

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 26
ARC 26/13**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN STEPHEN CROSS
 Plaintiff

AND ONERAHI HOTEL LIMITED
 Defendant

Hearing: 11-13 December 2013
 (Heard at Whangarei)

Appearances: Mr Gregory Bennett, advocate for plaintiff
 Mrs Marie Menner Ryan, representing the defendant

Judgment: 18 February 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff, Mr Cross, worked as duty manager at the Onerahi Hotel for around 20 months. During his employment issues arose in relation to Mr Cross's alcohol consumption during work hours. They became the focus of a formal disciplinary process in February 2012. The process never advanced past its initial phase. The defendant contends that Mr Cross refused to engage in the disciplinary process and abandoned his employment. Mr Cross, on the other hand, claims that he was constructively dismissed.

[2] The Employment Relations Authority (the Authority) determined¹ that Mr Cross had been unjustifiably dismissed but that he had contributed to the situation that he found himself in, and that the remedies that might otherwise have been awarded in his favour ought to be reduced by 100 percent. The plaintiff challenges

¹ [2013] NZERA Auckland 104.

the Authority's determination on a de novo basis. That means that all matters (including the issue as to whether Mr Cross was unjustifiably dismissed) are now before the Court.

Background

[3] Mr Cross initially reported to Mr Donnelly, who was the hotel manager at the time. Mr Gardner took over the role of hotel manager a few months later and says that Mr Donnelly raised a concern with him about Mr Cross's drinking. Mr Gardner was told that these concerns had given rise to two warning letters. Mr Gardner's attempts to locate the letters proved unsuccessful. Mr Cross denied having received such correspondence.

[4] It is common ground that Mr Gardner spoke to Mr Cross about concerns relating to Mr Cross drinking while at work. This culminated in a meeting in early 2011. On 13 February 2011 Mr Gardner gave Mr Cross a letter inviting him to meet on 16 February 2011 to discuss "our earlier discussion with regard to consuming alcohol during work hours". Mr Gardner reiterated that he considered that Mr Cross might have a problem with alcohol and that it may be impacting on his work. Mr Cross did not accept that this was so. He advised Mr Gardner that he was taking some time off and Mr Gardner confirmed that he was comfortable with such a course so long as Mr Cross addressed any issues he was confronting. In the event Mr Cross took a week off work, on pay. The meeting that had been scheduled for 16 February did not take place. It appears that there were no further issues for a period of time but that things later began to deteriorate.

[5] I pause to note that it is apparent that Mr Gardner and Mr Cross enjoyed a positive working relationship and got on well. I accept that Mr Gardner wanted to do what he could to support Mr Cross. This manifested in the way in which he sought to deal with the concerns he had about Mr Cross's drinking but extended more broadly. For example, when Mr Cross was experiencing financial difficulties Mr Gardner extended him a personal loan of \$900, \$300 of which remains outstanding.

[6] I accept that Mr Gardner held genuine concerns about Mr Cross's conduct, including that alcohol consumption may be impairing his work. He received complaints from other staff members that Mr Cross was becoming erratic, was disappearing for periods of time, sometimes appeared inebriated and was not pulling his weight. His evidence was supported by the evidence of other witnesses.

[7] While Mr Gardner attempted to deal with the concerns on an informal basis that became increasingly difficult for him. He came under pressure from Mr Hill, the hotel's owner, to address the issues which were rapidly becoming divisive in the workplace and which had the potential, if not addressed, to impact on the reputation of the business and its operating licence. Although it is clear that Mr Cross did not accept that he had any issues with alcohol that might be affecting his work, he did accept in evidence that Mr Gardner talked to him about his concerns on a number of occasions.

[8] Towards the end of February 2012 Mr Gardner decided to drive to the camping ground where Mr Cross lived to talk to him about the situation. There was a dispute about the date of the meeting but I am satisfied that it occurred on 21 February 2012, consistently with a diary note made by Mr Gardner.

