

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Nigel Craig Lines (Applicant)  
**AND** Ohau Snow Holdings Limited (Respondent)  
**REPRESENTATIVES** Quentin Stratford, Counsel for Applicant  
Alan Jones, Counsel for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 25 July 2005  
26 July 2005  
**DATE OF DETERMINATION** 21 September 2005

DETERMINATION OF THE AUTHORITY

*Employment relationship problem*

[1] The applicant, Nigel Lines, (“Mr Lines”) makes three claims against the respondent, Ohau Snow Holdings Limited (“Lake Ohau Lodge”). They are a claim of unjustifiable dismissal, an allegation of a breach of s.62 of the Employment Relations Act 2000 and an allegation of breach of s.4 of the Wages Protection Act 1983.

[2] The respondent denies the allegation of unjustifiable dismissal, accepts some blame attaches to its compliance with s.62 but seeks to minimise that blame and claims the wages deduction complained about by Mr Lines had his implied consent and approval.

[3] Mr Lines was employed by Lake Ohau Lodge as a barperson. He started work there on 25 November 2003.

[4] It seems clear that there was a breach of s.62 of the Employment Relations Act 2000. There is dispute about exactly what documents Mr Lines was given by Lake Ohau Lodge on commencement, but it is common ground that the applicant was not given a copy of any employment agreement nor was he informed of the contact details of the relevant Union.

[5] Mrs Louise Neilson gave evidence for Lake Ohau Lodge. She and her husband, Michael Neilson, are effectively the governing and managing directors of the respondent company. Mrs Neilson is, amongst other things, responsible for the administrative side of the business and gave evidence that she normally took responsibility for providing commencing employees with the appropriate documentation.

[6] I found her to be a truthful and straightforward witness and accept her evidence that part of the explanation for the failure to provide appropriate commencement documents was Mr Lines’ own

failure to produce a copy of the bar manager's licence which he claimed to have and which Lake Ohau Lodge indicated was a key basis for his employment.

[7] Mrs Neilson said that there was an expectation that Mr Lines would produce his bar manager's licence and that once that was sighted by the employer, she would then complete the appropriate documentation in respect of the commencement of his employment. Because that never happened (for reasons which I will explain later), the initial recruitment process was untidy.

[8] It is clear from the evidence that Lake Ohau Lodge had numerous anxieties about the performance of Mr Lines and their evidence was that they spoke to him on a number of occasions to evidence that anxiety. However, as a matter of law, I find that none of those discussions could reasonably be regarded as a warning and it follows that Mr Lines had less understanding of the depth of his employer's concern than he ought to have had.

[9] Only one action by Lake Ohau Lodge is capable of being regarded as a warning and that is a letter dated 14 January 2004 in which Lake Ohau Lodge set out some particular concerns of a performance nature.

[10] Mr Michael Neilson for Lake Ohau Lodge said that he regarded the letter of 14 January as in effect a final written warning but it is clear that there is no reference on the face of the letter to that being its status nor, on the evidence from Mr Lines, was he aware that it had that significance.

[11] The 14 January warning letter refers to earlier discussions that the parties had but the difficulty for Lake Ohau Lodge is that after that warning letter, although their anxieties and concerns about Mr Lines probably increased, they took no steps to advise Mr Lines of those concerns until the date of dismissal on 1 April 2004.

[12] In that regard anyway, I accept Mr Lines' counsel's submission that the employer's growing disquiet about Mr Lines' performance was simply not adequately communicated to Mr Lines in a way that enabled him to discern the seriousness of his position and/or which could give him an opportunity to challenge inaccurate or erroneous perceptions or to improve his performance.

[13] I accept that Mr Neilson's evidence was that there were two previous verbal *warnings* during January, one on 5 January and one on 8 January, but Mr Lines does not remember them as warnings and thinks of them as only discussions. Further, neither of those so-called verbal warnings are referred to as such in the clear warning letter of 14 January and so I have to discount them.

