

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Peter Taylor (Applicant)
AND	Review Publishing Co Limited (Respondent)
REPRESENTATIVES	Mark Nutsford, for Applicant Paul Tremewan, for Respondent
MEMBER OF AUTHORITY	Marija Urlich
INVESTIGATION MEETING	13 February 2007
SUBMISSIONS RECEIVED	19 February 2007
DATE OF DETERMINATION	30 April 2007

DETERMINATION OF THE AUTHORITY

[1] Peter Taylor was employed for five weeks in the position of editor of the industry magazine "Beer, Wine and Spirits". His employment ended during a meeting on 20 October 2005. Events during this meeting form the central feature of this employment relationship problem; Mr Taylor says he was dismissed and that that dismissal was unjustified, Review Publishing says Mr Taylor's employment ended by mutual agreement and that he agreed to be engaged as a freelance writer.

[2] Mr Taylor seeks a finding that his dismissal was unjustified. He seeks remedies consequent to any such finding to reimburse lost wages and compensate him for hurt and humiliation caused to by his dismissal.

[3] Review Publishing says that Mr Taylor readily accepted he did not have the skills necessary to successfully fulfil the editor position and agreed that his employment should end with two weeks payment in lieu of notice.

Pre-employment representations

[4] "BWS" is one of a number of industry magazines published by Review Publishing. Review Publishing is owned by Peter Mitchell. Mr Taylor and Mr Mitchell had worked together during the 1960s. They renewed their acquaintance in August 2005 when Mr Taylor telephoned Mr Mitchell to catch-up. During the course of this conversation Mr Mitchell invited Mr Taylor to

meet with him to discuss a position in his company.

[5] Mr Taylor attended the meeting with Mr Mitchell who explained he needed an editor for a brand new liquor industry publication, "BWS". Mr Mitchell invited his managing editor, John Winters, into the meeting to discuss the role in more detail with Mr Taylor. Mr Taylor was offered the position and said he would need to consider the offer; at the time he was working for Suburban newspapers for about 30 hours per week and needed to consider giving up that work.

[6] Mr Taylor says that during the meeting he made it clear to Mr Mitchell that he would need support in the new role, specifically that he would need support with editorial duties for at least the first two additions of the magazine and that he was unfamiliar with Mac computers and the liquor industry. Mr Taylor says that Mr Mitchell positively responded to each of his concerns. Mr Mitchell says Mr Taylor said he was an experienced journalist. Mr Mitchell said he needed an editor with writing skills and that he saw a clipping file of Mr Taylor's work, which Mr Taylor denies. Mr Mitchell did not say in his evidence that Mr Taylor was an experienced editor or that he satisfied himself that Mr Taylor had sufficient editorial experience to fulfil the position of editor of "BWS". There was no suggestion that a journalist role is the same as an editor.

[7] The evidence does not support a finding that either Mr Mitchell or Mr Winters made any rigorous assessment of Mr Taylor's skills or experience to fulfil the role of editor of "BWS".

The terms of employment

[8] A written employment agreement was sent to Mr Taylor, signed by Mr Mitchell and dated 6 September 2005. Mr Taylor countersigned the employment agreement on 13 September 2005 when he commenced his position with Review Publishing. For the purposes of this determination the relevant clauses of the employment agreement are:

"Terms of Agreement

1.1

This agreement shall come into effect on 12/9/05 and shall remain in force for a period of twelve weeks. During this time performance reviews will take place and this contract will then be renegotiated or terminated pursuant to any provision of this agreement.

5. Probationary/Trial Periods

5.1

Employment is subject to a trial period of three months (dates advised in letter of appointment) during which time the Employee's performance will be reviewed in weeks 3, 7, and 9 of trial period. The Employee will be

entitled to whatever training, supervision, support and resources during this period as may be deemed necessary by the Employer, and will be advised at the performance review meetings of their work performance in relation to the standards required of them. The Employer will clarify the standards required with reference to the Employee's position description. (REFER SCHEDULE 1)

5.2

The Employer may extend the trial period to enable the Employer to conduct additional performance reviews. Notice of the extension of the trial period and the length of the extended trial period will be given to the Employee in writing before the completion of the initial trial period.

5.3

One week's notice of termination of employment may be given after two performance reviews or at the final performance review if the Employer considers that the Employee has failed to meet the required standards.

5.4

Where the Employer terminates the agreement under this clause the Employer may elect to pay one week's wages in lieu of notice.

5.5

On successful completion of this the probationary period, the Employer will give written confirmation to the Employee of the Employee's position with the Employer.

35 Disciplinary Procedures

35.1

Before entering into a formal disciplinary process, the Employee will be given a reasonable opportunity to improve. This may be in the form of an informal verbal reprimand. The intent is to encourage the Employee to behave in a manner that is appropriate to their employment. In some cases it may be more appropriate to move directly to the formal procedures.

