeting of 17 February 2006

[23] The meeting between the parties on this date is not in my view subject to the same criticisms that are able to be made about the employer's letter of 15 February. The meeting was minuted and Ms Knapp was asked whether she had any objection to the accuracy of the minutes. The only matters that she referred to were not matters of any substance. Accordingly, it is fair to make the judgement that both parties accepted that the minutes were a fair reflection of the general thrust of the meeting.

[24] The minutes comprise approximately 1½ A4 pages of notes which appear to be a more or less verbatim account of the interchange between the parties.

[25] The minutes confirm the evidence otherwise given that the meeting started with Ms Knapp reading her prepared statement, then proceed to a discussion about the information provided by the security company (in some detail), then traverse the question of when Ms Knapp completed her timesheet about which it seems there was some difference of opinion between Ms Knapp and Clinkers, then the information that Chris Adams had provided to Clinkers when he exited the premises in the small hours of 15 February, then records Mr Brown's suggestion that the meeting wind up so that he can talk to the Police and get a written report from the security guard.

[26] Ms Knapp's support person, Ms Farmer, is then recorded as having asked what Ms Knapp should have done if she had found Mr Adams out the back and there was then discussion about Ms Knapp feeling *unsafe*.

[27] The minutes then record Ms Knapp becoming *very upset* because Clinkers was *doubting her* and making her *look like a criminal* because of the disagreement between Ms Knapp and Clinkers about when she completed her timesheet. Mr Barker, for Clinkers, said that he did not mean to make any suggestions about Ms Knapp being a criminal or *cast any cloud over anything else*. Ms Knapp, indicated that if she was not believed in that respect, then the employer might doubt her other statements. It was at this point, after the employer had asked if there was anything more that anybody wanted to say, that Ms Knapp offered her verbal resignation.

[28] On the basis of the evidence available from the meeting, it is difficult to see anything improper in the employer's process. Ms Knapp accepted, as did her support person who also gave evidence at the investigation meeting, that it was appropriate for Clinkers to ask Ms Knapp questions as part of its investigation process. However, Ms Knapp felt that the employer had pre-judged the matter, and in particular that, because the employer had already spoken to Chris Adams on his exiting of the bar premises, the employer had formed the view that Chris Adams' evidence was to be preferred over Ms Knapp's. She told me in answer to one of my questions that *Chris Adams has not been made accountable for being on the premises but I have been made accountable*.

[29] Ms Farmer, Ms Knapp's support person, thought that Clinkers was trying to get rid of Ms Knapp, thought that it was *ganging up* on Ms Knapp and indicated that *if I had been in [Ms Knapp's] shoes, I would have handed in my notice as well*.

[30] Ms Farmer said that, in the meeting, the notes of which I have just referred to, the employer kept insisting that Ms Knapp had *put the bloke inside to sleep it off because that is what he said*. Ms Farmer said that the employer *didn't believe anything [Ms Knapp] said*.

[31] Ms Farmer thought that because the employer had yet to speak to the Police, it had made its mind up already that Ms Knapp was responsible.

[32] This theme about the Police was echoed by Ms Knapp herself in her evidence when she said, during questioning by counsel for Clinkers, that *we wouldn't be sitting here if they [she means Clinkers] had called the Police*.

[33] In fact the factual position is that Clinkers had tried to contact the Police and had left a message for the particular policeman who Ms Knapp had herself contacted once she became aware that there was an issue about Mr Adams' presence in the building. Clinkers, however, was not able to make contact with the particular police officer concerned before Ms Knapp resigned.

[34] Clearly, there is a conflict of evidence as to what happened in this meeting. The evidence of Mr Brown, which is confirmed by the minutes of the meeting which are broadly accepted by Ms Knapp, is that there was a reasonable exchange of views between the parties about the issues that were of concern to the employer and the minutes themselves acknowledge that the statement which Ms Knapp read and which goes into considerable detail as to why the allegations against her cannot be made out, was received by the meeting at its commencement.

[35] Further, and critically in my view, the minutes confirm that Mr Brown said that he thought it appropriate to bring the meeting to a conclusion so that he could conduct further inquiries before Ms Knapp announced she wished to resign. I think the timing of these events is significant because, by the time Ms Knapp decided to offer her resignation, she would have known in the most tangible way that the employer regarded the matter as still open because there were further discussions to be held. To some extent anyway, that fact goes some way to repairing the damage done by a very unsatisfactory letter written by the employer on 15 February.

[36] On the other side of the coin, the evidence for Ms Knapp, both from her own mouth and from Ms Farmer, is that the meeting was effectively a sham and that the dye was cast. I do not think that that evidence is made out and I prefer the evidence of the employer, supported as it is by the minutes that the employer took which Ms Knapp did not substantially disagree with. In my opinion, Ms Knapp and her support person would have been emotionally fraught by the employer's allegations and perhaps would not have seen things as clearly as they might otherwise have. I think their view that the employer had made its mind up is particularly given the lie by the clear statement by the employer, referred to in the minutes, that there were further inquiries to be conducted. In his evidence, Mr Brown refers to talking to Chris Adams, the Police and the other staff member on duty on the night in question. There was no reference to Mr Brown talking to Mr Adams in the minutes of the meeting. However, if the minutes are wrong on that point and he indicated at the meeting that he was talking to Mr Adams as well, that further strengthens my conclusion that this was not a meeting where Ms Knapp had no potential outcome other than the termination of her employment.

