

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 5
5357605

BETWEEN MICHELLE MAREE BIRD
Applicant

AND GSL TARAWERA LIMITED
T/A NORMANBY HOTEL
Respondent

Member of Authority: P R Stapp

Representatives: Kyle Macneil and Victoria Dryden Counsel for
Applicant
No appearance/no representation for the Respondent

Investigation Meeting: 14 December 2011 at New Plymouth

Determination: 16. January 2012

DETERMINATION OF THE AUTHORITY

The Authority's investigation meeting

[1] The respondent was served with the statement of problem and the notice of investigation meeting by a professional document server arranged by the applicant's representative. No good cause has been provided for the respondent's failure to have someone present at the Authority's investigation meeting. There is a possible explanation from a note on file about a support officer's contact with lawyers associated with the respondent who may have been able to help. The lawyers had no instructions and no authority to accept service of the documents. Apparently the company is insolvent and has no assets. There have been no details provided. The company was registered as at 14 December 2011 at 7.59am (and is still registered as at 13 January 2012). I decided to continue and act fully in the matter with the investigation meeting as if the respondent attended and been represented.

Employment Relationship Problem

[2] Michelle Bird commenced working on or about 29 December 2010 for GSL Tarawera Limited t/a Normanby Hotel as a hotel manager, but without a written employment agreement. It was agreed she would work 30 hours a week. She was employed to run and manage the Normanby hotel for the company's director, Nardeen Le Haavre and her partner, Bob Baker. This included using her name to serve alcohol because Ms Le Haavre and Mr Baker did not have a manager's certificate.

[3] When Mrs Bird was not working Ms Le Haavre and Mr Baker arranged other people to cover for her. Two weeks after Mrs Bird started work Ms Le Haavre quit her job elsewhere and started working at the hotel. This involved a reduction in Mrs Bird's hours of work. The reduction occurred without consultation or warning. Mrs Bird tried to arrange meetings with Ms Le Haavre and Mr Baker to discuss these matters, but meetings that were arranged were cancelled by them at short notice, usually by text message. Mrs Bird's partner intervened to try and help her.

[4] Mrs Bird says she tried to raise problems she was having in her work. By letter dated 11 February 2011 Ms Le Haavre requested Mrs Bird to attend an investigation meeting, which was scheduled to be held on 14 February 2011 to discuss various complaints and incidents at work. The letter also outlined a disciplinary procedure and Mrs Bird's rights to a support person. Although the letter purported to attach a copy of an employment agreement, Mrs Bird says she did not receive it. I accept what she says because there was never a written agreement in the first place and the respondent failed to reply and respond in these proceedings. Mrs Bird's partner attempted to discuss the situation with Mr Baker and Ms Le Haavre. He says Mrs Bird resigning was raised, and he was told to tell Mrs Bird to resign and that everything would be forgotten. Mrs Bird resigned on 25 February 2011, in writing, with reasons for her resignation. Her representative raised a personal grievance and requested the employer to provide wage time and holiday records. There was no reply from the respondent to the request.

[5] It falls on the Authority to make a determination.

Issues

[6] Does Mrs Bird have a personal grievance?

[7] Was the Mrs Bird's resignation foreseeable and was the employer in sufficiently serious breach to cause her to resign?

[8] Is this a matter for a penalty against the respondent for not providing an intended employment agreement and failing to reply to a request for wage time and holiday records?

The facts

[9] Mrs Bird says that it was agreed she would work 30 hours per week and would be paid \$16 per hour. She was paid by cash and cheque, but often her payment was late. Despite Mrs Bird asking for payslips she says none were provided. She approached IRD with her concerns about whether or not any tax had been paid by her employer.