...

[9] Mr Taylor was not provided with the position description referred to in clause 5.1 of the employment agreement.

The first edition of "BWS"

[10] Mr Taylor set to work on the first edition of "BWS". He sat adjacent to Mr Winters and they spoke every day. Mr Mitchell was overseas for the first weeks of Mr Taylor's employment and was therefore unavailable for support or feedback. The week three performance review referred to in clause 5.1 of the employment agreement was not conducted. Review Publishing did not provide an explanation as to why.

[11] Mr Taylor said Mr Winters was very helpful with industry contacts but that Review Publishing failed to adequately train him on the production system operated by the Mac computer he was assigned, that he did not have access to a number of features of that system

for three weeks, that he did not receive any business cards until three weeks into his employment and that his telephone was unable to receive messages until two weeks into his employment. He said these difficulties were stressful and impacted in his ability to perform his duties. Mr Taylor accepted that deadlines were set by which stories must be completed and that those deadlines were communicated to him.

[12] Mr Winters accepted Mr Taylor experienced some difficulties beyond his control during the first weeks of his employment but that he still had concerns about Mr Taylor's performance and raised these with Mr Mitchell upon his return from overseas. I take from that that Mr Winters did not have the authority to raise these concerns directly with Mr Taylor. Mr Winters said his concerns were that Mr Taylor seemed to take a long time to come to grips with the production system and the importance of deadlines.

[13] On his return from overseas Mr Mitchell held a editorial meeting with Mr Taylor and Mr Winters. He told them that he wanted more spirit articles in the magazine, because there was too much on beer and wine. Mr Winters undertook to write the spirits articles. Mr Taylor continued to prepare the rest of the copy and in particular focused on completing a feature article on sparkling wine. Mr Taylor said the sparkling wine feature took longer to complete than anticipated because it was larger than first envisaged and it took a long time to get responses from industry contacts. During the editorial meeting there was no discussion of Mr Winter's concerns about Mr Taylor's performance. The focus was to get the magazine completed for printing.

[14] Mr Mitchell and Mr Winters are critical of Mr Taylor during the final days before the magazine was to go to print. They say they had to complete all the pre-production while Mr Taylor, whose position was editor of the magazine, continued to write articles, while they proof read and checked page layout. When I asked Mr Winters where Mr Taylor had failed as an editor he said Mr Taylor should have been free of writing a few days clear of the production cycle ie, before it went to the printer, to allow for fine tuning.

[15] Mr Mitchell said he was not happy with the layout of the magazine and that it did not have the look he wanted. Mr Mitchell said this was not Mr Taylor's fault alone, that production was also responsible. He said the changes that needed to be made put some pressure on the production timetable.

How did Mr Taylor's employment end?

[16] After the magazine went to print Mr Taylor was asked to attend a meeting with Mr Mitchell and Mr Winters. Mr Mitchell said the purpose of the meeting was to tell Mr Taylor that he was unhappy with the look of the magazine. Mr Mitchell said he thought Mr Taylor did not

have the ideas necessary to create the sort of magazine he wanted. Mr Mitchell opened the meeting by saying to Mr Taylor "You're not an editor's asshole". Mr Mitchell said he did not mean the comment to be insulting and described it as an amicable phrase. In his oral evidence Mr Mitchell said he suggested to Mr Taylor that he not do editorial work but do freelance writing for the company. Mr Winter said he recalled Mr Mitchell saying to Mr Taylor that he thought it would be better if they "called it a day", that Mr Taylor seemed very relieved and said he had been thinking about leaving in a month's time. Mr Mitchell and Mr Winter described the meeting as amicable and that it ended with handshakes.

[17] Mr Taylor said that he thought the offer of freelance work was made to sweeten the situation. He said he felt pretty awful and that he had done his best in the circumstances. Mr Taylor said his comment about leaving in a month's time was made because he thought the next magazine would be easier to produce and that if there were no improvements in terms of workplace support that he would consider his next step.

[18] The time and date of this meeting are disputed. Mr Taylor said the meeting was held at 4.45pm on Friday, 21 October. He said he was sure of the date because it was the Friday before Labour weekend and he saw Mr Mitchell briefly the following Wednesday when he returned to pick up his belongings. He says he would not have seen Mr Mitchell on a Friday because he does not attend the office on that day. Mr Mitchell says the meeting was held on Thursday 20 October and he relies on the file note he made immediately following the meeting:

*"Started Sept 9, 2005 (TUES)
Meeting 9am Oct 20, 2005 (Thursday)
Left immediately
Paid for that week
& a further 2 wks pay
Expenses paid by*

[19] Nothing turns on this dispute. However, I find the meeting was held on Thursday, 20 October 2005 at the end of the working day. Mr Mitchell accepted that the meeting was not held at 9am and that it occurred later in the day. Mr Taylor's personal grievance letter states that the meeting occurred on Friday 20 October 2005, which indicates a degree of uncertainty as to the date, and Mr Taylor's evidence was very clear that Mr Mitchell did not attend the office on Fridays.