[9] I accept Mr Gardner's evidence that he made it clear to Mr Cross that he had serious concerns about Mr Cross's drinking and that a range of options were discussed, including the possibility of resignation (although it is unclear who raised this possibility). The outstanding \$300 was also raised and Mr Gardner indicated that he would be prepared to forego the debt in the event that Mr Cross decided to resign. Mr Cross says that he felt pressured to resign but I do not accept that. I prefer Mr Gardner's evidence about the tenor of the conversation and the approach he took to it, having regard to the nature of their relationship and the approach Mr Gardner generally took to staff issues. Mr Gardner was aware that Mr Cross was studying and needed financial support, which was why he had agreed to loan him \$900. He said, and I accept, that he did not want to see Mr Cross lose his job but did want to deal with the concerns that had been raised and have them resolved. I do not accept that Mr Gardner told Mr Cross that Mr Hill wanted him gone, a proposition strongly refuted by both Mr Gardner and Mr Hill. In the event Mr Cross told Mr

Gardner that he was going to resign and it was agreed that he would work out two weeks' notice.

[10] Sometime after the meeting Mr Cross changed his mind. Mr Cross maintained that he withdrew his resignation the next day, but I am satisfied it was some days later – on 25 February 2012. That is consistent with Mr Gardner's evidence which, in turn, is consistent with his diary entry for that date. During the intervening period Mr Cross had discussions with other staff, including Mrs Codlin. She worked as a cleaner at the hotel and gave evidence that she had had a conversation with Mr Cross on either Friday 24 February or Saturday 25 February while she was at the hotel having a drink with her husband. She says that Mr Cross told her that he was pleased that he no longer worked at the hotel, that he had resigned and that he had toasted his departure with a glass of beer. Mrs Codlin says that she cautioned Mr Cross about the potential perils of resigning a position before finding alternative work. Mr Cross could not recall such a conversation. I accept Mrs Codlin's cogent evidence about the conversation and what was discussed during the course of it.

[11] Mr Gardner did not take any issue with Mr Cross withdrawing his resignation when he advised that he was doing so on 25 February. This tends to support his evidence that rather than wanting to get rid of Mr Cross he wanted to deal with the issues of concern in a constructive manner and was not seeking to secure Mr Cross's departure from the hotel. Mr Cross did not have a clear recollection of the discussion that took place on 25 February, and I prefer Mr Gardner's evidence as to what unfolded. Mr Gardner advised Mr Cross that a formal process would be commenced and it was agreed that Mr Cross would pick up a letter confirming the position on Monday 27 February. It was agreed that there would be a meeting at 2:00 pm on 2 March 2012.² Mr Gardner told Mr Cross that he would be stood down until the issues of concern had been addressed. Mr Cross accepted that he would be stood down until the meeting had occurred.

[12] Despite agreeing to do so Mr Cross did not pick up the letter. Mr Gardner took it on himself to drive to the campground twice in an effort to hand deliver the

² Reflected in a diary entry for 25 February 2012.

letter to Mr Cross but without success. Nor did Mr Cross attend the meeting at 2:00 pm on 2 March 2012, despite having been advised that it would be taking place at that time and on that date. Mr Cross criticised Mr Gardner for not ringing him to find out where he was. Conversely, Mr Cross did not take any steps to contact Mr Gardner.

[13] The approach that Mr Cross chose to adopt in relation to the process that Mr Gardner was attempting to follow had some parallels with the manner in which he had dealt with issues relating to his draft employment agreement some 11 months previously. Mr Gardner had asked him to sign the draft agreement and he had refused, advising that he had a difficulty with a number of provisions (which he failed to specify). Mr Gardner tried to engage with Mr Cross in relation to his concerns and ultimately invited him to put a line through the provisions he took issue with. Mr Cross did not do so. When this was put to him at hearing Mr Cross criticised Mr Gardner, contending that he should have presented him with a significantly reduced document, although it remained unclear how he expected Mr Gardner to undertake such a task in the absence of any engagement in terms of identifying what he had an issue with and why.

[14] To return to the chronology. Mr Cross arrived at the hotel later on 2 March 2012. Mr Gardner was not there but the staff advised Mr Cross that he was not rostered on to work (consistently with him having been stood down) and attempted to give him the letter that Mr Gardner had earlier left for him. He refused to take the letter from anyone other than Mr Gardner and demanded to speak to him. Mr Gardner was contacted and he immediately drove to the hotel. Mr Gardner says that Mr Cross asked him whether he was fired and that he (Mr Gardner) confirmed that he had not been. Mr Gardner gave the letter of 27 February to Mr Cross. Mr Gardner also advised Mr Cross to nominate a time and place for the meeting and that he would make himself available.

[15] By the time Mr Cross received the letter it was out of date.³ The scheduled time for the meeting which had been agreed on, and which was referred to in the letter, had already passed. The letter referred to two concerns. The first concern related to Mr Cross arriving at work in an “impaired state”. The second stated concern related to Mr Cross putting his colleagues in a position where they had to consistently cover for him.