[14] On 21 February 2004, there was a dispute between Mr Lines and customers in the bar which resulted in a verbal complaint being received by Lake Ohau Lodge the following morning. The evidence of Mr Neilson was that he and his wife spoke with Mr Lines on receipt of that complaint but they make no claim that this discussion was a warning in a legal sense. Mr Neilson's evidence in answer to a question from me was that they (Lake Ohau Lodge) had got to the stage where they were contemplating dismissal but wanted to think about that for a period.

[15] That period seems to have come to an end on 1 April 2004 when there was an initial meeting in the morning of that day in the bar where Mr Lines worked. Present as well as Mr Lines were Mr and Mrs Neilson. The precipitating event seemed to have been a telephone call from Contiki Tours which was a major client of Lake Ohau Lodge. In one of the January discussions between the parties (which Lake Ohau Lodge seeks to call a warning but which I have decided was no more than a discussion), Mr and Mrs Neilson made it clear to Mr Lines how important the Contiki business was to Lake Ohau Lodge and their evidence (which I accept) was that they quantified the importance of the business to Mr Lines in that discussion.

[16] On 31 March 2004, Murray Scott, who is the Operations Manager of Contiki Holidays, rang Mr Neilson in what he described in his evidence was a *for your information* call to again complain about Mr Lines. This precipitated the meeting with Mr Lines the following day.

[17] It is clear from the evidence of both Mr and Mrs Neilson that they had completely lost confidence in Mr Lines by then. It is also clear that they were not really sure how to deal with the situation. Mr Neilson said in his evidence that he had never dismissed anybody before and at one stage in the dismissal process he confessed that he had *started to dither* by then.

[18] The evidence is graphic that by the time Mr and Mrs Neilson get to the dismissal meeting on 1 April, they are literally *at the end of their tethers*. For instance, Mr Neilson said in his evidence that from 14 January onwards, *I wasn't sure I could trust him* (meaning Mr Lines). Mrs Neilson said in relation to the dismissal meeting that *we were at the end of our tether with him. We had tried really hard with him. He was in constant denial of ever being wrong. The final complaint from Contiki was the last straw. His role was to be hospitable and Nigel was simply not hospitable. We had come to the end.*

[19] The meeting in the bar on the morning of 1 April concluded with Mr Lines storming off. Mrs Neilson's evidence is clear that she thought that Mr Lines was dismissed then and certainly that is Mr Lines' view and is consistent with his behaviour in storming off.

[20] After he stormed off, Mr Lines uncontroverted evidence was that he went for a drive and then returned to see Mr Neilson alone in Mr Neilson's office.

[21] Mr Neilson's evidence was that the purpose of this second meeting was to enable Mr Lines to offer an explanation which might have forestalled his actual dismissal. This is inconsistent with the evidence of both Mr Lines and Mrs Neilson that Mr Lines was dismissed at the end of the first meeting.

[22] In any event, there was a second meeting. Mrs Neilson was not present at that second meeting. Mr Neilson admitted in evidence before the Authority that he had handed Mr Lines the dismissal letter at the beginning of the second meeting in his office so it is difficult to see how Mr Lines could have properly responded, even assuming that he had a full picture of what the problems actually were (and his evidence was clear that he did not).

[23] The letter of dismissal is itself a curious document. The distress and tension which Mr and Mrs Neilson obviously felt at the whole situation is absolutely evident from this dismissal letter.

[24] One extraordinary aspect of the dismissal letter is an offer to retract the notice of dismissal if, on reading the letter, Mr Lines has any explanation to offer. The inexperience and uncertainty of Lake Ohau Lodge in this matter is graphically portrayed by this extraordinary suggestion.

### ***Issues***

[25] There are a number of subsidiary matters which need to be considered along with the central issue as to the safety of the dismissal. It is convenient to deal with the subsidiary issues first. The issues are:

- (a) Has there been a breach of s.62 of the Employment Relations Act 2000, and what are the consequences of that?
- (b) Has there been a breach of s.4 of the Wages Protection Act 1983, and what are the consequences of that?

