

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 213/10  
5160049

BETWEEN                      KATHERINE RAWIRI  
   Applicant  
  
AND                                OTOROHANGA SERVICE  
   AND CITZENS CLUB INC  
   Respondent

Member of Authority:        K J Anderson  
  
Representatives:              J Parlane, Counsel for Applicant  
   E Tait, Advocate for Respondent  
  
Investigation Meeting:        4 November 2009 at Hamilton  
  
Submissions Received:        1 December 2009 from the Applicant  
   21 December 2009 from the Respondent  
  
Determination:                6 May 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Ms Rawiri, claims that effective from 31<sup>st</sup> December 2008, she was constructively dismissed and that this action by her employer was unjustified. Ms Rawiri also claims that her employer, the Otorohanga Service and Citizens Club Inc committed a breach of the good faith provisions of s.4 of the Employment Relations Act 2000. Finally, Ms Rawiri claims that she has been underpaid in regard to her wages and also, she was not paid appropriately for seven public holidays.

[2]     The respondent, the Otorohanga Service and Citizens Club Inc (“the Club”) denies the claims of Ms Rawiri and says that she abandoned her employment. In regard to the claim for wages, the Club acknowledges that it owes Ms Rawiri some monies, as calculated some time ago by a Labour Inspector.

## Background Facts and Evidence

[3] The overall evidence presented to the Authority is not as clear as one would wish. It is adequate to determine the issues, but on some matters, the Authority has been required to come to some conclusions based on an assessment of what appears to be most likely.

[4] The Club is a relatively small operation with its membership comprising residents from the local Otorohanga community. It is operated with some paid staff in conjunction with voluntary assistance, which includes the President of the Club, Mr Eric Tait. The Manager of the Club, to whom Ms Rawiri was responsible to, was Mr Paul Simmons. He was later superseded by Ms Marlene Chapman who took up her role from 8<sup>th</sup> December 2008.

[5] Ms Rawiri started her employment with the Club on or about August 2006 as a bar person. She later gained a bar manager certificate and was employed as the Bar Manager from August 2007. On or about 25<sup>th</sup> February 2007, Ms Rawiri was subjected to most unsavoury behaviour by a Mr Gareth Gray.<sup>1</sup> Ms Rawiri asked him to leave the club premises due to his unacceptable behaviour. The actions of Mr Gray, upon leaving, including baring his posterior to Ms Rawiri in a most offensive manner, warranted the involvement of the Police. Mr Gray returned to the Club on or about 6<sup>th</sup> June 2008. Ms Rawiri refused to serve him due his unacceptable behaviour in February 2007. The evidence of Ms Rawiri is that when she asked Mr Gray to leave, he responded by informing her that she should wait to his mother starts work at the Club and that Ms Rawiri then; “... *won't have a job.*”<sup>2</sup> It appears that Ms Chapman was about to commence employment managing the restaurant at the Club. Ms Rawiri subsequently had a Trespass Notice issued against Mr Gray under the Trespass Act 1980. This was subsequently cancelled by the Club mainly, it would seem, for the reason that Ms Rawiri lacked the requisite authority to issue the notice. Ms Rawiri then made an application to the District Court for a restraining order against Mr Gray but this was declined by the Court (on 24<sup>th</sup> November 2008) due to the circumstances not meeting the requirements of the Harassment Act.

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<sup>1</sup> Mr Gray was not a member of the Club – but he could visit the Club three times – “signed in” by a member.

<sup>2</sup> Mr Gray is the son of Ms Chapman.

[6] On 11<sup>th</sup> July 2008, Mr Tait wrote to Ms Rawiri alleging that she had failed to follow appropriate “lock-up” procedures for the Club premises. The letter informed Ms Rawiri that: “***THIS IS YOUR THIRD WARNING.***” There also appears to be a further letter from Mr Tait dated 16<sup>th</sup> July 2008 but this has not been produced to the Authority. Ms Rawiri responded in two letters dated 23<sup>rd</sup> July 2008 refuting the allegations with explanations as to the circumstances as she believed them to be. Ms Rawiri informed that as she had only received one previous written warning (3<sup>rd</sup> April 2008), the warning issued by Mr Tait was a second not a third warning, but in any event, she believed it was not valid. The evidence about the overall circumstances pertaining to the response of the Club to Ms Rawiri’s letters is inconclusive and the Authority has not been asked to examine the validity of the “third warning,” but in any event, the subsequent misconduct of Ms Rawiri superseded this matter.