[16] Mr Cross queried the reference to being in an “impaired state” and what it meant. Mr Gardner responded by saying that it meant being “pissed”. Mr Cross invited Mr Gardner to view the CCTV footage from the hotel and suggested that this would confirm that he had not been drinking. Mr Gardner did not take up this suggestion, making the point in evidence that the cameras were focussed on the public areas of the hotel and that a number of the concerns that staff had raised with him related to Mr Cross allegedly disappearing from these areas for periods of time.

[17] Despite the definition of the phrase in an “impaired state” that Mr Gardner had provided (if any had in fact been needed) and the clarity with which the 27 February letter had been crafted, Mr Cross wrote to Mr Gardner on 3 March 2012 again querying the meaning of the phrase by way of reference to dictionary definitions. He stated that he assumed that he was being stood down from duty on full pay and advised that he would continue to work his rostered shifts in the interim. On 5 March Mr Cross wrote another letter to Mr Gardner requesting copies of his wage and holiday records, which he subsequently received.

[18] Mr Gardner wrote to Mr Cross on 6 March 2012 acknowledging receipt of the 3 March correspondence. He advised that “[a]s our previous meeting failed to eventuate, I now make myself available, at your leisure...” to discuss the matters identified in his earlier letter of 27 February 2012. Mr Cross accepted in evidence that Mr Gardner was making it clear that the ball was in his court to nominate a meeting date and also accepted that he never responded to Mr Gardner’s request.

³ The letter is dated Monday 27 February 2012 and refers to “last night”. It is apparent that the letter was written on Sunday 26 February but not typed until the following day and that the reference to “last night” is to Saturday, rather than Sunday, night.

[19] Mr Cross arrived at the hotel again on 9 March 2012. His evidence as to why he did so varied. Initially he said that he came in to work his shift. He then said that he expected to have the (as yet unscheduled) meeting with Mr Gardner, but also suggested that it was to clarify the basis on which he was stood down. Mr Cross could not have reasonably thought that he would be meeting with Mr Gardner as no meeting had been arranged. That is because Mr Cross had failed to respond to the request to nominate a date contained in Mr Gardner's earlier letter. He could not reasonably have expected that he would be working as he was well aware that he had been stood down while the investigation was still taking place.

[20] Mr Cross says that when he arrived on 9 March staff advised him that he was not to work. He asked to speak to Mr Gardner. Mr Gardner was contacted and told that Mr Cross was at the hotel. Mr Gardner drove to the hotel and spoke with Mr Cross. Mr Cross gave evidence that during this conversation Mr Gardner told him that he was no longer working at the hotel. Mr Gardner refuted this, saying that he simply reiterated what he had previously said, namely that Mr Cross was stood down pending attendance at a formal meeting which had not yet occurred. Mr Gardner's evidence was consistent with the contents of his earlier letter dated 27 February 2012 and it became clear in cross examination that Mr Cross could not clearly recall the conversation.

[21] Mr Cross asked for all of his outstanding wage entitlements, including holiday pay. Mr Gardner asked Mr Cross to return his management key until matters were resolved. It was agreed that Mr Cross would return to the hotel on 12 March to collect his pay and to hand over his key.

[22] A further meeting occurred on 12 March 2012. Mr Cross returned his key and received a payment in cash, as he had requested, together with a payslip, expressed to be for the period ending 4 March 2012. The final line of the payslip noted "termination payment". Mrs Menner Ryan, who had organised the payment, gave evidence that the payment was generated in this way because she believed that Mr Cross had resigned at the time she processed the payment, having previously been advised that this was so. This led her to use the "termination" option when processing the cash payment for Mr Cross that he had earlier requested.

[23] Nothing more was heard from Mr Cross for over two weeks. Mr Gardner assumed that Mr Cross had no intention of returning to work. He said:

... I never saw [Mr Cross] after that [12 March 2012]. He didn't make a date to have the meeting. For all intents and purposes and assuming from the previous resignation a couple of weeks prior it seemed to me that he wasn't coming back to work. He certainly didn't make any effort to address the issues with which I needed to talk to him about on a formal basis.

