

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 133
5367080

BETWEEN WAYNE RUSSELL HEATH
Applicant

AND THE WAIRARAPA
SERVICES AND CITIZENS
CLUB INC
Respondent

Member of Authority: P R Stapp
Representatives: Mr Heath in person
Carolyn Heaton, Counsel for the Respondent
Investigation Meeting: 8 August 2012 at Masterton
Submissions Received: 8 August 2012 (at the investigation meeting)
Further information by: 10 August 2012
Determination: 31 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem is about:

- Mr Heath's employment with the Wairarapa Services and Citizens Club in Masterton while its regular manager was on parental leave;
- Personality differences between Mr Heath, the Club's President and the Secretary;
- The secretary's attitude towards a visitor to the club who asked for a tape of an advertising jingle that the Club had paid for (22 September 2011);

- For the time taken by Mr Heath to balance the tills, his idea of what training should have been involved and whether a manual to assist him was available; and
- Mr Heath's employment ending on 22 September 2011.

[2] Mr Heath claims he was harassed, ostracised and bullied by people at the Club that included the Secretary during his time at the Club. He claims that he was dismissed on 22 September 2011 by the Secretary during a conversation at the club, and subsequently, on the telephone by Mr Ron Graham, the Club's President.

[3] The Club denies all Mr Heath's claims.

The issues

[4] The main issues in this employment relationship problem are:

- (a) What were the terms of employment and Mr Heath's role in the Club;
- (b) What happened and who said what to whom on 22 September 2011 (involving Mr Heath, Mr Graham the Club's Secretary (Janice Dixon));
- (c) How did Mr Heath's employment end, in other words, did he leave or was he told to leave?

Mr Heath's employment at the Club

[5] Mr Heath was offered employment at the Wairarapa Services and Citizens Club Inc (the Club) in a letter dated 26 July 2011 purportedly as a fixed term employment agreement. He was employed to be an acting manager for five months. Both parties agreed this would be until the manager returned from maternity leave on and about 26 December 2011. The respondent accepted that the letter was not sufficient for a fixed term employment agreement and did not meet the requirements of 66 of the Employment Relations Act. This is a chartered club run by elected officers with paid employees. Mrs Janice Dixon filled the role of the Club's Secretary, and as such this position is a paid employee of the club (not an honorary position and/or an elected position).

[6] Mr Heath's previous experience involved him in personal business activities, but he is primarily an entertainer on the club circuit. This was a chance he saw to

break in to management functions in the industry that he was familiar with. That is why he accepted the role.

[7] His appointment was to fill the role as an acting manager of the Club while its existing manager was on parental leave until 25 January 2012. It was agreed that Mr Heath would be paid \$25 per hour and that he was required to work 15 to 20 hours per week to carry out the duties of the position as acting manager. He was paid without question upon completing time sheets for his hours.

[8] The Club's full time manager (the manager) was involved in a hand-over when Mr Heath started work. This was for a short period of time before she went on her leave.

[9] There was no written employment agreement, other than the terms that were offered to Mr Heath in the letter of offer of employment. Mr Heath claims that upon being employed he got agreement to be reimbursed for a conference to be held in Gisborne later in the year since he would be going there anyway to entertain the delegates. He says the Club agreed to pay his expenses and accommodation for the conference. There was conflicting evidence given to the Authority about this arrangement from Mrs Dixon, and Mr Graham. The former said that the committee agreed to consider any expenses. The impression was left that there was no agreement by the committee to pay the expenses. However, Mr Graham said that it was agreed the Club would meet the costs, but qualified this that Mr Heath was not paid because Mr Heath's employment had ceased, and that he was not employed when the conference occurred.

[10] Mr Heath recalls a staff meeting that occurred on 31 August 2011 involving the manager, and that he was told to take the day off by her. He says he was not paid for this day. At the Authority's investigation meeting the Club could not produce any evidence to challenge this or to show and support that he was actually paid. Subsequently a timesheet has been identified showing that Mr Heath recorded 6 hours work and the Club says that he would have been paid for it. A payment is confirmed by the wage time and leave record and an inclusive payment.

[11] Mr Heath says that this meeting was an early indication of a problem. He has produced a minute in regard to the meeting which referred to any problems or inquiries being passed on to Mr Graham (Minute staff meeting 31.8.2011).

