

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 165/08
5108728

BETWEEN GWYNNETH WOODMAN
 Applicant

AND PORTOBELLO HOTEL &
 BISTRO LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Bill Clark, Advocate for Applicant
 Michael Guest, Advocate for Respondent

Investigation Meeting: 22 May 2008 at Dunedin

Submissions received: 20 June 2008 from Applicant
 18 June 2008 from Respondent

Determination: 28 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Woodman, she was unjustifiably dismissed from and disadvantaged in her employment with the respondent company. She seeks lost remuneration in the sum of \$2,181.94, recompense for unjustified reduction in her working hours in the sum of \$2,237.40, holiday pay on these amounts in the sum of \$353.54, compensation for hurt and humiliation of \$6,000, reimbursement of two days wages lost through attendance at mediation and the Authority's investigation being \$200 and costs in the sum of \$900.

[2] The respondent denies it disadvantaged Ms Woodman and that it dismissed her unjustifiably. It says Ms Woodman either resigned from or abandoned her employment because she failed to carry out a reasonable and lawful instruction from

her employer. As a consequence of its views on the matter the respondent declines to meet Ms Woodman's expectations of remedies.

The issues

[3] To determine this matter the Authority needs to make findings on the following issues:

- Was the applicant consulted as to her views when the company changed from shifts to set days for employees engagements;
- Did the applicant refuse to follow a lawful and reasonable instruction from her employer;
- Did the applicant abandon her employment;
- Was the applicant unjustifiably disadvantaged;
- Was the applicant unjustifiably dismissed;
- If either unjustifiably disadvantaged and/or dismissed, did the applicant contribute to the circumstances giving rise to these grievances; and
- If so, what, if any remedies should be awarded to the applicant.

Relative history and events

[4] Gwynneth had been employed as a waitress at the hotel and bistro from November 2004. At the end of March 2007 the business changed hands when it was purchased by Mr Perry and Mrs Tracy Reid. The outgoing proprietors provided her with a very positive reference which was relied on by the incoming proprietors who essentially rolled over the applicant's employment arrangements and carried on.

[5] Tony Reid, the son of the incoming proprietors, was appointed as chef with responsibility for kitchen and restaurant management. Together with his mother Tracy Reid, he arranged the work rosters for staff and he also directed kitchen and wait staff on a day to day basis.

[6] The applicant's hours were determined by a roster and she averaged 21.55 hours over 2-3 days per week. Towards the end of April, management discontinued

the roster system but without consultation with Gwynneth as required by clause 4.4 of the individual employment agreement.

[7] As a result of the move from rosters for staff according to their availability the respondent moved to a system of fixed days with staff being given the opportunity to select which days they preferred. Gwynneth was not involved in this process which resulted in her having only a Saturday available for her to work. She says her average weekly hours dropped to 9.12 hours per week.

[8] On 8 September 2007 Gwynneth finished her shift at the hotel around 9.15pm and went home. She expected to return to work the following weekend. Prior to the weekend she received a text message from Tony advising she was not required. He says he was told by another worker, Genevieve Gaskill, that the applicant wanted the weekend off. The following weekend the applicant was again told she was not required.

[9] Gwynneth rang Mrs Reid to inquire why she was not needed to be told that she was no longer employed.

[10] The heart of the matter are the events at the end of the applicant's last shift. The respondent says Gwynneth abandoned her employment after she refused to re-clean the kitchen chiller and the service chiller in the bistro. Tony Reid told the Authority,

this is when I informed her that if her attitude kept up, this would be her last shift. She worked for another hour and then took it upon herself to leave work early. She did not have permission to leave work. She left work at around 9.15pm. The hours of the bistro are 5pm to 9pm and then a full clean up, which usually takes anywhere from 1-2 hours. ... She had an option to carry out a reasonable instruction or she would not be given further work. She chose stubbornly to resign by her actions of walking out and abandoning her employment. I believed that her attitude as an employee was so sub-standard that, in the face of previous warnings, her termination would have been justified, but it was Gwynneth who walked out.

[11] Gwynneth's account of the events is significantly different. She says:

On 8 September when I came into work Tony was in a mood. Although by the time Fay and Ernie sold the business I was mostly employed as a waitress, he made me clean the majority of the kitchen. In a sense he was not going to let me stand still all night. When there was nothing left to clean I was made to re-clean things as, according

to Tony, they hadn't been cleaned well enough. When I reacted by putting on a front of being overly happy to re-clean he had the music in the kitchen turned off and said it hadn't to be turned on again. He did not say at any point that I was being fired.