[6] Mr Gray returned to the Club on 9<sup>th</sup> September 2008 along with his partner and children. Ms Rawiri again refused to serve him alcohol. Subsequently, there was an exchange between Ms Rawiri and Mr Tait relating to whether Ms Rawiri should serve Mr Gray. There was then a further scene from Mr Gray, leading to him being required to leave the Club. The evidence and the relevance of the actions of Mr Gray, and his relationship with Ms Chapman, appears to partially go to the claim of constructive dismissal, in that Ms Rawiri appears to infer that Ms Chapman wanted to be rid of her.

### **The Final Warning**

[7] There was a series of incidents involving Ms Rawiri and her off duty behaviour on 11<sup>th</sup> October 2008, involving excessive alcohol consumption at the Club, her conduct at a social function at the Star Tavern in Kihikihi, and throwing a bottle from a bus which she was travelling on with other Club members. Consequently, Ms Rawiri was required to attend a disciplinary meeting on 29<sup>th</sup> October 2008, with Mr Tait and Mr Simmons. Ms Rawiri was represented by the Service and Food Workers Union (“SFWU”). The outcome of the meeting was that via a letter from Mr Tait, Ms Rawiri received a final written warning for:

*“... inappropriate behaviour bringing the Otorohanga Service and Citizens Club into disrepute.”* The letter also set out the expectations of the Club in regard to the future conduct of Ms Rawiri with a review of her performance in three and then six months time. Also due to the behaviour of Ms Rawiri on the premises of the Club on 11<sup>th</sup>

October, she was barred from attendance at the Club, outside her normal hours of work, for two years.<sup>3</sup>

### **Further Alleged Performance Issues**

[8] Mr Tait had occasion to write to Ms Rawiri again in early December. The letter provided to the Authority is simply dated “*December 2008.*” Ms Rawiri is requested to attend an “Investigative Meeting” on 9<sup>th</sup> December 2008. Mr Tait outlined concerns about the “*continued failure*” of Ms Rawiri to meet the required standards of her job. The letter sets out seven specific areas of concern that the Club wished to discuss with Ms Rawiri and she was informed that the purpose of the meeting was to decide on; “... *what actions, if any, are to be taken regarding your continued failure to meet the required work performance standards of your job and may lead to the termination of your employment with the Otorohanga Service and Citizens Club.*” Ms Rawiri was informed of her right to bring a support person to the meeting.

[9] Ms Rawiri failed to attend work on 8<sup>th</sup> December 2008 – she phoned in as being sick. When phoned on 9<sup>th</sup> December by Ms Chapman, who enquired if Ms Rawiri would be at work, Ms Rawiri informed she was still sick and would provide a doctor’s certificate to Mr Tait at the meeting on 10<sup>th</sup> December.

[10] A meeting duly took place on 10<sup>th</sup> December 2008. Mr Tait and Mr Andrew Ormsby were present for the Club and Ms Rawiri was represented by Ms Jackie Hurst – SFWU. The minutes of the meeting record that the relevant issues discussed were:

- The incidents to date;
- The cause of the injury to Ms Rawiri’s ankle and why she didn’t come to work, but was able to work at a secondary job driving a clothing truck, and the associated failure to provide a medical certificate;
- Ms Rawiri’s hours of work;
- Confirmation that Ms Rawiri would report to Ms Chapman as the Club Manager as outlined in a letter to staff dated 5<sup>th</sup> December 2008;
- The failure of Ms Rawiri to pass on a meal order to the kitchen and patrons having to wait up to 45 minutes for their meal;

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<sup>3</sup> The notes of the meeting held on 29<sup>th</sup> October 2008 record that the two union representatives accepted the outcome.

- Ms Rawiri encouraging members to sign a petition to replace the management board of the Club and Ms Chapman.

[11] The minutes record that Ms Rawiri left the meeting. The telephone interview evidence of Ms Hurst is that Ms Rawiri “walked out.” and I got the general impression that Ms Hurst had some difficulty in getting Ms Rawiri to accept that her actions needed to be addressed. The meeting concluded on the basis that Mr Tait and Mr Ormsby were to decide the outcome for Ms Rawiri and a further meeting would take place the following week. It also seems that Ms Hurst indicated that Ms Rawiri would provide a medical certificate the following day.

### **Absence from Work**

[12] Ms Rawiri never returned to work. Her evidence is that she was on sick leave. The Authority has sighted three medical certificates in the name of Katherine Mana Hohepa.<sup>4</sup> The first certificate shows that Ms Rawiri attended her doctor on 9<sup>th</sup> December 2008 and was diagnosed as unfit to attend work at the Club due to “*stress and anxiety*” until 15<sup>th</sup> December, but she was able to work at her secondary job. It seems that Ms Rawiri made no mention of this at the meeting on 10<sup>th</sup> December. Ms Rawiri visited her doctor again on 16<sup>th</sup> December. The certificate records that Ms Rawiri’s job at the Club is causing her “*undue stress*” and she should not return to this work until 24<sup>th</sup> December 2008 but she can continue with her secondary job. Finally, Ms Rawiri visited her doctor again on 24<sup>th</sup> December 2008 and she was certified to be unfit to return to work until 17<sup>th</sup> January 2009. Mr Tait says that he was not aware that Ms Rawiri used the name Hohepa and nor was Ms Chapman. Ms Rawiri says that she gave the two available certificates to Mr Simmons who did know of her maiden name. It appears that the Club never received the third medical certificate.

[13] On 16<sup>th</sup> December 2008, because he could not contact Ms Rawiri, Mr Tait contacted Ms Hurst to enquire as to whether Ms Rawiri had provided a medical certificate and when she might be likely to return to work. Mr Tait also indicated to Ms Hurst that he wished to discuss with Ms Rawiri the earlier investigation meeting and its outcome. It seems that following contact with Ms Rawiri, Ms Hurst had a further discussion with Mr Tait and informed him that she had been told by Ms Rawiri that she had “*a gutsfull*” of the situation at work. It seems that Mr Tait understood that

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<sup>4</sup> Hohepa is Ms Rawiri’s maiden name.

Ms Hurst was saying that Ms Rawiri was resigning. This is corroborated by the written evidence of Ms Rawiri. She says that she spoke to Ms Hurst and then later with Mr Shane Vugler, of the SFWU. The evidence of Ms Rawiri is that Mr Vugler informed her that she had given Ms Hurst permission to give notice on her behalf and nothing further could be done by the Union. However, the evidence of Ms Hurst confirms that Ms Rawiri did say she had a “gutsfull” of her job but Ms Hurst says that she advised Ms Rawiri that if she was going to resign she should put it in writing. In a letter to Ms Rawiri dated 18<sup>th</sup> May 2009, apparently obtained in preparation for the Authority’s involvement, Ms Jill Ovens, Northern Regional Secretary for the SFWU, conveys that the Union could not take the case any further for Ms Rawiri due to a conflict of evidence between Ms Rawiri and Ms Hurst. The letter concludes:

*However, Jacquie’s [Ms Hurst] notes reflect the conversation as described above and if we took your case, her evidence would be that you wanted to resign and this is what she told your employer. That is definitely what Jacquie took out of the conversation with you. Thus there is a potential conflict of evidence in our representation of you as our own witness would say that you told her you wanted to resign.*

[14] Matters then appear to have taken a rather odd twist in that on 31<sup>st</sup> December 2008, there was a telephone conversation between Ms Rawiri’s sister, Ms Hohepa, and Ms Chapman. It is the evidence of Ms Chapman that she received a phone call from Ms Hohepa. Ms Chapman was under the impression that it was Ms Rawiri’s mother but this is clearly not correct. Ms Chapman says that Ms Hohepa told her that Ms Rawiri; “... wasn’t able to come back to work.” Ms Chapman says that she was aware of the conversation between Mr Tait and Ms Hurst and had the “*impression*” that Ms Rawiri had resigned. The telephone evidence of Ms Hohepa is that she told Ms Chapman that she had been asked by Ms Rawiri to give a message.<sup>5</sup> This was that a medical certificate would be dropped off to the Club and that Ms Rawiri would be ready to start work. Ms Hohepa says that Ms Chapman told her that as the resignation of Ms Rawiri had been given by the Union, she had been replaced. Ms Chapman denies saying that Ms Rawiri had been replaced, rather it was a matter of another person filling the roster at the time, due to the uncertainty about what Ms Rawiri intended.

