

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 103/09
5146374

BETWEEN TRACEY WRATT
Applicant

AND MARK GILLESPIE t/a THE
ROYAL HOTEL
Respondent

Member of Authority: James Crichton

Representatives: David Carruthers, Counsel for Applicant
Mark Gillespie in person

Investigation Meeting: 6 July 2009 at Greymouth

Determination: 15 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Wratt) alleges that she was unjustifiably constructively dismissed by the respondent (Mr Gillespie), that she was disadvantaged by unjustified actions of Mr Gillespie, and that she is owed unpaid wages.

[2] Mr Gillespie denies constructively dismissing Ms Wratt and says that she resigned of her own accord, denies disadvantaging her by unjustified actions but accepts that there may be an amount of holiday pay due and owing.

[3] Ms Wratt was employed at the Royal Hotel as a bar manager and she commenced her duties in January 2008. It is common ground that initially 40 hours per week was expected, but whereas Ms Wratt's evidence was that she expected 40 hours per week indefinitely, Mr Gillespie said that it was always the intention that the hours would fluctuate according to seasonal conditions. Mr Gillespie said in his

evidence that Ms Wratt knew the industry well enough to know that that was always the position.

[4] There was also dispute about an employment agreement. Ms Wratt says that she was promised an employment agreement but it never eventuated. In fact, it seems that Mr Gillespie provided Ms Wratt with an employment agreement but that it was never signed and Mr Gillespie argued that both parties were responsible for failing to get that organised.

[5] Ms Wratt complains that when she returned from surgery and a consequent period of sick leave in June 2008, she discovered that Mr Gillespie had *unilaterally reduced my hours*. Mr Gillespie agreed that he had done this, but said that his motive was to equalise the work available between Ms Wratt and the other barperson. Mr Gillespie said that the change in hours was partly occasioned by seasonal change (which Ms Wratt would be well aware of from her experience in the industry) and partly to fairly equate the hours available between Ms Wratt and the other barperson working. He said that on average Ms Wratt had only worked 33½ hours in the previous period whereas the other woman had worked 38½ hours on average. However, Ms Wratt said that the reason for her hours being so much reduced was because Mr Gillespie had taken into account the period that she was away on sick leave.

[6] Ms Wratt also complained that on two occasions Mr Gillespie had altered her time sheets down. Mr Gillespie agreed that this had happened on two occasions. He said the first occasion was when Ms Wratt had clocked off half an hour after closing off the EftPos machine (when he docked her half an hour). The second occasion was when she asked for time off to pay a bill and was seen doing her supermarket shopping.

[7] Matters came to a head in July 2008 when there was an argument about a customer. Ms Wratt formed the view that the customer had been overcharged and she raised this with Mr Gillespie who did not agree. The customer who was living in the house was, according to Mr Gillespie, *not a good payer* and accordingly Mr Gillespie limited this man in how much credit he could have at the bar.

[8] Some time after the discussion between Ms Wratt and Mr Gillespie about the alleged discrepancy in the customer's bill (Ms Wratt says she thinks about three

weeks), Mr Gillespie saw Ms Wratt and the customer talking at the bar and eventually established that Ms Wratt had in fact told the customer that she considered there was a discrepancy in the customer's account.

[9] Ms Wratt agreed with me that she *may be* ought not to have told the customer that and that her obligation to the employer ought to have prevented her from engaging directly with the customer in that way.

[10] Clearly, Mr Gillespie was furious at Ms Wratt's behaviour and made that absolutely plain on 29 July 2008 when these events happened. He says that not only did Ms Wratt's action cost him money in that he had to struggle to be paid by the customer, but also it was wrong of her to provide the information to the customer in the first place when, if she had a problem, she ought to have brought it to him.

[11] The following day, Mr Gillespie was still wild with Ms Wratt and rang her and told her not to come in. He told me he did tell Ms Wratt that he was not opening the bar, although he did in fact open the bar but not until later than the usual time.

[12] The day after that, 31 July 2008, Ms Wratt appeared at the hotel and handed Mr Gillespie her resignation. It is in the following terms:

31 July 2008

Dear Mark and Sue,

I would like to thank you for my employment at the Royal Hotel but due to personal reasons I will be giving you a week's notice as of today, Thursday 31 of July.

Once again thank you for the opportunity of working at the Royal and I wish you both and the business well.

Yours sincerely

Tracey Wratt

[13] A statement of problem was filed in the Authority on Ms Wratt's behalf on 12 December 2008 after mediation was unable to successfully resolve the problem.

Issues

[14] The issues that require determination in this matter are as follows:

- (a) Was Ms Wratt unjustifiably constructively dismissed;
- (b) Is Ms Wratt owed wages;

- (c) Has Ms Wratt suffered disadvantage as a consequence of unjustifiable actions of the employer?

Was Ms Wratt constructively dismissed?

[15] I am satisfied on the evidence before me that Ms Wratt was not constructively dismissed from her employment. The nature of the employment was perhaps feisty but I do not see any evidence of the sorts of precursors to a constructive dismissal situation developing.

[16] There is no evidence whatever that Ms Wratt was told to resign; indeed, it is clear that her resignation was a significant nuisance to Mr Gillespie. Further, there is no evidence whatever of a course of conduct from Mr Gillespie designed to encourage Ms Wratt to resign. Certainly there were differences between them, but on the basis of the exchanges at the investigation meeting, each seemed to give as good as they got and I am not persuaded that the evidence discloses any evidence of Mr Gillespie trying to force Ms Wratt out. Furthermore, Mr Gillespie had asked Ms Wratt to join his business and he did that because she was good at her job.

