

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Aaron J Reid (Applicant)  
**AND** Shayne Kavanagh (Respondent)  
**REPRESENTATIVES** Aaron J Reid In person  
P B McMenamin, Counsel for Respondent  
**MEMBER OF AUTHORITY** Helen Doyle  
**INVESTIGATION MEETING** 30 November 2004  
**DATE OF DETERMINATION** 2 February 2005

DETERMINATION OF THE AUTHORITY

*The employment relationship problem*

[1] Aaron Reid, the applicant, says his problem is that he was unjustifiably dismissed from his employment at The Strawberry Tree in Kaikoura. The Strawberry Tree is a bar owned and operated by Shayne Kavanagh, the respondent.

[2] Mr Kavanagh says that Mr Reid was employed on a casual basis and that he was not, given the casual employment agreement, under any obligation to continue to offer Mr Reid employment at the bar.

*The background*

[3] From the documentation lodged with the statement of problem and statement in reply there appeared to be significant areas of dispute between the parties. After hearing from Mr Reid and Mr Kavanagh I was satisfied that there were not, in fact, many genuine disputes about the facts. I can therefore set out succinctly the facts related to the employment.

[4] Mr Kavanagh built a bar called *The Strawberry Tree* in the seaside settlement of Kaikoura. Through friends Mr Reid got to know Mr Kavanagh and helped him out on the building site.

[5] When building was completed Mr Kavanagh offered Mr Reid some employment, initially as a bouncer on the door and then as a barman. It was agreed Mr Reid was to receive \$11.00 per hour.

[6] There was no written employment agreement between Mr Reid and Mr Kavanagh. I explained to Mr Kavanagh during the investigation meeting that a written employment agreement was required under the Employment Relations Act 2000.

[7] Although there was no written employment agreement I am satisfied that Mr Kavanagh intended to offer to Mr Reid employment of a casual nature. Mr Reid confirmed that he was aware that the employment was of a casual nature when his employment commenced but says that the arrangement was varied when he attained his bar manager's certificate and that there was continuity of employment.

[8] The wage and time records reflect that Mr Reid received his first pay for work performed for the week ending 13 November 2002.

[9] Mr Reid explained to me that he did not know at the start of each day if or when he was going to be working at The Strawberry Tree. Sometimes Mr Kavanagh would advise Mr Reid when he was needed by telephone. More commonly though, Mr Reid and Mr Kavanagh would be together at the home of Mr Kavanagh or another friend and an arrangement would be made during that time as to if or when Mr Reid should go to the bar.

[10] Mr Kavanagh said that he would generally decide each day whether to open the bar or not. He said that he would ask Mr Reid if he was available to work more hours on public holidays or special events but that sometimes it was a matter of simply looking about on a particular day to see if there were numbers of people about in Kaikoura to justify opening the bar. Mr Kavanagh said that the weather and the seasons had an impact on tourist numbers and a decision about opening the bar or not and that he did not know when the bar opened what the situation would be over the winter season. The flexibility Mr Kavanagh wanted would not I accept have been particularly easy to manage with a permanent employment arrangement.

[11] Mr Reid wanted Mr Kavanagh to write up a roster. In one letter copied to the Authority Mr Reid wrote that his hours were *very irregular* and *sometimes you didn't know whether you were coming or going*. Mr Reid wrote a roster to try to get some structure as to who would be working on a particular day but the roster was really only adhered to on one occasion. I accept that Mr Kavanagh was resistant to and therefore unsupportive of a roster because he wanted to keep a degree of flexibility.

[12] Mr Reid would jot down the hours that he worked and the records would go to a Mrs Stringer who did the pays and accounts for The Strawberry Tree. Although Mr Reid was paid weekly there was no set pay day and I accept Mr Reid's evidence that occasionally the pay was late and he had to chase it up.