[10] Mrs Bird had a number of concerns about her work at the Normanby hotel that she attempted to raise. The problems were:

- a. That Ms Le Haavre exposed Mrs Bird to contraventions of the Sale of Liquor Act by leaving Mrs Bird's name up as the duty manager after hours and also when she was not present and had finished work. Mrs Bird says she went back to work and observed that her name was being used while she was not present.
- b. That Mrs Bird was directed to act as a duty driver while she was the duty manager and thus left the hotel while there was no qualified manager on duty. She says this happened on at least one occasion.
- c. That Ms Le Haavre got intoxicated at work and Mrs Bird refused to serve her. Ms Le Haavre would serve herself behind the bar.

- d. That there was little training provided by Mr Baker and Ms Le Haavre in regard to a new till system that they introduced. On one occasion the system closed down when Mrs Bird pushed some button. She says that in response Mr Baker called her a “*f..... idiot*” in front of customers. Mrs Bird says she did react and swore back at Mr Baker, but later that night they sat down and apologised to each other. She says she thought that was the end of that matter.

[11] After raising her concerns she was given a formal letter dated 11 February 2011 with complaints about her work that she tried to respond to and explain immediately, because she was so shocked. She says that in her opinion the letter from her employer was in retribution to her raising concerns in her employment. No details of the allegations were provided by the respondent. I hold that Mrs Bird’s reaction to comment immediately at the time to the allegations was because she could explain some of the matters and was shocked and annoyed about other allegations, which she denied. The letter outlined a disciplinary procedure and her right to be represented and/or have a support person present.

[12] I hold that the letter was prepared and given in response to Mrs Bird’s and her partner’s prior requests for meetings to discuss her concerns at work, including the unilateral change in hours of work without any notice and her exposure to legal issues concerning the Sale of Liquor Act because of Ms Le Haavre’s behaviour and practices. I am supported in this conclusion by the quickness in the timing that the respondent set out to deal with the matter at the time. This involved a three day timetable. Also, there is a clear history of the respondent and its director and her partner being unwilling to meet and deal with the issues raised by Mrs Bird before the letter. This was supported by the request made by Mr Baker to Mrs Bird’s partner to tell her that if she resigned everything would be forgotten. The discussion between Mr Bird and Ms Le Haavre and Mr Baker meant the employer would have clearly known that a resignation from Mrs Bird was foreseeable given the seriousness of the matters Mrs Bird had raised about what was happening in the hotel and its bar. Mr Bird collected Mrs Bird’s final pay (\$160) for the previous week’s work. He also uplifted her name sign so that it could not be used while she was not at work. There remains an issue about the payment of any holiday pay. I reserve that matter. Mrs

Bird also has the option available to lodge a complaint with a Labour Inspector for any holiday pay.

[13] Mrs Bird's representative raised a personal grievance on 28 February 2011 seeking lost wages, compensation, costs, and a penalty against the employer for failing to provide an intended employment agreement.

[14] The respondent was requested by Mrs Bird's representative to provide wage time and holiday records, the employment agreement and all personal information. There was no reply. This has severely disadvantaged the applicant calculating her average wages for her claims.

[15] The respondent failed to agree to attend mediation.

Determination

[16] In the absence of the respondent replying to the statement of problem and attending the investigation meeting I accept Mr and Mrs Bird's evidence. Their evidence based on the information in the statement of problem was not challenged by the respondent. Mr and Mrs Birds' evidence was consistent, clear, emphatic and entirely believable on key points. Mrs Bird adequately explained how she knew about what was happening with her name tag. Her partner spontaneously, without prompting, explained how he collected the final pay and took with him Mrs Bird's name tag.

[17] I hold that Mrs Bird has a personal grievance. It would have been foreseeable to any fair and reasonable employer that Mrs Bird would resign given the seriousness of the matters that she raised to be addressed during her employment. Also, there had been a discussion about Mrs Bird resigning that involved Mr Bird, Ms Le Haavre and Mr Baker. The reduction in hours without notice and consultation was an unjustified disadvantage in the lead up to the various other matters. Mrs Bird lost her hours and there was an impact on her wages. Mrs Bird's resignation arose at the initiative of her employer failing to act as a fair and reasonable employer, particularly with the use of her name as the duty bar manager. Mrs Le Haavre and Mr Baker left Mrs Bird exposed to considerable risk that an employee should not have to put up with.