[12] As time went on Mr Heath became more concerned about his role and about the training. He started to take exception to the way in which Mrs Dixon responded to his inquiries, queries or requests on how to do anything. It is clear from the information that Mr Heath has provided to the Authority that he took her reaction to him quite personally on various matters as they appeared to impact on his integrity and the way in which he was being treated. Mr Heath further complains that his employer was not able to view any of the matters he had in his employment objectively, because of a personal relationship between Mr Graham and Mrs Dixon.

[13] From the beginning of his employment Mr Heath compiled his own “manual” and/or notes of what he was required to do, and how to do the work associated with the tills, rosters, pokies, computers, the change machine, balancing, takings and the banking. He also took issue about Mr Graham making announcements, for example on the Club’s “draw” nights and other members’ nights that he says were his duties. Mr Graham says he was entitled to act in that role as the President.

[14] Mr Heath’s concerns caused him to request a meeting that occurred on 14 September 2011. It was attended by Mr Heath, Mrs Dixon, Mr Graham and a committee member who was requested to attend by Mr Graham and Mrs Dixon as a support person for them. No notes exist of the meeting/conversation.

[15] This meeting (on 14 September) involved a discussion about various matters. It is common ground that it became tense and that people became agitated when Mr Heath made accusations and allegations about discrepancies in the books. At that point Mr Graham decided that the meeting should be adjourned to enable everyone to gather their thoughts and meet again later.

[16] On 15 September Mr Heath decided to get legal advice. He decided that he would put his head down and work out the remaining months of his employment, and to try and put his various concerns behind him until his employment ended.

[17] There was a further meeting on 16 September where not much happened. There certainly was no further progress on any of the issues that Mr Heath had in his employment, particularly about his training, the manual and how he believed he was being treated by the secretary. Up until this point he had not made any formal complaint about bullying, harassment and/or being ostracised and/or being denigrated.

[18] On Thursday 22 September Mr Heath says that Mrs Dixon challenged him in regard to his CV and his experience in managing clubs. He says that *her outburst* was inconceivable and spiteful, and he took exception to it as he claims she had shared her views with other club people in the area, including other club managers. There was no proof either way on the reliability of this since Mrs Dixon denied it and Mr Heath had no independent evidence to support the claim.

[19] Mr Heath says that after he had cleared his desk and gone home he telephoned his solicitor for advice. He then decided to telephone Mr Graham to ask him if he was aware of the latest episode, and says he got a reply *yes, I was going to make some time and talk with you*. Mr Graham denies this.

[20] Mr Heath says that Mr Graham did not accept that Mrs Dixon was out of line, and Mr Heath says he then asked Mr Graham twice if the Club's position was that he was to leave his employment. He says that Mr Graham affirmed that it was the Club's position that he *leave, and that it would be best for everyone*. Mr Graham denies the claim.

[21] Mr Heath then returned the Club's keys and left them on the Secretary's desk along with his timesheet. Mr Heath says that this amounted to him being dismissed. This is denied by the Club.

Finding on dismissal

[22] Mr Heath and Mrs Dixon had a conversation in which Mr Heath took exception to, he continued to finish his work, then cleared his desk, went home, contacted his lawyer for advice, and then telephoned Mr Graham. He subsequently returned the keys and his timesheet.

[23] Mr Heath's evidence is that he was dismissed by Mr Graham during the telephone call that took place on 22 September when Mr Graham confirmed it would be best if he left. It is clear from Mr Heath's evidence that he denies that he resigned (p.1 letter of 16 November 2011, Mr Heath's statement and statement of problem). However, the words "*sacked, fired and/or dismissed*" were not used by anyone from the Club, I hold. This was only an impression Mr Heath had, I hold. First he went home and said to his wife that he thought that he had been "*sacked*". Second the words he says Mrs Dixon and Mr Graham used were that he was to leave.

[24] Mr Heath relies upon being told to leave by Mrs Dixon first, and that it was confirmed by Mr Graham over the telephone that he was to leave and that it would be best for everyone. Mr Heath reasonably concluded that he had been dismissed. I hold that the witnesses genuinely believe what they are saying, but that does not mean that they have recalled the events accurately. It is more likely than not that Mr Heath's version meant that he reasonably concluded that he had been asked to leave and in essence had been dismissed.