[37] I am also supported in that conclusion by Ms Knapp's own work in researching the matter between receiving the employer's ill-conceived letter of 15 February and the meeting itself. Ms Knapp put together an excellent analysis of what was wrong with the allegations that the employer appeared to be making against her and, as I mentioned earlier, emphasised the absurdity of her allowing a person the worse for drink to remain on the premises when she set the alarms and went home. The only possible explanation for Mr Adams being on the premises, Ms Knapp encourages us to reason, is that she did not know he was there and thus, at the very least, had nothing to do with telling him to lie down where says he was told to lie down.

[38] Accordingly, I reach the conclusion that the meeting itself was a fair and reasonable exercise of the employer's obligation to investigate what, on the face of it, is a serious allegation and that the process used by the employer did not unfairly impact on Ms Knapp at all.

The resignation letter of 19 February 2006

[39] Ms Knapp wrote this letter on the Sunday immediately after the Friday meeting and forwarded it by email to Clinkers. In this letter, she confirms the verbal resignation which she gave at the meeting and then sets out in reasonable detail why she felt obliged to resign. In essence, there are two strands to this letter of resignation. The first, concerns her concerns about her own health and safety in the workplace because Mr Adams had been able to remain in the bar environs without being detected, thus revisiting, as it were, fears originally generated by the earlier robbery.

[40] The second theme in the letter is the conclusion that her *integrity has been seriously questioned*. In this latter regard, Ms Knapp is referring to her contention that Clinkers preferred the version of events advanced by Mr Adams in the small hours of 15 February over the dispassionate and considered views she advanced by way of explanation.

[41] Ms Knapp makes a number of specific observations about the fact of not being believed but the essence of her complaint, it seems to me, is the allegation that the employer preferred Mr Adams' *drunken* and off-the-cuff view in the small hours of the morning to her sober and considered view in the full light of day.

[42] Ms Knapp said in answer to a question from counsel for the respondent, that *based on the tone of the meeting I didn't see it as a possible outcome that I could come back to work*. This is an interesting observation in my opinion and in fact, it seems to me, to point up the difficulty that Ms Knapp has with her claim because she really can only complain about the tone of the meeting and even that relies on her perceptions of other people's statements, which may or may not be right.

[43] What is clear is that, at the point that Ms Knapp resigned towards the end of the 17 February meeting, the employer had already made it abundantly clear that it had to make further inquiries and even when Ms Knapp furnished her written resignation, presumably the employer had taken no further steps to investigate matters because of the intervention of the weekend.

[44] It follows that in my judgment, Ms Knapp herself pre-judged the employer's response and her resignation proceeded on the erroneous footing that the employer had made it impossible for her to do anything but resign. I do not accept the logic of that. In my opinion, it was highly likely that the employer would come back and indicate that Ms Knapp had no case to answer.

[45] Certainly, there is absolutely no evidence that the employer sought a resignation from her, nor in my view is there any evidence to support a conclusion that the employer prosecuted a course of conduct designed to produce a resignation.

[46] The only possible basis on which Ms Knapp might succeed is on the footing that the employer was guilty of a breach of its duty to the employee which had the foreseeable consequence of producing a resignation. I accept that the letter written by the employer on 15 February is ill-conceived, but in my view the conduct of the meeting which followed that letter goes some way to repairing the employer's default in the production of an unsatisfactory document. Further, Ms Knapp's own behaviour and her trenchant criticism of the allegations made against her, show that she herself made proper use of the employer's meeting process to appropriately defend herself and so the notion that her resignation was somehow foreseeable seems to me remote indeed.

[47] Of course, the employer has an obligation to provide a safe workplace and, if Ms Knapp's anxieties are well placed, then that might ground her personal grievance. Again, I am left with the conclusion that Ms Knapp did not give Clinkers a chance to ensure her safety.

[48] Her primary concern was around the fact that the young patron (Chris Adams) had apparently secreted himself in the premises after the bar closed. Given that Ms Knapp did not work again for the employer after the meeting on 17 February 2006, at which she first tendered her resignation, there was no opportunity for the employer to secure her safety.

[49] I am reinforced in that conclusion by the paucity of evidence of Ms Knapp raising security issues at an earlier time. She said she was concerned about the earlier robbery, as well she might have been, but it seems she raised an issue about improved lighting on one occasion with a former manager and did not follow it up when she says no steps were taken. Conversely, the employer's evidence was that they had taken security issues seriously after the robbery and done a number of things to improve security. Mr Brown's evidence was that they had responded to the staff's concerns.

[50] In my view, the evidence of Clinkers is to be preferred on the security issues. The evidence before the Authority suggests Clinkers did take security issues seriously and did respond to staff concerns. Conversely there is little evidence of Ms Knapp making her concerns known to Clinkers except at the final meeting where she resigned before the employer could reasonably be expected to have responded appropriately. It follows that I do not think the allegation the workplace was unsafe can be made out.

Determination

[51] I have reached the conclusion, for the reasons advanced earlier in this determination, that Ms Knapp resigned her position and was not constructively dismissed.

Costs

[52] Costs are reserved.

James Crichton
Member of Employment Relations Authority