- (c) Was the procedure used to effect the dismissal safe?
- (d) Is there substantive justification for the dismissal?
- (e) Has the applicant contributed to his own misfortunes.

### ***Section 62 of the Employment Relations Act***

[26] There is no question that there has been a breach of s.62 of the Act. Mr Lines claims that that is the position and Lake Ohau Lodge accepts that it failed to follow *some* of the requirements of the Act but allege that part of the reason for that should be sheeted home to Mr Lines himself.

[27] The evidence is clear that Mr Lines was not provided with a written copy of an individual employment agreement, that he was not provided with information about the applicable collective employment agreement, that he was not advised of the relevant Union or told that he might join that Union or how to contact the Union.

[28] While it is highly speculative, there is an argument for the view that if Mr Lines had been provided with the information about the Union membership and chosen to join, a capable Union official might well have assisted him at an early stage which could have avoided the dismissal which subsequently followed.

[29] However, I must say that I think it unfair and unreasonable of Mr Lines to argue that he is entitled to the protection of the law when on all the evidence before me it seems more likely than not that Mr Lines knew or ought to have known that in holding himself out as a person who had a bar manager's licence, he was deliberately misrepresenting the factual position.

[30] In the result, Mr Lines' erroneous representation that he had a qualification which he did not have meant that he earned over the comparatively short period of the employment significantly more than he would otherwise have earned. Lake Ohau Lodge says that the figure that he earned over and above what he would have earned as a simple barperson was \$1,700 and while Mr Lines' counsel disagrees with that figure, there is no doubt that he earned more than he was actually entitled to by virtue of claiming a qualification which he did not have.

[31] What is even more fundamental is the evidence of Lake Ohau Lodge that one of the main reasons that Mr Lines was hired was precisely because he claimed to have the bar manager's licence.

[32] The employer wanted Mr Lines to produce his bar manager's licence so that an individual employment agreement could be entered into and their evidence was that the trigger point for completing that documentation was the provision of the bar manager's licence so that matters could be properly concluded.

[33] I do not accept Mr Lines' evidence that the first occasion on which he was asked to produce the bar manager's licence was in March (that is the month before he was dismissed). I prefer the evidence of Lake Ohau Lodge's witnesses, including that of Alastair Usher who was a former co-worker of Mr Lines and who gave the clearest evidence by telephone from London that he was aware of at least six occasions on which Mr Lines was asked by either Mr or Mrs Neilson to produce his bar manager's licence.

[34] Mrs Neilson's evidence was clear that she wanted the bar manager's licence so that she could complete the employment agreement documentation. That does not seem unreasonable. Both she

and Mr Neilson also made the point that Mr Lines was being paid on the footing that he in fact held the bar manager's licence when he plainly did not.

[35] I accept the submission of Lake Ohau Lodge's counsel that it is more rather than less likely that Mr Lines knew full well that he did not hold the licence because, having completed the part of the process for obtaining the licence which it is common ground he had completed, he would have known (or certainly ought to have known) that the course of study he undertook was simply a part of the requirement.

[36] My finding then is that there has been a breach of s.62 of the Employment Relations Act. However, I am not persuaded that Mr Lines has explained satisfactorily why he claimed to have a bar manager's licence when he clearly did not. I accept the evidence of Lake Ohau Lodge that they were waiting for the provision of the bar manager's licence (and gave Mr Lines numerous reminders to produce the licence) to enable them to complete the employment documentation. In all the circumstances, I decline to determine any penalty in relation to this breach.

#### *Section 4 of the Wages Protection Act*

[37] Mr Lines says that he did not consent to a deduction from his wages of \$50 for cleaning the chalet that he lived in after the end of the employment relationship.

[38] The evidence is that the \$50 deduction is a standard deduction which is a provision in all of the employment agreements entered into by Lake Ohau Lodge and I accept that evidence. The difficulty though for Lake Ohau Lodge is that because by common consent they cannot prove that Mr Lines received the house rules (which contain the \$50 deduction provision), it seems to me that they are unable to rely upon it.