[12] It is of some significance that the time records of the respondent shows at least fourteen other occasions where the finish time was before 9.30pm, some of which finished before 9pm.

[13] Mr Perry Reid also gave evidence in respect of the events on that shift. However, I have preferred that provided by Tony simply on the basis that he was actually present on the night and able to give firsthand account of what took place. It is also significant that when questioned as to the warnings Tony Reid referred to in his evidence, he was unable to point to any formal disciplinary process having been invoked in regard to Gwynneth's employment.

[14] On the issue of the change in her hours of work Gwynneth told the Authority:

On top of all this my hours had also been cut. The way they were cut seemed really unfair to me. Tracy drew up rosters for the first month or so after they bought the business. My hours were spread over three days and were about the same as my previous hours with Fay and Ernie. Tracy said to me that she had too much work dealing with the other company (Natures Wonders) to be making rosters. The following week, between my times at work, everybody grabbed at least two days each, some days with double shifts. By the time I was working again all the days and shifts had been claimed by others. I had only the Saturday night and sometimes the Saturday lunch time left. I asked Tony about this and he said everyone just wanted set days and that the days taken were the only days the other employees could work. So that was that I had no say in matters.

[15] In her evidence to the Authority Mrs Reid said she initiated the change in hours saying she needed a life outside the pub. She advised that she put up a note near the freezer and staff were able to put their options on to that notice. When questioned by Mr Clark on the matter Tony agreed that the rosters were abandoned and staff were hired on fixed days. Further he confirmed there was no written variation or discussion with Gwynneth, and when asked by Mr Clark whether her hours reduced by default, the witness replied yes.

[16] Each member of the Reid family spoke of Gwynneth as an unsatisfactory employee. Mrs Reid summed it up by saying *she did not like to be given any*

instruction. When I attempted to make myself crystal clear as to the standard I wanted in her employment she became sullen.

[17] For her part, the applicant denies that this was so saying she was usually a cheery person.

The investigation meeting

[18] At the investigation meeting the Authority heard evidence from the applicant herself and on behalf of the respondent from Mr and Mrs Reid, Tony Reid and Genevieve Gaskill. The parties had very distinct views and evidence on the key events, there being very little common ground between them.

[19] A considerable amount of evidential debris came to light at the investigation meeting, much of it relating to events following the dismissal and preceding the Authority's investigation. Much of this related to what I regard as Gwynneth venting her anger and frustration at the loss of her position on bebo.com, much of which was unflattering to the Reid family and the hotel however, neither they nor the hotel were specifically named in these entries.

[20] Another was passing reference to an allegation of sexual harassment in respect of Tony Reid around team building exercises involving hugging. I am satisfied from the evidence I heard and the fact the matter was not pursued formally in the Authority indicates this either was of minor significance or may never have happened.

[21] Of major concern however was the evidence given by Genevieve Gaskill informing the Authority that the applicant had approached her to enlist her support in bringing a sexual harassment claim against Tony Reid and the offer of a financial inducement to participate in that exercise.

[22] This witness told the Authority she never took part in any group hugs and did not observe or know of any such exercise and denied the applicant's allegation that *Tony would regularly poke us females in the stomach and back and tried touching our bra straps in a flirty way.* The witness said nothing of this type had occurred in her case and that she had not observed that happening to anyone else. Further, she said she would complain loudly if something of the kind did happen to her.

[23] Genevieve Gaskill said that on the second occasion when Gwynneth spoke to her of these matters she was so concerned at what she saw as *a blatant attempt to enlist me to make a false complaint that I spoke to my mother at the first opportunity about what Gwynneth had said. ... We were both concerned at the seriousness of the situation and that I might somehow be dragged in to a false complaint so we decided to make notes of our discussion so that I was protected but unfortunately these notes have been mislaid.*

[24] I will return to this matter later.

Analysis and discussion

[25] The respondent's adjustment to the applicant's hours of work were on the evidence, a breach of s.14 of the Employment Agreement which requires any variation to be recorded in writing. It also breaches ss 4.3 and 4.4 which require seven days notice of changes. As a result of the method employed by Mrs Reid this situation was an analogous to a raffle with those working during the week having the opportunity to garner the hours they preferred. This clearly reduced Gwynneth's hours of work and she suffered loss as a result of that. For the sake of completeness I make it clear that the applicant was a part-time permanent worker on a roster not a casual employee.