[25] Even although Mr Heath relies upon evidence from his wife and daughter who say, and confirm, that they overheard Mr Graham on the loudspeaker of the telephone, I hold:

- a) That Mr Graham did not sufficiently protect the club's interest in the matter when Mr Heath telephoned him about Mrs Dixon and what she had done.
- b) That Mr Heath has been consistent from the earliest time about what he says happened.
- c) That the Club accepted Mr Heath's employment ending without following it up with Mr Heath.
- d) That Mr Heath had made some allegations that required a response and there was no procedure put in place to deal with it.
- e) That the Club's approach to Mr Heath's employment arrangement did not meet the requirements of s 66 of the Act to rely on a fixed term employment arrangement, although both parties did have mutual expectations about Mr Heath's acting manager role while the manager was on leave.
- f) That there had developed a dysfunctional emotional and difficult set of relationships between Mr Heath and Mrs Dixon.

Credibility

[26] However, Mr Heath I hold used his phone genuinely to try and get some corroborating evidence, but in doing so has fallen short of being communicative and responsive in his employment. He could have done more to help fix the situation than simply putting closed questions to Mr Graham to confirm he wanted him to leave.

This is especially so given the meeting held on 16 September 2011 and Mr Heath's own claims.

[27] There is no record and no confirmation of any formal complaint being made by Mr Heath to his employer in regard to the allegations of bullying, harassment, being ostracised and being denigrated before he filed the claims in the statement of problem in the Authority. I am satisfied these matters are all matters in the background to what became a dysfunctional working relationship between Mr Heath and Mrs Dixon. As Mr Heath genuinely formed a view that that was what was happening I have to assess that in light of Mrs Dixon's denials, that there was no formal complaint and that Mr Heath's examples relate to conversations that more than likely put in context mean that people have taken different inferences from.

[28] It is clear that even although the meeting on 14 September 2011 was tense and people got aggravated and there needed to be a cooling down period they all left on the basis that they would meet again on 16 September. At best this could have been a cooling off period before the next meeting.

[29] Mr Heath did not deny Mr Graham's evidence at para.22 (Mr Graham's written statement) that he was the person who said *if we thought it was better for him to leave all we had to do was say so. I said again; let's review it in a week's time.*

[30] Furthermore, Mr Heath says at p.16 of his statement that the Friday 16 September meeting *went without incident and the Secretary seemed friendly and helpful for a time.*

[31] Following the altercation on 22 September, Mr Heath chose to clear his desk, go home and consider himself dismissed. It is more likely than not that Mr Heath formed this impression of the situation because he was following the advice of his lawyer which was to ask the direct question of Mr Graham, as he did. Mr Heath did not return to work after leaving his keys. Instead he wrote a letter raising a personal grievance (dated 16 November 2011) for unjustified dismissal and/or constructive dismissal. He outlined his grievances in that letter to make a claim (and subsequently amended it with more details later) for lost wages due to being dismissed, pay for 31 August 2011 and 23 September 2011, reimbursement of costs, compensation for harm, loss of integrity and injury to feelings, and future lost earnings. He strenuously relies on his letter as being accurate. The club's two witnesses have relied upon their

memory to recollect what they say happened in their written statements provided much later and with no notes to reflect back on.

[32] Mr Graham says that he said to Mr Heath during the telephone call that it was a shame that they could not sit down and discuss the problem. Mr Heath denies this, but did nothing himself to clear the way forward. Mr Graham acknowledged that he and the Club did nothing more in regard to Mr Heath after that telephone call, except that a final payment of wages and holiday pay was made to Mr Heath.

[33] It is my conclusion that Mr Heath certainly got upset with Mrs Dixon. However she had no power and or authority to make any decision over his employment because she was a paid employee and Mr Heath did not report to her in his employment. Although he said during the Authority's investigation meeting that he reported to Mrs Dixon there is no clear indication that that was so, I hold. I must therefore conclude that Mr Heath built up his reaction to her disproportionately as a result of his perceptions of her power and became too emotional about her role. However she seems to have had some influence in that it has not been denied and or challenged she had a relationship with Mr Graham, and Mr Graham's reaction, according to Mr Heath, makes it more likely than not that he supported Mrs Dixon, especially after the meeting on 16 September 2011 and in regard to the events on 22 September. As such it is more likely than not that Mr Heath was told to leave because Mr Graham took no action proactively to demonstrate anything to the contrary. Mr Heath's reaction to working out the day and taking back the keys and not returning to work and Mr Graham not following up what was happening leads me to conclude Mr Heath's employment was being dispensed with by Mr Graham.

[34] I am not satisfied that Mr Heath deliberately set about to set up the situation for his own gain as has been submitted, but his failure to be more communicative and responsive is a contributory factor, which I will take into account later.