[24] On 2 April 2012, and some two weeks after receiving the payslip with the cash payment he had requested, Mr Cross wrote to the defendant querying the reference to "termination" on the payslip and requesting a written explanation as to the "alleged termination". He also asked for copies of any correspondence between Mr Gardner and himself. Mrs Menner Ryan forwarded the letter to Mr Gardner, who had since left his position with the hotel. Mr Gardner told Mrs Menner Ryan to provide Mr Cross with copies of the correspondence he had requested. The request for a written explanation for the alleged termination went unanswered and no follow up action was taken by either party.

The parties' respective contentions

[25] Mr Bennett, for the plaintiff, submitted that Mr Cross was constructively dismissed on 21 February 2012, at the meeting at the beach during which the option of resignation was discussed. Alternatively, it was submitted that Mr Cross was dismissed before 6 March 2012 and that this is reflected in the fact that the pay slip that accompanied his cash payment on 12 March 2012 referred to the pay period to the end of 4 March 2012. More generally it was submitted that the plaintiff was the victim of a concerted effort to get rid of him for reasons that had nothing to do with alcohol consumption.

[26] The defendant's case is that the plaintiff was never dismissed and that he abandoned his employment.

Constructive dismissal?

[27] A constructive dismissal occurs where an employee has been given the option of resigning or being dismissed, the employer has pursued a course of conduct

designed to secure the departure of the employee or where the resignation arises out of a breach of duty. None of these scenarios apply in the present case. Even if Mr Gardner presented Mr Cross with a choice (which I do not accept he did) it is evident that it was one that Mr Cross felt well able to back out of, given that he took the time to reflect on his position and withdraw his resignation.

[28] Assuming that the events of 21 February 2012 could otherwise have amounted to a constructive dismissal that was overtaken by Mr Cross's subsequent withdrawal of his resignation, with the acquiescence of Mr Gardner some days after the resignation had occurred.⁴

An orchestrated attempt to get rid of Mr Cross?

[29] Mr Cross gave evidence that he believed that he was targeted by management in an effort to get rid of him because, to use his words, he was regarded as "the Man Who Knew Too Much". As I understood it, this was because management was concerned that he was aware that unlawful deductions may have been made to other staff members' wages.

[30] I do not accept that the defendant was keen to get rid of Mr Cross, and such an objective is not consistent with the evidence. It is clear that Mr Gardner took extensive steps to deal with the concerns that had been raised in relation to Mr Cross and that he wished to address the issues in a constructive manner. They did, however, need to be dealt with. While it is clear that Mr Cross had a firm view that there were no issues relating to his drinking that is not a view that was shared by others. His employer was entitled to raise the matter with him, including having regard to the need to protect its business interests and the interests of other employees. Nor was there evidence to support the existence of a management concern about what Mr Cross knew or did not know about the way in which other staff members were being treated.

⁴ The plaintiff did not pursue a claim of unjustified disadvantage. Events relating to Mr Cross's stand-down were referred to by way of background only.

Failure to establish that Mr Cross had been consuming alcohol at work

[31] It was submitted that the defendant ought to have required the plaintiff to undergo alcohol testing to establish that he had in fact been drinking while at work. There are two difficulties with this proposition. First, it remained unclear what basis the defendant would have had for requiring Mr Cross to undergo any such test. Second, the defendant was not obliged to establish that Mr Cross had been impaired by alcohol while at work prior to carrying out its employment processes. That would be to put the cart before the horse. I am satisfied that there was a sufficient basis for the defendant to initiate an employment process and there is nothing to support the inference that it was being pursued for an ulterior motive. Any explanation or response that Mr Cross may have had to the allegations (such as whether there was a systemic culture of alcohol consumption amongst staff) could have been offered at the meeting. That did not prove possible as Mr Cross failed to attend the meeting that was scheduled and then failed to take any steps to arrange a meeting himself, as he had been requested to do.

Did Mr Cross abandon his employment?

[32] An employee may be deemed to have abandoned their employment if they fail to attend work for a consecutive number of days without good cause or communication with his or her employer. In such circumstances, the employee has essentially unilaterally terminated the employment agreement and there is no dismissal.

[33] In *E N Ramsbottom Ltd v Chambers*⁵ the Court of Appeal made it clear that an employer should be cautious in drawing an inference that an employee has abandoned their employment and should take reasonable steps to make inquiries of the employee.⁶ This is reinforced by the statutory obligations of good faith under s 4 of the Act. Those obligations apply to both parties and require each to be responsive and communicative.

⁵ [2000] 2 ERNZ 97 (CA).

⁶ At [26].