[13] Mr Reid could not recall the date he obtained his bar manager's certificate but it was whilst he was working for The Strawberry Tree. Mr Reid said that he was told that he would from that point become fulltime and his pay would increase. Mr Kavanagh did not accept that he ever advised Mr Reid he would be fulltime or permanent but indicated that he may be able to offer Mr Reid more hours.

[14] I have carefully considered the record of Mr Reid's hours of work and income. The record describes Mr Reid as a *Casual Bar Person* but that of itself is not determinative of the relationship between Mr Reid and Mr Kavanagh.

[15] A careful analysis of the pattern of hours and days worked by Mr Reid is required for the period of his employment from 13 November 2002 to 30 May 2003. There is considerable variation in the number of hours Mr Reid worked per week. This could partly be explained by the summer season bringing an influx of visitors to Kaikoura. For example for each of the three weeks Mr Reid worked in November 2002 the hours ranged between 6 and 13. There was no work done between 24 November 2002 and 16 December 2002 and then for the week ending 22 December

there was 11 hours worked but for the week ending 29 December the hours had increased to 26. Mr Reid also worked long hours on 30 December and 31 December 2002. Mr Reid worked each week in January 2003. His hours ranged from 69½ for the week ending 12 January 2003 and 30¼ for the week ending 26 January. In February Mr Reid worked each week between 22 hours and 32½ hours and in March between 24½ and 40½ hours each week. Mr Reid worked during April until the week ending 25 April 2003 and his hours were between 22½ and 37½ hours per week for that month.

[16] Mr Reid worked more often on some days/nights than others, for example Friday and Saturday, although he did not work the same days every week and some weeks he did not work Fridays or Saturdays. There was no pattern as such.

[17] Mr Reid had on occasion decided not to accept work that was offered. There was no difficulty in that respect and other employees were available to take up the work offered.

[18] In late April or early May 2003 Mr Reid advised Mr Kavanagh he was going to take a holiday and would be back on 16 May. Mr Kavanagh was quite comfortable with Mr Reid having a holiday.

[19] The bar was closed for about 10 days whilst Mr Reid was away to enable some renovation to be undertaken. Mr Kavanagh said that prior to Mr Reid taking a holiday he had advised him and the other staff that business was quiet and he would be doing more hours himself from that point onward. Mr Reid did not accept that Mr Kavanagh advised him that the work would be tapering off.

[20] On Mr Reid's return from holiday he went to see Mr Kavanagh in the Bar. Mr Kavanagh explained to Mr Reid that he was going to work by himself for a while. Mr Reid asked for some outstanding wages and holiday pay.

[21] Mr Reid returned to the Bar a few days later to get Mr Kavanagh's signature on a form. When Mr Reid arrived Mr Kavanagh was teaching a new employee how to make coffee and he questioned Mr Kavanagh on this. Mr Reid was firmly of the view that Mr Kavanagh had lied to him about the reason he was not being offered work.

[22] The only other work Mr Reid was offered at the bar was as a bouncer on the door for the week ending 30 May 2003.

[23] Mr Kavanagh said that the business was quieter over the winter months but he also had some concerns about Mr Reid. These concerns were not put to Mr Reid but I conclude were the main reason that no further work aside from a few hours as a bouncer was offered to Mr Reid. Mr Reid said that the main reason for his concern and anger in this matter was that Mr Kavanagh was untruthful as to the reasons he was not being offered work at the bar.

### ***The issues***

[24] One of the main issues in this case, as I explained to the parties at the start of my meeting, was the nature of the relationship between them. It is not an easy task to determine whether a relationship has changed from a casual engagement, as both Mr Reid and Mr Kavanagh accept this was at the start, to one where because of regularity or continuity of employment the employment status has been varied to that of permanent employee.

