IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 14/09
File Number 5134308

	BETWEEN	Shaun Stevenson Applicant
	AND	Bentan Twisted Limited Respondent

Member of Authority:	Denis Asher
Representatives:	Trent Petherick for Mr Stevenson Gary Tayler for the company
Investigation Meeting	Napier, 13 January 2009
Submissions Received	By 12 February 2009
Determination:	16 February 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The company denies Mr Stevenson's claims that it unjustifiably disadvantaged or unjustifiably dismissed him and says he abandoned his employment.

[2] It agrees he was not provided with a written employment agreement but disputes his various claims for holiday pay and unpaid wages.

[3] The company opposes the application of penalties in respect of the employment agreement matter and the holiday pay claims.

[4] During the Authority's investigation the parties agreed that a labour inspector could assist them in respect of Mr Stevenson's claim he was owed unpaid wages.

[5] Following the Authority's investigation, and as an expression of good conscience, the company paid Mr Stevenson for statutory holidays he had worked but for which he had not received days in lieu.

[6] Mr Stevenson is legally aided.

Background

[7] The company operates a restaurant, bar and a TAB outlet in Waipawa. Its sole director is Ms Wenda Veen. Mr Stevenson started as a barman for the company on 10 August 2007, working variable hours. He later took up a full-time position often managing the bar despite not holding the appropriate certification.

[8] The parties' employment relationship began breaking down as a result of events on 6 May 2008: on that day Mr Stevenson reported to Ms Veen that the TAB till was down $400. He says that on 8 May, following a rostered day off, Ms Veen alleged and implied in front of others on several occasions that he had taken the missing $400, and that he was also responsible for the bar till being down $223 and beer being lost because valves were not properly turned off. He says that, in front of others, Ms Veen demanded the return of hotel keys; Mr Stevenson says he felt unable to remain at the workplace and left shortly afterward. Mr Stevenson believes he was effectively dismissed at this or a latter point.

[9] Other than agreeing she required the return of keys held by the applicant, Ms Veen denies Mr Stevenson's allegations.

[10] Mr Stevenson visited his doctor on 9 May and was advised to take time off work because of stress. As it happened, Mr Stevenson obtained two medical

certificates covering the periods 9-14 May and 16-23 May 2008 inclusive (doc 7); he could not account for his failure to make himself available for work during the intervening period, i.e. 14 & 15 May.

[11] Mr Stevenson says he wanted to resolve matters, and sent a letter to the company dated 12 May asking for a meeting (doc 4). In the absence of a time response, Mr Stevenson says he then sent a second letter to the company dated 15 May seeking urgent mediation assistance (doc 6).

[12] In fact the company had received Mr Stevenson's first communication and replied by way of its own letter dated 13 May, proposing a meeting on 16 May (doc 5). Because of the address recorded on the applicant's sick leave certificate, the company's letter was sent to that address, which was the applicant's mother's address. Mr Stevenson received the invitation several days after the proposed meeting date, hence that opportunity was lost.

[13] Ms Veen says she never saw the applicant's letter of 15 May proposing mediation.

[14] On 23 May, having been medically cleared to return to work the following day, Mr Stevenson telephoned the company to discuss his return: he did not speak to Ms Veen but was told by another staff member he was no longer rostered on to work. Mr Stevenson telephoned again on 2 June. Again he did not speak to Ms Veen but to another staff member who advised he was not rostered on to work. Mr Stevenson says he took this advice as further evidence his employment had been terminated. He subsequently registered with the Ministry of Social Development, authorised Work and Income to obtain income details and received a sickness benefit for a period of two weeks (doc 8).

[15] Ms Veen's reason for not contacting Mr Stevenson was because, said she, of a reluctance to risk aggravating his medical condition which she had been advised (by telephone) was stress and traumatism: instead she expected Mr Stevenson to contact her. Other than the letter of 12 May that she responded to, she received no texts or telephone calls from the applicant.