[17] That leaves the prospect of Ms Wratt being constructively dismissed by reason of a breach of duty by the employer so serious as to create the reasonably foreseeable consequence that Ms Wratt would resign her employment.

[18] The only basis on which that argument could be made out is the contention that, by flying into a rage on 29 July 2008, Mr Gillespie so misconducted himself as to force Ms Wratt to resign her position.

[19] Certainly this is Ms Wratt's argument. She says in effect that Mr Gillespie made it impossible for her to continue, but I do not accept that argument. As I say, she seems a young woman well able to look after herself and certainly the exchanges that I observed in the investigation meeting did not show any unwillingness to be heard. Furthermore, the factual position is that the incident where Mr Gillespie lost his temper happened on 29 July and the following day Mr Gillespie rang Ms Wratt and told her not to come in because the bar was shut. But that of course was not the position and Ms Wratt found that out because she was able to observe by passing the premises that day that the bar was indeed open. Rather than confront Mr Gillespie, she simply attended at the workplace the following day and handed in her resignation.

[20] The resignation which I recorded in full above is in unremarkable terms and makes no reference whatever to any unpleasantness or disagreement between the parties. On balance, Mr Gillespie's loss of good temper on 29 July might have been a breach of duty, but he took the entirely sensible step of asking Ms Wratt not to come in the following day (so that he could cool off), and I do not consider, on the facts before me, that anything would have alerted Mr Gillespie to the possibility (let alone the reasonable foreseeability) of Ms Wratt resigning her employment because of his behaviour.

[21] There had been arguments between them before as I have outlined, and both of them seem to accept that she gave as good as she got. My observation of the investigation meeting would support that conclusion.

[22] In all the circumstances then, I am not persuaded that this is a constructive dismissal. In my opinion, Ms Wratt resigned her employment and so there is no personal grievance on that basis.

Is Ms Wratt owed wages?

[23] I am absolutely satisfied on the evidence I heard that there is an outstanding amount of wages owed to Ms Wratt. She says that amount is \$643.58 which is made up of a number of items including underpaid ordinary wages, payment for a day off in lieu, partially unpaid holiday pay, and a deduction for an original bar tab which she said she thought had been in effect *forgiven* by Mr Gillespie.

[24] On the bar tab issue, Mr Gillespie said that he had originally thought to forgive it but that he was cross about Ms Wratt's sudden resignation and was particularly irritated by her behaviour in claiming to a customer that he had been overcharged by Mr Gillespie which resulted in Mr Gillespie losing money with that client.

[25] On the evidence before me, I am satisfied that Ms Wratt is owed the sum of \$643.58 by Mr Gillespie and there will be an order that that amount be paid. Mr Gillespie was clear that he owed money to Ms Wratt in respect of holiday pay and he also said in his evidence that Ms Wratt *might be right* about the payment for a day off in lieu. In relation to the bar tab which it seems he had originally agreed to write off and then deducted, I think the honourable course of action, and the correct legal position, is that if there was an understanding that that matter was forgiven (and I hold that there was), then it cannot be reintroduced at a later date.

Has Ms Wratt suffered a disadvantage grievance?

[26] I do not think there is any evidence of a disadvantage grievance in the present case. I am satisfied that the changes to the roster and thus to hours to be worked by Ms Wratt was done for proper purposes and, given the nature of the industry and Ms Wratt's obvious knowledge of it, it seems to me unlikely that she would not have been very clear that reductions of that magnitude in the quiet season were more or less inevitable. This would be particularly so when the employer has an obligation not just to Ms Wratt but also to other staff and their needs for access to work.

[27] Furthermore, the employment relationship was not just a one way street. Mr Gillespie agreed to pay Ms Wratt some sick pay during one of her periods of ill health, notwithstanding the fact that the length of her employment was such that she had no entitlement to sick pay. She acknowledged during the investigation meeting that she had benefited from that concession.

[28] Ms Wratt's other complaint related to the changing of her time sheets. Again, I am satisfied the time sheets were changed for proper purposes. She did not dispute Mr Gillespie's contention that she had been given time off to pay a bill but was seen doing her grocery shopping. Her complaint that she had been docked a half hour when she claimed a half hour beyond the time she closed off the EftPos machine ought to have been taken up with Mr Gillespie at the time and resolved at the time. On the face of it, Mr Gillespie's logic in making the adjustment makes sense to me.

Determination

[29] I am satisfied that Ms Wratt does not have a personal grievance either by reason of an unjustified dismissal or by reason of having suffered a disadvantage because of unjustified actions of her employer, Mr Gillespie. It follows that she is not entitled to receive any compensation nor is she entitled to payment of wages that she lost as a consequence of any grievance.

[30] However, Ms Wratt is entitled to be paid the wages that she ought to have been paid correctly while she was employed by Mr Gillespie. I order that Mr Gillespie is to pay to Ms Wratt the sum of \$643.58 net being unpaid wages due and owing to Ms Wratt. Mr Gillespie is to account to the Inland Revenue Department for the tax on that sum.

Costs

[31] In the particular circumstances of this case, a costs award is inappropriate and I direct that costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority