

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Kelvin Presland (Applicant)  
**AND** Coraliice Ltd (Respondent)  
**REPRESENTATIVES** Martin Dumbill, Counsel for Applicant  
David Missen, Advocate for Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 19 April 2005  
**SUBMISSIONS RECEIVED** 2 May 2005  
31 July 2005  
**DATE OF DETERMINATION** 5 September 2005

**DETERMINATION OF THE AUTHORITY**

**The Employment Relationship Problem**

- [1] Mr Presland claims that he was unjustifiably dismissed from his employment on or about 14 July 2002 (albeit the matter was not filed with the Authority until August 2004). Mr Presland asks the Authority to find that he has a personal grievance and award him the remedies of lost wages and compensation.

**Background Facts and Evidence**

- [2] Coraliice Limited (“the Company”) is a Tauranga company. It manufactures and distributes food quality flaked salt ice. The major clients of the business are fishermen that are usually only in port for a short time and require ice at short notice. The nature of the business is that at times it is a 24 hours, 7 days a week operation. The owner/operator of the business is Mr Bruno Weidmann.
- [3] Mr Presland started his employment with the Company in March 2002. The job largely consisted of the loading and delivery of ice, by truck, to customers and assisting with general maintenance on the ice making plant. From May 2002, Mr Presland effectively lived “on the premises” of the business as it was then that he moved into a flat that Mr Weidmann had made available. Mr Weidmann also lived on the premises in a separate unit.
- [4] It appears that Mr Presland was an accident prone if not careless person. The evidence is that within a reasonably short time of taking up his employment, he was involved in several accidents with the Company truck, and two cell phones met an irreversible fate, having been dropped from a height onto concrete, and into the Tauranga harbour respectively.

- [5] Nonetheless, it seems that Mr Presland and Mr Weidmann got along reasonably well and they had a drink together at a local bar from time to time though Mr Presland says that Mr Weidmann often drank too much but there is no evidence to support this assertion. On the other hand, the evidence of Mr Weidmann is that he noticed some “mood swings” on the part of Mr Presland where his attitude towards Mr Weidmann was disrespectful and there was some irresponsible use of tools and equipment. Mr Weidmann says that he raised the matter of Mr Presland’s changing moods, partly as he thought he may be able to assist him, but Mr Presland told him, in colourful language, to mind his own business. Mr Weidmann also says that Mr Presland’s moods were reflected in disrespectful behaviour towards some of the Company’s clients and Mr Weidmann was concerned that they might go elsewhere to get their ice. Mr Presland denies that he engaged in the behaviour alluded to by Mr Weidmann.
- [6] The relationship took on a more negative tone on 21 June 2002. Mr Weidmann says that on that day, they were both working in the ice tank. Mr Presland was in a bad mood and swearing unreasonably. Mr Weidmann says that he told Mr Presland to stop the swearing and the response from Mr Presland was to throw down the shovel he was using and he demanded a written employment agreement. Mr Weidmann’s further evidence is that Mr Presland informed him that if an employment agreement wasn’t provided to him by the next day, Saturday 22 June, he would “fuck off without any notice.”
- [7] Mr Presland has a somewhat different view of events regarding his request for an employment agreement, but it does appear that an employment agreement was produced by Mr Weidmann and perused by Mr Presland. It also appears that some subsequent discussion about the content of the agreement probably occurred, but it seems that nothing was concluded. Mr Presland also says that he was unhappy about a number of aspects of his employment including reduced hours of work and safety issues regarding the ice making plant.
- [8] The overall evidence projects a picture of an employment relationship that was quickly deteriorating, albeit Mr Presland and Mr Weidmann have a different perspective of why that was so. Mr Weidmann says that while there was an understanding that Mr Presland would be absent from work on 23 June, Mr Presland failed to arrive at work on 24 June 2002, without any prior arrangement or explanation, and he received a verbal warning that such behaviour would not be tolerated.

### **The Events of Sunday 14 June 2002**

- [9] Matters came to a head on Sunday 14 July 2002 and again, both men have a different perspective of what occurred on that day.
- [10] Mr Weidmann says that there were orders for ice to be delivered to two fishing boats that day between the hours of 12:00 noon and 2:00pm. There was also a second delivery to be made to a boat at 4:00pm that day. Mr Weidmann expected Mr Presland to load the truck and carry out the deliveries and says that Mr Presland was aware that he was required to carry out this work. The further evidence of Mr Weidmann is that on 14 July he was working in his office and as the morning went on, he became aware that he had not heard Mr Presland start up the delivery truck in preparation for loading the ice. It takes about 1.25 to 1.5 hours to load the truck with the quantity of ice required.
- [11] Mr Weidmann says by approximately 12:00 noon, he concluded that Mr Presland was not going to be at work in time to load the truck and have it delivered on time, so he decided he would commence the loading. Mr Weidmann’s evidence is that Mr Presland arrived at 12:15pm and when questioned by Mr Weidmann about his intentions, Mr Presland explained

that he had his young daughter with him and she would have to be returned to her mother (Mr Presland is separated from his partner), more or less immediately, meaning he would not be able to make the first delivery. While Mr Weidmann was unhappy about that, he accepted that Mr Presland had to take his daughter back to her mother and he therefore agreed to do the first delivery of ice. Mr Weidmann says that he expected that Mr Presland would be back to do the 4:00pm delivery.

- [12] The evidence of Mr Presland is that he was uncertain as to what the work commitments were for Sunday 14 July but thought that there was a confirmed booking for 4:00pm that day. At 12:15 he thought he would check with Mr Weidmann who told him that three boats required ice at 1:30pm. Mr Presland says he told Mr Weidmann that he would make arrangements to take his daughter back to her mother and he did so, with the intention of doing the delivery. Mr Presland says that five minutes later Mr Weidmann told him that the ice was now required at 1:00pm. Mr Presland says that he told Mr Weidmann that he had to continue with his commitment to take his daughter home and the response from Mr Weidmann was: "Fuck you then I'll do it myself."
- [13] Mr Presland says that he took it that Mr Weidmann intended to also make the 4:00pm delivery so decided to spend the rest of the day with his daughter. Mr Presland also says that he intended to involve the Union the next morning to assist him with obtaining an employment agreement. The further evidence of Mr Presland is that at 9:25 that evening, Mr Weidmann "banged" on the door of his flat and when Presland opened it, Mr Weidman said to him: "You've got seven days to fuck off."
- [14] Mr Presland says that Mr Weidmann started "ranting and raving" about how he was the "boss." He believed that Mr Weidmann was drunk and he told him to go away and sober up. Mr Presland says that Mr Weidmann was persistent in attempting to want to want to talk to him but after a few minutes left. Mr Presland says that Mr Weidmann returned to his flat again at approximately 9:45pm and banged on the door. Upon opening up, Mr Presland says he told Mr Weidmann he would see him at 8:00am the next day to which Mr Weidmann responded that he should come to work at 10:00am and they would talk. The further evidence of Mr Presland is he was concerned that Mr Weidmann was going to become "physical" and he thought about calling the Police.
- [15] Mr Presland says that Mr Weidmann came to his flat at 8:30 the next morning and said: "Are you coming into fucking work I've got ice to deliver." At this point in events, Mr Presland says that he informed Mr Weidmann that he had decided to see a lawyer and Mr Weidmann responded with some further obscene language and left. Mr Presland then contacted an advocacy business, Employment Dispute Services, and was advised not to have any further contact with Mr Weidmann. He did not return to work again.
- [16] Mr Weidmann accepts that he went to Mr Presland's flat on the evening of 14 July. He says that he was not drunk but had consumed "a couple" of handles of beer. When he spoke to Mr Presland he asked him why he did not come back and do the 4:00pm delivery of ice that afternoon. Mr Weidmann says that Mr Presland told him to "fuck off" and told him he was drunk. Mr Weidmann's further evidence is that he then said to Mr Presland: "If you continue to talk like that you can pack your bags and fuck off in seven days." Mr Weidmann says it was agreed that they would talk again at 8:00am the next day but as Mr Presland had not arrived at work by 8:30am, he went to Mr Presland's flat to enquire as to his intentions. Mr Presland informed him that he was going to seek legal advice and Mr Weidmann agreed that he should do so.

[17] Mr Weidmann decided to summarise his position in a hand written letter dated 15 July 2002 and which he delivered to Mr Presland's mailbox that afternoon. The content of the letter follows:

“Coralice has assessed your performance to perform the duties for which you were employed. Whilst you did fulfil [sic] the majority of your duties to a satisfactory standard most of the time it has been established that for unknown reasons at this time you did choose to withdraw satisfactory service to this company.

This occurred in the first instance several weeks ago when you demanded a written contract (on a Saturday) to be given to you on Monday, verbally, under threat of leaving without notice. Consequently a written agreement was handed to you requesting you procure professional advice on clauses. You were given the option to delete and / or add clauses whereupon negotiation and hopefully agreement and signing would take place to the satisfaction of both parties. To date you have not done so despite your requirement for urgency at the time.

The verbal agreement to date appears to have continued to satisfactorily for both parties until Sunday 14-7-02.

As above, several weeks ago you withdrew your agreed service to the detriment of customers, management and the company for a couple of days (without notice). A verbal warning was given that such action would not be tolerated.

You repeated the same action again for a delivery that had been booked some days earlier for Sunday 14 July 02 for 4pm. Namely FV Schameel for 4pm for 9 ton of ice. You again failed to inform management of your choice not to do this delivery leaving client/customer and management in the lurch.

The management attempted to get you to respond and fulfil your duties and obligations to the company @ 0830.

You blatantly refused to do so and again to the detriment of management the customers and the company.

You chose to seek legal advice and management agreed that maybe you should do so.

Unless you respond to this writing positively within 24 hours as of 4pm 15 July 02 the company has no choice but to issue this letter as a notice of TERMINATION of the EMPLOYMENT CONTRACT (even though only verbal contract) as of today's date.”

[18] In a separate letter, also dated 15 July 2002, Mr Presland was given seven days notice to vacate the flat that he occupied, purportedly on the grounds that the flat was required by a family member, namely, Mr Weidmann. There was also an issue about rent monies owed by Mr Presland.<sup>1</sup>

[19] Mr Weidmann says that because Mr Presland never responded to his letter within the given 24 hours, he took it that Mr Presland no longer wished to work for Coralice, especially given the recent behaviour of Mr Presland including his failure to be at work when required. On 19 July, Mr Presland asked for his holiday pay to be paid that day. He also returned the gumboots that had been issued to him by Mr Weidmann who says that a “smelly” brown liquid had been poured into the gumboots.

## **Analysis and Conclusions**

[20] The primary question that requires an answer is: Was Mr Presland dismissed or did he abandon his employment?

---

<sup>1</sup> This matter has been to the Residential Tenancies Tribunal.