[18] Mrs Bird has established that she has lost 8 weeks wages from 25 February 2011, until she got a new job. She was not able to be specific about her start date. Therefore I have accepted the eight weeks as the minimum submitted to me. She has mitigated her loss by looking for and obtaining another job, which was with better pay. She has not contributed to the situation giving rise to the personal grievance. The amount of lost wages is \$3,840.

[19] Also she has established a claim for compensation. Her evidence about the impact on her of her dismissal because of the seriousness of the respondent's breach and actions shows that she has been hurt and humiliated. I accept that she was upset, "blindsided" and that there was an impact on her health, to cause her to need sick leave for 2 weeks, because of the employer's actions. There was a financial impact because she lost her earnings and this worried her. I am satisfied that there was some emotional impact on Mrs Bird caused by her employer's actions because during the Authority's investigation meeting Mrs Bird became tearful about what happened to her. I accept that this was genuine emotion. I award her \$8,000 compensation.

[20] The respondent failed to provide an intended employment agreement. The respondent has relied on that being an oversight. There was no proof that any agreement was sent to Mrs Bird since Mrs Bird says that it was not attached to the letter she received. I hold that any oversight was not a sufficient reason for the employer failing to provide an employment agreement, especially since Mrs Bird had requested one. In other words the breach was a deliberate failure by the respondent to provide a copy of the intended agreement in relation to individual terms and conditions where no collective employment agreement covers the work. Section 63 A (e) of the Employment Relations Act (the Act) applies because there is no proof of a collective employment agreement applying and there being no coverage for the work carried out by Mrs Bird. The respondent's failure was ongoing at least until 11 February 2011, and thus the claim has been commenced in 12 months under s 135 (5) of the Act. I order a penalty of \$3,000 to be paid to the Crown as a matter of public policy.

[21] The respondent failed to provide wage time and holiday records when they were requested by Mrs Bird's representative on 25 February 2011. The respondent has deliberately failed to provide the records requested. This is supported by the

failure of the respondent not even to reply to the applicant's representative's correspondence. As a deliberate action this matter attracts a penalty under s 130 (4) of the Act, I hold. The respondent failed to meet the request for the records made under s 130 (2) of the Act. I order a penalty of \$2,000 to be paid to the Crown as a matter of public policy. The claim was also commenced in twelve months of the request being made. Therefore s 135 (5) has been met. There was no evidence as to whether or not a wage time and holiday record was kept as required.

[22] Mrs Bird is entitled to costs since they follow the event where she has been successful with her claims. The applicant is legally aided. She has been put to unnecessary costs by the respondent and needed to bring this action to get vindication and her entitlements. The respondent's behaviour and obstruction has added to her costs. I award her the sum of \$2,617.40 costs, \$71.56 for the filing fee and \$80 for the professional document server.

Authority's investigation meeting obstructed by the respondent

[23] The respondent, and its director and her partner, have obstructed the Authority's investigation by not appearing and/or not arranging representation. They did not provide any reasons for failing to lodge a statement in reply in the time required and did not ask for leave to reply and respond when they were given the opportunity. They did not follow a timetable put in place by me for the Authority's investigation meeting, and after being informed that leave would not be unreasonably withheld they still failed to turn up to the investigation meeting. They failed to provide wage and time records also.

Orders of the Authority

- [24] GSL Tarawera Limited is to pay Michelle Bird:
- a. \$3,840 lost wages.
 - b. \$8,000 compensation.
 - c. \$2,617.40 costs, \$71.56 for the filing fee and \$80 for the professional document server.

[25] GSL Tarawera Limited is to pay to the Crown a penalty of \$3,000 for failing to provide a copy of the intended employment agreement and a penalty of \$2,000 for failing to provide wage time and holiday records as requested.

P R Stapp
Member of the Employment Relations Authority