[39] I do accept the evidence that the house rules were affixed to the wall in the workplace and that they would have been discussed and/or handed out at staff meetings which Mr Lines probably was at but I think the employer does have an obligation to be absolutely explicit about a matter such as this, particularly when the terms of s.4 are mandatory.

[40] In passing, I make the observation that I do not accept counsel for Mr Lines' submission that Mr Lines did not have an individual employment agreement. Given that he worked for the employer for four months, that is a nonsense. What is true is that he did not have a **written** individual employment agreement.

[41] To recompense Mr Lines for the illegal deduction of the chalet cleaning fee from his pay, I direct that Lake Ohau Lodge pay to him the sum of \$50.

#### *Procedure*

[42] There can be little doubt that the procedure engaged by the employer to effect the dismissal of Mr Lines did not meet the standards required by New Zealand employment law.

[43] I have already found that the only warning prior to the dismissal was the letter in respect of Mr Lines' performance dated 14 January 2004. As I have mentioned above, there is evidence that there were verbal warnings (Mr Usher, a witness for Lake Ohau Lodge, speaks of many verbal warnings), but I am not satisfied that those episodes can properly be referred to as verbal warnings.

[44] Even if I am wrong about that, there can be no doubt at all that the actual dismissal event was so unsafe as to not be able to stand.

[45] It seems to be common ground that whatever happened before 14 January 2004, there was no warning action taken after that date until the day of the dismissal.

[46] There was a major incident on 21 February 2004 which even Mr Neilson's evidence does not claim to have resulted in a verbal warning issued to Mr Lines. All that happened after a complaint was received was that Mr Lines was spoken to by Mr and Mrs Neilson but Mr Neilson's evidence was that there was *no formal meeting*.

[47] So no further disciplinary responses were made by Lake Ohau Lodge until the complaint was received from Contiki on 31 March which precipitated the meeting in the bar the following day, 1 April 2004.

[48] The evidence is that Mr and Mrs Neilson were there, that the pair of them went through the Contiki complaint and certainly Mrs Neilson and Mr Lines both thought that he had been dismissed at the end of that morning meeting.

[49] Mr Lines left the meeting, went for a drive, returned to talk to Mr Neilson in his office and on Mr Neilson's evidence was immediately presented with the letter of dismissal dated 1 April 2004.

[50] Even if Mr Lines were ready, willing and able to offer an extensive explanation of what he understood to be the employer's complaint, it was clearly too late because by common consent he had been dismissed verbally at the end of the morning meeting and even if that is not right, he was presented with a dismissal letter at the beginning of the afternoon meeting, before he has even had an opportunity to offer any explanation.

[51] Those facts, coupled with the inadequacy of the advice to Mr Lines about what the meeting concerned and the difficulty that he would have had in getting a representative to be present, even assuming that he knew what the meeting was about, make the dismissal process unsafe.

### ***Substantive justification***

[52] Lake Ohau Lodge presents a case for substantive justification based really on Mr Lines' attitude to the job. In essence, they say that he was arrogant and cocky and could not be told anything. Witness after witness has said that Mr Lines' attitude was harming the reputation of Lake Ohau Lodge and thus damaging the employer's business.

[53] All of the Lake Ohau Lodge witnesses made it clear that they had conveyed their concerns in one way or another to the employers so the employers will have been well aware of the challenges that they were facing, given Mr Lines' attitude.

[54] The fatal difficulty for Lake Ohau Lodge is that they did not tell Mr Lines what he was doing wrongly, give him an opportunity to explain himself or give him a reasonable opportunity to remedy his alleged defaults. Without that, the genuine concerns that the employer might have are meaningless and simply cannot be given weight to.

### **Contribution**

[55] Generally, I accept the submission of counsel for Mr Lines that it is difficult to see how Mr Lines could have contributed to matters in circumstances where he was not made aware of the nature of his defaults.