- [21] Mr Presland says that he was dismissed on the evening of 14 July 2002. He says that Mr Weidmann told him he had seven days to “fuck off” and that this was related to the failure on the part of Mr Presland to carry out the 4:00pm delivery of ice that day.
- [22] On the other hand, Mr Weidmann says that Mr Presland abused him and in response he did say that if Mr Presland continued to use that type of language towards him then he had seven days to “fuck off.”
- [23] The evidence on whether Mr Presland was dismissed on Sunday evening is inconclusive as I gained the impression that both men have sanitised their respective version of events. The best that I can make of the overall evidence is that an altercation occurred over Mr Presland’s failure to return and carry out the 4:00pm delivery of ice. I conclude that Mr Weidmann probably had more alcohol to drink than he says and while he may have had good reason to want to discuss the absence of Mr Presland that afternoon, it was unreasonable and unacceptable of him to come to Mr Presland’s accommodation at that time of the evening. It was even more unacceptable given that he had been drinking and he was clearly in no mood to enter into a rational discussion. The matter should have been left to the next morning.
- [24] There is also the evidence pertaining to the second visit of Mr Weidmann that Sunday evening and I accept the substance of Mr Presland’s evidence about this, albeit I suspect he has embellished it somewhat concerning the alleged attitude of Mr Weidmann. Nonetheless, even allowing for some exaggeration regarding Mr Presland’s evidence, I conclude that Mr Weidmann was not entitled to harass Mr Presland in the manner he did.
- [25] However, despite the altercation between the two men, it seems that Mr Presland did intend to be at work the next morning, albeit the starting time is in dispute. Clearly, Mr Weidmann expected Mr Presland to be at work on the morning of 15 July and made his displeasure known when Mr Presland failed to appear.
- [26] I conclude that the employment relationship was more probably than not still intact as of Monday morning 15 July, albeit it was most certainly tenuous. It seems to me that both men reached their respective conclusions about the continuation of the employment relationship some time later on the Monday morning. In Mr Presland’s case, after seeking advice, he concluded that he had been dismissed on the Sunday evening.
- [27] As far as Mr Weidmann was concerned, because Mr Presland never responded to his letter of 15 July within the 24 hour deadline, he concluded that Mr Presland no longer wanted to work for him.
- [28] Weighing up the rather bizarre behaviour of both Mr Weidmann and Mr Presland, I come to the following conclusions:
- (a) I find that without further dialogue with Mr Weidmann, Mr Presland could not reasonably conclude that he had been dismissed on Sunday evening. His employment remained open to him.
  - (b) It is my further finding that it was not the action of a fair and reasonable employer to issue an ultimatum in the manner that Mr Weidmann did via his letter of 15 July, particularly when this letter was accompanied by another letter giving Mr Presland 7 days to vacate his accommodation. Mr Weidmann knew that Mr Presland was seeking legal advice that day and accepted that this was appropriate. While Mr Weidmann could have reasonably expected that Mr Presland would have conveyed to him his intentions

after obtaining legal advice, particularly given the tenuous nature of the employment relationship, there was also an obligation upon Mr Weidmann to enter into further discussion with Mr Presland pertaining to the breakdown in the relationship and its future.

- (c) Given the overall circumstances that existed at the time, I find that the combination of the two letters delivered to Mr Presland, read together, effectively conveyed to Mr Presland that he was dismissed.
- (d) I also find that the dismissal was unjustified on the grounds that it was not the action of a fair and reasonable employer to issue the two letters in question thereby effecting a dismissal.
- (e) I find that the work performance of Mr Presland warranted disciplinary action and I do not accept his view that it was reasonable for him to assume that Mr Weidmann had indicated he would carry out the 4:00pm delivery of ice on Sunday 14 July 2002. Rather, I find that it is more probable than not that Mr Presland simply decided that he was going to take the day off. This action was consistent with the general attitude that he had adopted towards his employment with Mr Weidmann in the later stages and was probably symptomatic of the overall dissatisfaction with the job that had arisen.

[29] Mr Weidmann failed to address this matter of misconduct on the part of Mr Presland in a reasonable manner and his overall behaviour on the Sunday evening of 14 July must be seen as unreasonable also. Undoubtedly, there were also performance issues to be addressed with Mr Presland but the law requires such matters to be dealt with in a particular manner as set out in *Trotter v Telecom Corporation of New Zealand Limited* [1993] 2 ERNZ 65 at 679:

“When the dismissal is to be for reasons of alleged unsatisfactory work performance, fairness and reasonableness require that the specific reasons for dissatisfaction are disclosed to the employee; a reasonably specific and measurable improvement demanded of him or her; and a reasonable period of time given for it to be established whether the employee is able to achieve that improvement, and at the end of that time a dispassionate consideration given to the question whether enough progress has been made to avert dismissal.”

[30] In regard to Mr Presland’s failure to be at work on Sunday afternoon, 14 July 2002, Mr Weidmann was entitled to treat that incident as serious misconduct and address it accordingly as a disciplinary matter, but the law requires that certain procedural requirements must be met.