[35] There was no investigation in any follow up. This is an employer that could have sufficiently put in place an investigation given it is run by a committee, another committee member had been previously involved and the Club has been able to get legal advice and representation. The club did not raise any concerns with Mr Heath on a formal basis and/or in a disciplinary process and at the very least to involve him any of the matters arising during 16-22 September. No opportunity was given to Mr Heath to respond and indeed Mr Graham never went back to Mr Heath when the

employment ended. As such Mr Graham and/or anybody from the Club did not consider Mr Heath's explanation about what had happened.

[36] I hold that Mr Heath has a personal grievance for his dismissal. His employment ended unjustifiably at the initiative of the employer. I now turn to remedies for this.

[37] Mr Heath's lost wages from the time he was dismissed on 22 September to 16 January 2012 as claimed amounts to 16 weeks \$9,200. This is the date the parties mutually believed that Mr Heath's employment would continue to. He had no expectations beyond that date. In addition he has also claimed 9 alternative Saturdays that he would have worked in the total amount of \$675. However, Mr Heath's responsibility to mitigate his loss has been limited, and thus I reduce the first wages amount claimed to 9 weeks compensation for reimbursement of lost wages (\$5,175) and further reduce it by 15% for contribution for his failure to be more communicative and responsive at least to the committee since he had some issues with Mrs Dixon and Mr Graham in their roles and his employment. This amounts to \$4,398.75.

[38] Claims for 2 miscellaneous days work (2 x days x 4 hours x \$25 per hour) have not been substantiated sufficiently. Indeed at least for 31 August there is contradictory evidence about the payment for the day given the wage, time and leave records. It is not clear at all what the other day related to and when it was. However Mr Heath referred to 23 September and as this date was after his dismissal it is included in the claim for lost wages as he was only paid until 22 September.

[39] Holiday pay has been claimed for 403 total hours and I have not been informed what this is for. The final pay purports to complete the requirements for holiday pay anyway, having regard to the wage record produced that shows a payment for holiday pay (25 September). I therefore dismiss his claims.

[40] Mr Heath has claimed \$20,000 compensation for emotional harm, loss of integrity and injury to feelings. I assess this only at \$4,000 because there was no independent evidence and what evidence there is can only be based on Mr Heath's assertions and the limited detail he was able to refer to at the Authority's investigation meeting. I accept that his feelings have been affected by what happened and that he

was hurt personally because of the employer's conduct. This is reduced by 15% for contribution.

[41] Mr Heath has also claimed the reimbursement of various "outlays". I have no hesitation in dismissing each of them because there was no proved contractual entitlement in the first place for them. Legal costs incurred in employment relationship problems during the employment and before any filing in the Authority are expected to be met by the parties. Also, he was not entitled to the payment of the Gisborne club's conference because he was not employed at the time of the conference taking place. I do not accept that Mr Graham agreed to actually pay Mr Heath because he has always qualified any that payment needed Mr Heath to be working at the club. That is entirely plausible given there was no written arrangement between the parties.

[42] I also reject the claim for the loss of entertainment income relating to Mr Heath's private arrangements for future lost earnings. This is because his lost wages are recoverable and it is his responsibility to mitigate his losses. His wages loss can only relate to the period until the time his employment was due to end at the club and he never had any expectations of continuing employment with the club after that date. Mr Heath says that he needed to make arrangements for future income as an entertainer and that required some lead in time that he was not given by the club when he left earlier than the expiry date of his employment. Furthermore his claim has been based on estimates of income and activities. This is not sufficient to establish the claim and what he has indicated is that sometime in the future he will possibly also be able to earn some income from entertaining. Thus he is not eligible for future lost earnings. In other words his losses can not be attributed to his employment ending and that he will be deprived of income because of it. If that was the case he would have needed to start planning for his future anyway because there was a mutual arrangement that he would cease working in December when the manager returned.

[43] The remaining claim for the filing fee is an entitlement he can claim and he spent \$71.56 to file in the Authority. He is required to meet his own miscellaneous costs for reimbursements as he was acting on his own.

[44] My summary of the situation is that:

[45] Mr Heath was unjustifiably dismissed.

[46] The Wairarapa Services and Citizens Club Inc is to pay Wayne Heath:

- a. \$4,398.75 lost wages.
- b. \$675 lost wages for Saturday work.
- c. \$3,400 compensation for hurt and humiliation.
- d. \$71.56 filing fee.

P R Stapp
Member of the Employment Relations Authority