[16] Ms Veen confirmed she had not returned Mr Stevenson to the roster: she said that was because she had not dismissed him but because of the ongoing

possibility he was not fit to work, the risk he did not appear and the difficulty she would face of finding a replacement staff member at short notice. She also noted he had not returned to work during the narrow gap (two days) between the two medical certificates and expected to hear from Mr Stevenson when he was fit to return to work.

[17] Ms Veen said Work and Income's advice, received on 16 June, came as a complete surprise: she responded to it that day (document 10) advising that – as far as she was aware – Mr Stevenson remained on stress leave and asked, if the applicant had terminated his employment, could either Mr Stevenson or Work and Income advise her of the termination?

[18] The next advice Ms Veen received was a letter from Mr Stevenson's counsel dated 4 July 2008 advising of, amongst other things, his unjustified dismissal grievance (doc 15).

[19] Mr Stevenson found casual employment on 28 July and permanent full-time employment from mid-November 2008.

Mr Stevenson's Position

[20] Amongst other submissions the applicant accepts he has the onus of establishing he was dismissed.

[21] In various judgements the Courts have held that the term 'dismissal' should not be construed narrowly but as the termination of employment at the initiative of the employer.

[22] Ms Veen's requirement that Mr Stevenson return his keys and then permanently rostering him off resulted in his dismissal. When that exactly occurred is a matter for the Authority to determine.

[23] The respondent made no enquiries of the employee and ignored his efforts (two written letters, several telephone calls and one text) to resolve the problem. Trust and fair dealing required the respondent to make enquiries of Mr Stevenson where he had not shown a clear intention to end the employment relationship: *E N Ramsbottom Limited* v *Chambers* [2000] 2 ERN 97.

Company's Position

[24] Amongst other arguments, the company advances the following points:

[25] It says it is not helpful to respond to the applicant's personal allegations against Ms Veen.

[26] By way of training and written directions, and as a matter of commonsense, Mr Stevenson was required at the start of each shift to ensure that the TAB till balanced from the previous shift. However, on 6 May Mr Stevenson checked the till some time into his shift when he says he discovered a shortfall. Ms Veen was concerned by the applicant's failure to undertake a check at the start of his shift as the ability to focus on the reason and time of the loss was made more difficult if not lost altogether.

[27] Ms Veen asked for the applicant's (and another employee's) keys as she intended to open in the mornings herself so as to get to the bottom of her concerns over money going missing. It is argued on Ms Veen's behalf that was entitled to act in the way she did, and it did not constitute dismissal of Mr Stevenson.

[28] Ms Veen points out she agreed to Mr Stevenson's written request for a meeting, following his departure on sick leave but it was the applicant who failed to respond to the company's letter of 13 May: instead, he provided another medical certificate effective to 23 May without, during the interval, returning to work or accounting for his absence.

[29] Nothing further was heard from Mr Stevenson until the respondent received advice from the Department of Social Services, initiated by Mr Stevenson, advising he no longer worked for the company.

[30] These events clearly indicate it was the applicant who abandoned his employment.

Discussion and Findings

Employment Agreement and Holiday Pay, etc Claims

[31] The company acknowledges it is in breach of s. 65 of the Act which is now over 8-years old. That section mandates a prescriptive, written individual employment agreement. Case law is well-established that, per the amendment s. 63A (2), penalties will apply for any failure to meet that requirement; see for example *The Wellesley Ltd* v *Adsett* unreported, Shaw J, 3 Dec 2007, WC 31/07.

[32] However, the company argues that the intention of s. 63A of the Employment Relations Act 2000 is that the employee must bring an action within a year from the time that he was aware he was not offered a written employment agreement prior to him accepting employment on oral terms. The breach must be limited to a pre contractual action known by Mr Stevenson, i.e. in or before August 2007 when he commenced employment. He has brought a claim outside of twelve months from that date.