The minimal procedural requirements that an employer must observe before deciding to dismiss an employee are well established and are set out in *NZ (with exceptions) Food Processing etc IUOW v Unilever* [1990] 1 NZILR 37. The requirements are:

1. Notice to the employee of the specific allegation of misconduct to which the employee must answer and of the likely consequences if the allegation is established;
2. An opportunity, which must be real as opposed to a nominal one, for the employee to attempt to refute or to explain or mitigate his or her conduct; and
3. An unbiased consideration of the worker's explanation in the sense that the consideration must be free from determination and uninfluenced by irrelevant considerations.

Unfortunately, Mr Weidmann failed to adequately acknowledge his legal obligations regarding Mr Presland’s work performance or misconduct and hence the dismissal was unjustified and Mr Presland has a personal grievance.

## Remedies

[31] Given that I have found that Mr Presland has a personal grievance, I now turn to the remedies that may be available to him.

(a) Reimbursement of Wages

Section 123(b) of the Employment Relations Act 2000 (“the Act”), provides that where the Authority determines that an employee has a personal grievance, it may provide for:

“the reimbursement to the employee of a sum equal to the whole or any part of the wages or any money lost by the employee as a result of the grievance.”

Further to that provision, section 128(2) of the Act provides that:

“If this section applies then, subject to subsection (3) and subsection 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months’ ordinary time remuneration.”

Subsection (3) provides that:

“Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.”

[32] Mr Presland claims for reimbursement of wages for 16 weeks from 15 July 2002 to 4 November 2002, when he obtained new employment. Given that there is a finding that Mr Presland contributed to the situation that gave rise to the situation that gave rise to the personal grievance, it is not appropriate that there be an award of more than the 13 weeks reimbursement provided by s.128(2) of the Act.

An assessment of the wages that Mr Presland would have earned is a little difficult but on the basis of the record of hours worked as provided by Mr Weidmann, it seems reasonable to arrive at an average of 40 hours per week worked. Mr Presland was paid \$13.25 per hour. Therefore,  $40 \times \$13.25 \times 13 \text{ weeks} = \$6,890$ . That is the sum that would have been awarded as reimbursement of wages in the absence of any contribution to the grievance by Mr Presland.

(b) Compensation

[33] Section 123(c) of the Act provides that where the Authority determines that an employee has a personal grievance, it may provide for:

“the payment to the employee of compensation by the employee’s employer, including compensation for-

(i) humiliation, loss of dignity, and injury to the feelings of the employee; .....

Mr Presland says that: “The whole thing was very upsetting” but the evidence of the effect of the loss of his employment is sparse. It also seems clear that Mr Presland had reached the conclusion that he would not be staying much longer in the employment of Mr Weidmann and so the cessation of his employment was not exactly unexpected. Nonetheless, I accept that the

suddenness of his dismissal accompanied by the loss of his accommodation, was the cause of some anguish for Mr Presland that warrants compensation of the sum of \$3,000, to be reduced on the basis of his contribution to the grievance.

(c) Contribution

[34] Pursuant to the provisions of section 124 of the Act, the Authority is bound to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. I find that Mr Presland markedly contributed towards the situation that gave rise to the personal grievance in that his unreasonable refusal to come back to work on Sunday 14 July 2002 was serious misconduct. He also refused to enter into any further dialogue with Mr Weidmann on 15 July despite being given a written invitation to do so. I assess Mr Presland's contribution at 50% and the above awards are to be reduced accordingly.

### **Determination**

1. Mr Presland was unjustifiably dismissed on 15 July 2002. He has a personal grievance.
2. Under the provisions of sections 123 and 128 of the Employment Relations Act 2000, Coraliice Limited is ordered to pay to Mr Presland the gross sum of \$3,445.00 as reimbursement of wages.
3. Under the provisions of section 123(c)(i) of the Act, Coraliice Limited is ordered to pay to Mr Presland the sum of \$1,500.00 as compensation.
4. Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 28 days of the date of this determination.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**