[20] Mr Taylor was paid two weeks salary in lieu of notice. Mr Taylor completed three freelance assignments for Review Publishing in November 2005 for which he received payment in February 2006.

Did Mr Taylor resign or was he dismissed?

[21] There is no evidence to support Review Publishing's contention that Mr Taylor agreed to resign his employment to accept freelance assignments. The end of the employment relationship was clearly and bluntly initiated by Mr Mitchell's opening comment in the meeting. Mr Taylor responded in a manner which was entirely understandable to preserve his dignity in what, I accept, was a shocking and humiliating situation. I am unclear how any response of Mr Taylor's to Mr Mitchell's advice that he "wasn't an editor's arsehole", a suggestion that he not do editorial work and might like to do freelance work could be characterised as agreement to resign. Mr Taylor was dismissed. There was nothing to agree too. That Mr Taylor did not fulsomely rebut advice of his dismissal or assert a personal grievance then and there does not mean he agreed to leave his employment.

[22] I am satisfied that the mechanics of how the termination would be effected were discussed and that Mr Taylor agreed to leave then and return to pack up his belongings later. This is not evidence that Mr Taylor agreed to resign.

[23] My conclusion that the dismissal issued from Review Publishing is further reinforced by the unfair manner in which the meeting was convened and conducted; Mr Taylor was not advised prior to the meeting of its purpose or nature, was not given an opportunity to have a representative present and was not given an opportunity to comment on the concerns Review Publishing had about his performance before a conclusion was reached. It is clear that the meeting was disciplinary in nature. Mr Mitchell said he convened the meeting because he was not happy with the look of the magazine and did not believe Mr Taylor had the skills to produce the magazine he had in mind. Mr Mitchell had serious performance concerns and he came into the meeting with a view that Mr Taylor could not fulfil the role of editor. There is no evidence that Mr Mitchell put his performance concerns to Mr Taylor to comment on and that he considered those comments. It is reasonable to conclude from this, along with Mr Mitchell's opening comments in the meeting that Mr Mitchell's intention was to end the employment relationship.

[24] Review Publishing failed to meet the barest standards of fair and reasonable conduct for such a meeting. Mr Taylor was unjustifiably dismissed at the meeting on 20 October 2005.

Remedies

[25] Mr Taylor has established that he has a personal grievance. He is entitled to a consideration of the remedies he seeks.

[26] I accept that Mr Taylor found the meeting of 20 October 2005 shocking and humiliating.

He is entitled to an award to compensate him for hurt feelings consequent to his dismissal. I set that award at \$3000 pursuant to section 123(1)(c)(i) of the Act.

[27] Mr Taylor seeks reimbursement of three months lost wages pursuant to section 123(1)(b). I am satisfied that Mr Taylor took reasonable steps to mitigate his loss after his dismissal. He is entitled to be reimbursed for three months lost wages, less the two weeks payment in lieu of notice paid to him and any wages earned during this period, including work performed for Review Publishing during this period, pursuant to section 123(1)(b) of the Act.

[28] Section 124 of the Act requires me to consider whether Mr Taylor has contributed to the circumstances which gave rise to his grievance. Review Publishing failed to draw its concerns about Mr Taylor's performance to his attention in a manner which was fair or reasonable and failed to give him a fair opportunity to respond to or address those concerns. Review Publishing agreed a probationary period with Mr Taylor which set out a structured process for reviewing his performance and failed, without explanation, to comply with the terms of the employment agreement to monitor his performance during the probationary period. If it had complied with the employment agreement these unfortunate events may have been avoided. However, I accept Review Publishing had serious concerns about Mr Taylor's performance in the position of editor of "BWS". Indeed Mr Taylor accepted that to a degree he was floundering in the role of editor.

[29] This is a situation where the remedies awarded to Mr Taylor should be reduced. The award of lost wages should be reduced from 12 weeks to 8 weeks, less the two week notice period and less any wages earned during that 8 week period, including any work performed for Review Publishing, notwithstanding that payment for that work was received at a later date. There should be no reduction to the award made to Mr Taylor under section 123(1)(c)(i).

Costs

[30] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so Mr Nutsford should file and serve a memorandum of costs within 28 days of the date of this determination. Mr Tremewan should file and serve a reply within a further 14 days and any reply should be filed and served within seven days of receipt.

Marija Urlich
Member, Employment Relations Authority