[33] I reject that argument on a plain reading of the words *reasonably have known*: s. 135(5)(b) of the Act. I do not accept they are qualified in the manner alleged by the company's advocate. I also do not accept it was reasonable to expect Mr Stevenson to have known from the time he commenced his employment of the company's statutory obligation to provide him with a written offer of employment. I find that once he was advised of the law he acted promptly and within 12 months to bring a claim.

[34] The company also attributes its breach to ignorance. It says it has subsequently moved swiftly to correct its mistake and all existing staff have written employment agreements.

[35] I am satisfied, however, that the absence of a written employment agreement including a description of Mr Stevenson's rights cannot be said to have caused or contributed to Mr Stevenson's grievance. Despite the absence of a written contract including, amongst other things, a description of the grievance process, he properly sought an early meeting with the respondent (refer to his letter of 12 May), which in turn was acknowledged by Ms Veen.

The meeting did not happen because of the effect of the erroneous address in Mr Stevenson's medical certificate. The applicant also promptly contacted the Department of Labour to clarify his rights, including going to mediation (refer to his letter of 15 May 2008 requesting mediation). There was no response to that letter because Ms Veen never received it. Because, as exampled, there is no evidence of disadvantage resulting from the company's breach, I am not persuaded that the appropriate penalty of $500 should be paid other than to the Crown.

[36] In respect of Mr Stevenson's claim he is owed wages for days in lieu of statutory holidays worked the company – in its submission dated 4 February 2009 – advised (par 53) that it intended paying the applicant the value of 5 alternative days earned but not taken (note: the applicant's final submissions received on 12 February confirm payment has been effected). The company says it has paid Mr Stevenson not because it concedes any money is owed but simply in good conscience.

[37] While it has taken some time in coming to this position – and leaving aside the respondent's claim the applicant has no authority to bring a claim for penalties – I am not satisfied the delay is evidence of the respondent deliberately attempting to escape its obligation and am therefore not prepared to impose a penalty: see *Xu and Anor* v *McIntosh* [2004] 2 ERNZ 448.

[38] Notwithstanding this undertaking but for completeness' sake, I direct that those monies be made to Mr Stevenson and – having regard to the fluctuating 90-day bank bill rate – that interest of 6% be paid from the date on when this claim was first raised on his behalf, i.e. on 4 July 2008 in the first advice of his personal grievance. The labour inspector can be expected to assist in confirming the quantum. In the event of the parties failing to reach agreement on the sum and/or calculation of the interest leave is reserved for this matter to be returned to the Authority.

[39] In the absence of a written employment agreement and evidence of any agreement by the parties that holiday pay would be paid on an as you go basis, and notwithstanding the evidence on Mr Stevenson's pay slips of payment of holiday pay, but because of his permanent employment status, I am obliged to accept his claim that he never agreed to a 'pay as you go' arrangement in respect of holiday pay and is entitled to those monies by s. 23

of the Holidays Act 2003. Failing agreement leave is reserved for the calculation of what is owing to Mr Stevenson to be returned to the Authority.

[40] Because the payslips are evidence of the respondent attempting to meet its obligation to Mr Stevenson under the Holidays Act I am not persuaded a penalty as sought is appropriate.

[41] Mr Stevenson's claim for unpaid wages is not yet made out. I am confident that the best way forward for the parties is for the labour inspector to identify any shortfall thus leaving the parties well placed to settle the matter on their own terms. Failing agreement leave is reserved for this matter to be returned to the Authority.

Dismissal or Abandonment?

[42] Was Mr Stevenson dismissed or did he, as the company submits, abandon his employment? Were I to find Mr Stevenson was dismissed it follows it was unjustifiable as due process and good cause are clearly and entirely absent.

[43] I do not accept Mr Stevenson was unjustifiably dismissed for the following reasons.

[44] I do not accept that Ms Veen's moves to stop any future loss of money (including requiring the applicant and another employee to return their keys) were other than proportionate and legitimate, as was her intention to inquire into significant sums (8% of turnover) lost to date. Those actions did not amount to a predetermination or an admonishment of Mr Stevenson or disciplinary action; neither did they effect his dismissal. The actions did not amount to Ms Veen accusing Mr Stevenson, or any other person, of being responsible. While clearly embarrassed, the applicant was not unjustifiably disadvantaged or unjustifiably dismissed by that event.