[56] Mr Lines' counsel quotes a section from the determination in respect of *Wright v. Tuinga Whanau Trust* AA117-05 (Member Scott) and I venture to adopt that quotation with approval. It is as follows:

*I have found that the other issues that gave rise to concern on the employer's part were not dealt with appropriately at the time they occurred. If there was substance to any of these issues the employer has not demonstrated to me by bringing evidence they were appropriately raised, that objective standards of expected conduct/performance were set, that Ms Wright's performance was appropriately monitored, that she was given appropriate support and training to achieve the standards required and that she was counselled and/or warned that her employment would be in jeopardy if she did not reach the required standards of performance/conduct.*

*As a result I am unable to find Ms Wright contributed to the situation giving rise to the disadvantage/dismissal she has faced and accordingly I will not be reducing remedies ordered in her favour for these reasons.*

[57] However, there are other issues in the instant case which need to be taken into consideration. First is the suggestion that the applicant, Mr Lines, was effectively paid *over the odds* by claiming he had a bar manager's licence when he plainly did not.

[58] Second, Mr Lines painted a mural on one wall of the chalet that he occupied at Lake Ohau Lodge and he acknowledged in his evidence before the Authority that he had done this entirely without authority. Lake Ohau Lodge seeks to recover from Mr Lines the cost of making good that particular wall.

[59] I consider it entirely appropriate that both of these matters be considered when the question of compensation is determined.

### **Determination**

[60] I find that Mr Lines has made out his claim for an unjustifiable dismissal by his former employer, Lake Ohau Lodge. That being the position, I need to consider compensation due for hurt, humiliation and injury to feelings and the issue of lost wages.

[61] Dealing with the lost wages first, the evidence was that Mr Lines was dismissed on 1 April and was not employed again until 15 June 2004. I award Mr Lines \$4,000 as a contribution to his lost wages for the period from the date of dismissal down to the date of re-engagement.

[62] On the question of compensation, I am not minded to make a large award and were nothing else in issue, I would have been inclined to make an award of \$3,000.

[63] However, as I have signalled earlier in this determination, I think it only appropriate that I rebate that award by an amount to assist the employer to repaint the chalet wall previously occupied by Mr Lines and now bearing his unauthorised mural and I allow \$1,000 under that head.

[64] I allow a similar amount to effectively compensate the employer for the overpayment occasioned by Mr Lines' erroneous claim of having a bar manager's licence.

[65] It follows that Lake Ohau Lodge is to pay Mr Lines the sum of \$1,000 in compensation.

### *Summary*

[66] Lake Ohau Lodge is to pay Mr Lines the following sums:

- (a) \$1,000 by way of compensation under s.123(c)(1) of the Employment Relations Act 2000;
- (b) \$4,000 gross as a contribution to wages lost in consequence of the dismissal; and
- (c) \$50 in reimbursement of the chalet cleaning costs erroneously deducted from Mr Lines' final pay.

### *Assistance for the employer*

[67] Lake Ohau Lodge gave evidence in this matter that they were uncertain of what to do in responding to what they perceived to be Mr Lines' performance inadequacies. Mr Neilson said that he had not dismissed anybody before and he was very frank about the difficulties which he thought he faced.

[68] The employer is in a remote rural location and so the difficulties about getting proper advice would undoubtedly be compounded.

[69] However, the employer also advanced some intemperate and unhelpful observations about Mr Lines' rights. Taken together, all these matters seem to me to speak volumes for the need for Lake Ohau Lodge to get proper employment law advice:

- (a) In respect of the structure of their employment arrangements and the basis on which they engage and enter into employment agreements with staff; and
- (b) The basis on which they deal with disciplinary and performance matters and/or dismissal issues.

[70] I commend to them the notion that they consult with their legal representative at an early date to obtain the appropriate advice that they so evidently need and/or that they seek to become members of the Otago/Southland Employers' Association or another equivalent body which can provide them with ongoing support and assistance even from a distance.

*Costs*

[71] Costs are reserved.

James Crichton  
Member of Employment Relations Authority