[15] There was no further contact by Ms Rawiri to the Club. Mr Tait says that he was made aware by Ms Chapman of her conversation with Ms Hohepa and while it

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<sup>5</sup> Ms Rawiri failed to explain why her sister contacted the Club on her behalf rather than making direct contact herself.

appears he remained under the impression that Ms Rawiri was resigning, he waited to see if Ms Rawiri would make contact about her duty roster. On 12<sup>th</sup> January 2009, Mr Tait tried, without success to contact Ms Rawiri. Then, on 21<sup>st</sup> January 2009, Mr Vugler contacted Mr Tait. It seems that Mr Tait informed Mr Vugler that Ms Rawiri was required to produce a medical certificate pertaining to her absence and that she should inform the Club as to her intentions. This did not happen.

[16] Given that there was no further contact from or pertaining to Ms Rawiri, Mr Tait wrote to her on 3<sup>rd</sup> March 2009 requesting the return of her keys and uniforms.

### **Analysis and Conclusions**

[17] The primary question for the Authority to determine is: Was Ms Rawiri constructively dismissed or did she resign from or abandon her employment?

[18] The evidence pertaining to this case is confusing and contradictory and at times, it is difficult to accurately identify the actual chronological order of various events. However, I am able to conclude that Ms Rawiri was not dismissed, in a constructive sense or otherwise. While I accept certain evidence,<sup>6</sup> particularly from Ms Gunson, that Ms Rawiri was under some stress in her work environment and that she may have been spoken to harshly by Mr Tait and that there was a lack of support regarding the gross behaviour of Mr Gray, I do not accept that Ms Rawiri was placed under such pressure by Mr Tait, or the Club generally, as her employer, that she felt she had no option but to resign. Rather, I conclude that it is more probable that Ms Rawiri came to the conclusion, that due to the problems that had arisen relating to her overall performance and conduct, all of which appear to be of some substance, and largely accepted as such by her representatives, she was in real danger of being dismissed and hence chose not to return to work. The evidence is that the Union certainly believed that Ms Rawiri intended to resign and conveyed this probable intention to Mr Tait. While I conclude that Ms Rawiri did in fact indicate an intention to resign via her representatives, it is dubious whether it could be taken that she did actually resign. However, what is clear is that she failed to give a clear indication of her intentions to the Club regarding her return to work after 31<sup>st</sup> December 2008. Nor did she provide the medical certificate, showing she was unfit for work until 17<sup>th</sup>

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<sup>6</sup> I did not find the evidence of Mr McNeill to be reliable.

January 2009. Therefore, I find that it was fair and reasonable for the Club to conclude that Ms Rawiri had, more probably than not, abandoned her employment. The employment agreement signed by Ms Rawiri on 11<sup>th</sup> July 2008 contains an abandonment of employment clause:

*In the event that the Employee has been absent from work for three consecutive days without notification to the Employer, and the Employer has made reasonable efforts to contact the Employee, this agreement shall automatically terminate on the third day without the need for notice of termination of employment.*

[19] The evidence is that Mr Tait attempted, without success, to contact Ms Rawiri to ascertain her intentions and then subsequently spoke to Mr Vugler and asked him to ascertain from Ms Rawiri what her intentions were. There appears to have been no further response by the Union or Ms Rawiri.

### **Determination**

[20] I find that Ms Rawiri was not constructively dismissed and that it is more probable than not that she abandoned her employment.

[21] In regard to the wages claims presented by Ms Rawiri, I find that there is no evidence to support her claim that she was underpaid by 50 cents per hour for 14 months. However, I accept, as does the Club, that Ms Rawiri is entitled to the gross sum of \$1,546.55 as calculated by a Labour Inspector and initially accepted as being correct by Ms Rawiri. The Otorohanga Services and Citizens Club Inc is ordered to pay Ms Rawiri, not later than 28 days from the date of this determination, the gross sum of \$1,546.55.

### **Costs**

[22] Costs shall lie where they fall.