[45] As a practical measure, and in light of earlier losses, Ms Veen had good reason to take immediate steps and to inquire into Mr Stevenson's actions (particularly his apparent and inexplicable failure to balance the till at the start of his shift) and those of all other employees. That was because a significant financial haemorrhage had to be staunched. Money had gone missing, and continued to go missing after Mr Stevenson's absence on sick leave, in a way

suggestive of 'an inside job'. As it happened, for various reasons including his legitimate absence on sick leave, Ms Veen was unable to undertake a formal investigation by meeting with the applicant and putting questions to him.

[46] As I make clear above, I do not accept that Ms Veen deliberately ignored Mr Stevenson's subsequent communications. Ms Veen says she only received one of his letters which she promptly responded to with a proposed meeting date: there is no reason to doubt her claim. I have no evidence to contradict that claim. The employee that Mr Stevenson says he gave his second letter to (requesting mediation – doc 6) was not called by either party to the Authority's investigation.

[47] I accept that Ms Veen reasonably and fairly restrained from telephoning Mr Stevenson direct because of his medical condition: she was properly concerned not to aggravate that condition.

[48] Similarly, taking her cue from the address on the applicant's medical certificate, Ms Veen used it to respond to his letter of 12 May; it was unfortunate Mr Stevenson had not updated his medical records with his changed address.

[49] Mr Petherick's submissions received on 29 January refer at par 9 to the history of *"… texts sent between the employer and the employee"*. His client confirmed during the Authority's investigation that he also texted his employer, i.e. there was two-way text traffic during the normal course of the applicant's employment. Whereas Ms Veen had good reason to be cautious in approaching the applicant, I do not understand why – in respect of his efforts to return to work and his perception of unresponsiveness by the company – Mr Stevenson was unable to telephone or text Ms Veen direct or attempt to meet with her face to face, as he had on previous occasions, but elected instead to speak only to other staff about whether he was rostered to return. It is clear from Mr Stevenson's evidence (pars 31 & 32 of his statement) that his conversation with those two other employees was effectively limited to whether he was rostered on or not. He did not ask them to approach Ms Veen to clarify his employment status but erroneously concluded – not because he had spoken directly to the respondent but on the strength of the fact he was not rostered on – that he had been dismissed.

[50] Good faith entails two-way traffic: see s. 4(1A) (b) of the Act. It is unlikely Ms Veen's mobile phone's voice recording system was not functioning, as claimed by the applicant: it is anyway no answer for his failure to text the respondent, or telephone direct, or otherwise attempt a meeting with Ms Veen by presenting himself at the workplace.

[51] Ms Veen's approach, after one attempt to set up a meeting which – from her perspective – Mr Stevenson did not attend or respond to, was to await his return. In all the circumstances I am satisfied this was, albeit barely given a failure to follow up the absence of ongoing medical certificates accounting for the applicant's absence, a fair and reasonable position for the company to adopt. That passive response is partly explained by Mr Stevenson's failure to present himself for work between the periods of his two medical certificates, and because the company had not heard from the applicant at the expiry of his final medical certificate.

[52] There was no assumption by the respondent Mr Stevenson had abandoned his employment (unlike the fact situation in *Lwin* v *A Honest International Co Ltd* [2003] 1 ERNZ 387) nor did it take any steps to terminate the employment relationship: it simply awaited the applicant's return and was – as Ms Veen's letter of 16 June 2008 (document 10) makes clear – surprised when it received advice from Work and Income that he no longer worked for it; Ms Veen believed at that time that Mr Stevenson remained on stress leave.

[53] The respondent's view, that Mr Stevenson regarded himself as dismissed, was of course reinforced by his counsel's letter of 4 July 2008 (doc 15), which did not seek clarification of the applicant's employment status but proceeded immediately with, amongst other matters, an allegation of unjustified dismissal.