### ***Determination***

[25] The well-known Employment Court case of *Barnes (formerly Kissell) v Whangarei Returned Services Association (Inc)* [1997] 1 ERNZ 626 considered whether an employee who was, like Mr Reid, a bar worker was a casual or permanent part-time employee. Initially in that case the employee had been rung up by the bar manager when work was available but after a period of time this had changed to a situation where the employee was no longer rung up but rostered on the bar for a minimum number of days and hours. The Court placed reliance on principles applied in earlier Court cases. The Court also relied on the placement by the employee on the roster and the requirement for her to obtain permission not to work and concluded that the employee had become a regular and permanent part-time employee whose employment could not be terminated by being rostered off.

[26] I do not find that Mr Kavanagh intended that the status of the employment relationship would change when Mr Reid had obtained his bar manager's certificate or that by agreement or by his conduct he said or implied to Mr Reid that it would do so. In concluding this I do accept Mr Kavanagh suggested that more hours may have been able to be offered to Mr Reid after that time and no doubt there was discussion about that. I also record for completeness that I was not satisfied that there had been agreement about a pay increase.

[27] I am supported in my view that there was no intention to vary the employment status by Mr Kavanagh's continued resistance throughout the relationship to the introduction of any roster system. I have also placed reliance on the fact that the way work was offered to Mr Reid did not change and that Mr Reid, throughout his employment, felt that he could turn down work if he had other plans. Even though Mr Reid did not usually turn down an offer of work his ability to do so without consequence or difficulty reflected I find the casual nature of the employment. I also place some weight on the fact that this was a new business and I accept that Mr Kavanagh really did not know what to expect during the winter season. There was a seasonal aspect to the business in that the busy period would be during the summer months. I find that on the balance of probabilities that Mr Kavanagh advised the bar staff at some stage that he thought the hours would taper off over the winter months.

[28] There was variation in the number of hours that Mr Reid worked each week and the days he worked. There was some degree of regularity and continuity of his engagements between late December and April. On close scrutiny of the records of hours worked I am unable to conclude that the hours Mr Reid worked were at a level of regularity or continuity so that Mr Reid was a permanent employee or that the true basis of the employment relationship was one of permanency. It seemed to me that Mr Reid accepted the engagements could/would be irregular and his concerns were directed more at the reasons why he was not offered any further engagement after 30 May 2003 rather than at the nature of the relationship itself.

[29] I may have formed a different view about the nature of the relationship if it had continued. Mr Kavanagh should be aware that casual arrangements with employees can take on features of regularity over time and may move to a situation where an employee is in fact a permanent employee. An employer should monitor the situation.

[30] In this case however I have not found Mr Reid was a permanent employee. Both parties are in agreement that Mr Reid was engaged as a casual employee and I do not find that this was varied so that Mr Reid became a permanent employee. After Mr Reid's last engagement on 30 May was completed Mr Kavanagh was not obliged to offer him any further work and there is no continuing relationship of employment. Mr Reid was not "sent away" in the sense of being dismissed by

Mr Kavanagh. He was not offered any further engagements. There are no grounds therefore for Mr Reid to claim that he was unjustifiably dismissed and he does not have a personal grievance.

[31] Mr Reid's main problem was that he did not believe Mr Kavanagh had been honest with him about the reasons he was not being offered further work. Mr Kavanagh and Mr Reid had been good friends but clearly that is no longer the situation. It is unfortunate that Mr Kavanagh did not treat Mr Reid fairly given their previous friendship by giving Mr Reid an opportunity to respond to the matters of concern. Had that occurred then the situation could have been resolved to everyone's satisfaction.

### ***Costs***

[32] I reserve the issue of costs.

[33] The parties should attempt to reach agreement with respect to costs particularly taking into account my final comments as to the reasons Mr Reid was longer being offered engagements. These were not put to Mr Reid.

[34] If agreement cannot be reached then the respondent has 14 days from the date of this determination to provide to Mr Reid and the Authority, a memorandum of costs and the applicant has a further 14 days to file and serve a reply.

Helen Doyle  
Member of Employment Relations Authority