[26] Standing back and weighing the evidence I have come to the view that Gwynneth was not formally dismissed by the respondent on the night of her final shift. As referred to above the evidence of Tony Reid was that he said *if her attitude kept up this would be her last shift.* That witness confirmed the applicant worked for another hour. And one of the few things the parties agree on is that nobody that night told the applicant she was dismissed.

[27] On the other hand I do not accept that Gwynneth abandoned her employment. I do not accept that she walked off the job as alleged, prior to the completion of tasks. It was clear from her evidence that the applicant expected to return the following Saturday and was surprised to receive the text saying that she would not be required. It was only after receiving the second text a week later that Gwynneth telephoned Mrs Reid to find out why she was not required and was told that she was no longer employed. Clearly there is a total lack of process and the denial by Genevieve Gaskill

that she told Tony Reid that the applicant wanted a weekend off as he had advised the Authority, confirms my view that there was an actual dismissal.

[28] It is clear that Gwynneth intended returning to the workplace and was prevented from doing so when advised by Mrs Reid that she no longer had a position with the respondent.

[29] The ban which was later put on the applicant coming in to the hotel seems unwarranted. However, as I understand it there is no other bar or bottle store nearby and I accept it imposed a considerable inconvenience on the applicant. I glean from the evidence that it was the patrons of the hotel who instigated the attempt to have Gwynneth get her job back. In those circumstances it seems a reasonable step for the respondent to place a ban until the matter could be resolved.

Remedies

[30] Returning to the issues set out above in this determination I find:

- The applicant was not consulted as to her views when the company changed from shifts to set days for the engagement of its employees. The applicant lost significant hours as a result of that unjustified action by the respondent;
- The applicant did not refuse to follow a lawful and reasonable instruction from Tony Reid. The evidence was clear that she undertook the re-cleaning of the items concerned and put a brave face on it regardless of her view that she had fulfilled the task correctly in the first instance;
- I find the applicant did not abandon her employment;
- The applicant was unjustifiably disadvantaged and was unjustifiably dismissed.

[31] Having found that Gwynneth has a personal grievance I now turn to the remedies to be awarded.

Remedies

- (a) Loss of remuneration
- (i) As a result of the applicant's hours being reduced in breach of s.4.3 and s.14 of the agreement, the respondent is to pay the applicant the sum of \$2,237.40 gross, and \$178.92 gross holiday pay on that sum;
- (ii) As the applicant was unjustifiably dismissed and lost remuneration as a result between 9 September and 11 November 2007, the respondent is to pay the applicant the sum of \$2,181.94 gross and \$174.55 gross holiday pay on that sum.
- (b) Compensation.

The Authority requires parties to approach it with clean hands when seeking to resolve their disputes. The evidence of Ms Gaskill, which I accept without reservation, refers to Ms Woodman's attempt to enlist her support in making a false claim against Tony Reid and offered this witness a financial inducement. Ms Gaskill told the Authority under oath *I asked Gwynneth how she had been sexually harassed by Tony and I was told by her that she would make things up. She told me that the Court would believe anything she says because she is a girl and sexual harassment is such a serious charge. She told me that I could get \$3,000 as an outcome.*

[32] Mr Guest exhorts me deprive Ms Woodman of all remedies regardless of my findings of fact in this case. I have considered that submission very carefully. Because the approach to Ms Gaskill was made some time after the dismissal of Ms Woodman, it is not part of the factual matrix surrounding the dismissal and disadvantage claims. Youthful enthusiasm and a desire to seek redress from her former employers is one matter, but the behaviour of Ms Woodman in attempting to induce a person to make a false complaint and then appear under oath in front of the Authority in support of that false accusation is quite another matter.

[33] But for this action on the part of Ms Woodman, the Authority would have awarded her, on the basis of the evidence of hurt and humiliation put before it, compensation of \$5,000. In order to sheet home the seriousness of her behaviour in

trying to subvert and mislead the Authority's process, I award the applicant the sum of \$1,000 under s.123(i)(c)(i) of the Act.

Costs

[34] On behalf of the applicant Mr Clark submitted an applicant for costs in the sum of \$900. This is unsupported by any documentation and so I urge the parties to attempt to resolve the issue of costs between them. If that cannot be achieved leave is granted to Mr Clark to lodge and serve a memorandum on costs 28 days from the date of issue of this determination. Mr Guest is to lodge and serve his memorandum in reply 14 days thereafter.

Paul Montgomery
Member of the Employment Relations Authority