[54] I do not accept the submission that Ms Veen's written advice to staff (doc 9) is evidence of a finding by the respondent that the applicant was responsible for any missing money (see par 14 of Mr Petherick's submissions received on 29 January). The quotations relied on are presented out of context; they do not record Ms Veen's statement that *"As you are all aware I have never believed (Mr Stevenson) took the money but he was responsible for the tills on the day. I am sure he just had the worst day of his life."* Ms Veen's evidence at the Authority's investigation confirmed that her concerns related to Mr Stevenson not

undertaking a till balance at the start of his shift, and her frustration that – in his absence – she had not been able to investigate the matter with his assistance. Without the applicant's co-operation, Ms Veen said she was also unable to progress an insurance claim as the assessor refused to process the claim until various questions had been put to Mr Stevenson.

[55] Despite the absence of a written employment agreement including a position description, I am satisfied from the evidence adduced by the investigation (including doc 43) that Mr Stevenson understood he was expected to – and frequently did – balance the TAB till before he commenced his shift.

Comment

[56] This has been a difficult matter to determine, not least because of the unusual passage of events (a falling away of the employment relationship) and the unfortunate absence of communication between the parties. The absence was made worse by both parties believing that the initiative for future communication rested with the other. Unfortunately, Mr Stevenson concluded from the passage of events that he had been dismissed when – by way of an objective assessment – there was no fair and reasonable basis for arriving at that conclusion.

[57] And while I do not doubt the effect of this miscommunication was devastating on Mr Stevenson, I am satisfied the respondent took no steps to dismiss the applicant. By a modest margin I am satisfied that Ms Veen's relative passivity did not amount to a deliberate repudiating of the employment relationship. Unfortunately, it is clear that – without justification – Mr Stevenson arrived at the view he had been dismissed and acted accordingly.

[58] As Mr Stevenson made clear during the Authority's investigation, he did not know how or when he was dismissed but was leaving it for the Authority to decide the matter. Having regard to the above, I am satisfied that – as Mr Stevenson was not dismissed by the company – he cannot be said to have been unjustifiably dismissed.

Disadvantage?

[59] In respect of other matters alleged to have amounted to an unjustified disadvantage, the investigation established no evidence in support of Mr Stevenson's generalised claims or that – prior to Mr Petherick's advice of a personal grievance dated 4 July 2008 – they had ever been raised with the company.

[60] Having regard to the above, I am satisfied that Mr Stevenson was not unjustifiably disadvantaged by the company.

Determination

[61] The company is in breach of s. 65 of the Act and is to pay a penalty of $500 to the Crown: ss. 133 (1) (b) of the Act applied.

[62] Mr Stevenson is owed wages for days in lieu of statutory holidays worked and interest on the same: this matter may be returned to the Authority if the parties are unable to reach agreement.

[63] Mr Stevenson is also owed holiday pay per s. 23 of the Holidays Act 2003; this matter may be returned to the Authority if the parties are unable to reach agreement.

[64] Leave is reserved for the parties to return to the Authority Mr Stevenson's claim in respect of unpaid wages should the parties not reach an agreement following the intervention of a labour inspector.

[65] As requested by the parties, costs are reserved. In the event agreement is not forthcoming on the same I can indicate that – as Mr Stevenson has succeeded in two respects – costs are likely to follow this event.

[66] In an attempt to assist the parties on this point I make the following observations: I do not accept the company has acted in a misleading way or that it blocked disclosure. I also note that the applicant was warned against filing amended statements of problem on the ground – as proven – that the investigation was the appropriate venue (and the best least cost opportunity) to pursue such matters.

[67] Mr Stevenson is legally aided and, notwithstanding his failure in respect of the two major grievance claims he brought (unjustified disadvantage and unjustified dismissal), he has succeeded in other areas.

[68] Taking account of the amount of that grant at the time of the investigation and the fact it ran for a day, the applicant might therefore expect to recover those costs.

Denis Asher
Member of the Employment Relations Authority