[34] It is not consistent with such obligations to refuse to engage with an employment process and thwart an employer's attempts to meet to progress a disciplinary process, as I am satisfied Mr Cross did. Mr Cross accepted that the ball had been placed 'in his court' following Mr Gardner's letter of 6 March and that was where he effectively left it. Mr Bennett submitted that it was the employer's obligation to nominate a date for the meeting following Mr Cross's non appearance at the scheduled meeting. I disagree. The defendant had arranged the initial meeting and had then indicated very clearly that Mr Cross should nominate a date that suited him for the second, given his non appearance at the first. He failed to do so. Instead he asked for all outstanding payments to be made to him, collected his pay, returned his key and nothing further was heard from him for a period of around two weeks.

[35] It was in these circumstances, and against the backdrop of discussions that had taken place between the parties, that Mr Gardner concluded that Mr Cross had abandoned his employment. This was a reasonable assumption to make given the context. I do not consider that it was necessary, in the particular circumstances of this case, for Mr Gardiner to take additional steps to make further contact with Mr Cross.

[36] I conclude that Mr Cross abandoned his employment. It follows that he was not dismissed, much less unjustifiably dismissed.

Remedies sought

[37] Even if Mr Cross had been unjustifiably dismissed from his employment there would be have been difficulties with the relief sought. First, there is no evidence that Mr Cross took any steps to mitigate his losses. As the Court observed in *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")*:⁷

....dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

⁷ (2009) 6 NZELR 530.

[38] Second, there are difficulties with the scope of the claim for compensation under s 123(1)(c)(i) of the Act, including in relation to the reliance on post-termination conduct by the defendant. In this regard Mr Cross referred to being offended by events that occurred well after his departure from the hotel, including the fact that a newspaper clipping relating to the outcome of the Authority's determination had been posted on the hotel notice board and that people had talked to him about the Authority's determination.

[39] There is authority for the proposition that post termination conduct by an employer can inflate the compensatory payments that might otherwise be awarded in an employee's favour. In *Sisson t/a Edgware Law v Lewis*⁸ reference was made to the "firm practice of this Court" that post-termination conduct "can exacerbate and aggravate the injury caused during the subsistence of the employment". And in *Abdalla v Chief Executive Officer of the Southern Institute of Technology*⁹ the Court held that the temporal restriction that applies to economic loss does not apply to non-economic loss, and took into consideration the fact that the employee continued to suffer hurt and humiliation after the employment agreement had been terminated.

[40] While there are references in both the Court¹⁰ and Authority¹¹ to post-termination conduct being an aggravating factor in the hurt and humiliation suffered by the employee it remains unclear what the basis for such a potentially broad brush approach is. The remedies provided for under s 123 appear to be clearly linked to the personal grievance itself and (in relation to s 123(1)(c)(i)) the hurt and humiliation caused by the grievance.

[41] While in some cases the hurt and humiliation actually caused by the grievance may be ongoing, and accordingly be relevant to the assessment of quantum, in the present case it is difficult to see why distinct actions of the employer (the posting of a newspaper article about the outcome of the Authority's determination) taking place long after the departure of the employee and the alleged

⁸ [2004] 1 ERNZ 200.

⁹ CC4/06 Employment Court, Christchurch, 5 May 2006.

¹⁰ *Strachan v Moodie and others* [2012] NZEmpC 95.

¹¹ *Nelson v Katavich* [2013] NZERA 35.

grievance (the unjustified dismissal) are relevant to an assessment of compensation under the Act.

[42] Even if such events were relevant they would not have justified an award in the circumstances of this case.

[43] Third, Mr Cross did not engage with his employer in relation to the disciplinary process. While a number of criticisms were raised about the basis for the defendant's concerns during the course of the hearing, the appropriate time for communicating those issues was at the time of the meeting. He did not attend the meeting despite being aware of it and then failed to arrange a further meeting time, as he had been asked to do. Rather Mr Cross ignored his employer's reasonable request and chose to send unhelpful correspondence that could not have been expected to advance matters and essentially sought to undermine, derail and avoid the employment process. Mr Cross significantly, if not wholly, contributed to any losses he sustained.

Conclusion

[44] The challenge is dismissed.

[45] It may be that no issue relating to costs arises. If it does, and it cannot otherwise be resolved between the parties, costs can be the subject of an exchange of memoranda with the defendant filing and serving and memorandum and supporting material within 30 days of the date of this judgment and the plaintiff filing and serving within a further 30 days.

Christina Inglis
Judge

Judgment issued at 3pm on 18 February 2013