IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 198/08
5111317

	BETWEEN	PETER GLEN Applicant
	AND	K & B LOADER Respondent

Member of Authority:	Philip Cheyne
Representatives:	Robert Thompson, Advocate for Applicant Brian Nathan, Counsel for Respondent
Investigation meeting:	2 December 2008 in Christchurch
Submissions Received:	3 December and 19 December 2008 for the Applicant 5 December 2008 for the Respondent
Determination:	22 December 2008

DETERMINATION OF THE AUTHORITY

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[1] Ken and Beverley Loader own and operate Gethsemane Gardens and a function venue known as The Ark. They employ staff to assist with these endeavours. Mr & Mrs Loader's house is in the gardens. Peter Glen is Mrs Loader's cousin. He came to live with them in October 2005. Later he started working for Mr & Mrs Loader but no written employment agreement was provided. In August 2007 Mr Glen vacated the property, Mrs Loader having spoken to him about leaving the house. Subsequently there were phone discussions between Mrs Loader and Mr Glen's mother and Mr Loader and Mr Glen. From this arises Mr Glen's personal grievance claim of unjustifiable dismissal.

[2] To resolve the grievance I need to consider the terms of Mr Glen's employment originally or as varied, whether he was dismissed or has another personal grievance (more of which shortly), and if so what remedies might be appropriate.

Another grievance?

[3] In his statement of evidence Mr Glen claimed that he was sexually harassed in the workplace. That was first raised in the statement of problem lodged on 29 May 2008. It was not specified in earlier correspondence from Mr Glen's representative to Mr & Mrs Loader. The incidents said to constitute harassment occurred in July 2007 at the latest. No grievance about them was raised at the time nor is there an application for leave now.

[4] If it had been open to consider on the merits whether the incidents complained of amounted to sexual harassment under the Employment Relations Act 2000, I would find they did not, even on Mr Glen's account. I should not be taken as accepting Mr Glen's evidence about the incidents in what follows. At worst there was some comment suggesting that Mr Glen should form a relationship with another employee and a threat of disinheritance. The two specific incidents were non-work social situations. There was no request for sexual activity accompanied by a threat affecting the employment; nor was there use of language, visual material or physical behaviour of a sexual nature. No grievance as defined arises on those alleged facts.

[5] It is also suggested that Mr Glen was dismissed because Mr & Mrs Loader disapproved of his sexual orientation and resisted their matchmaking attempts. I do not accept Mr Glen's view about that nor do I accept his evidence supporting it. I prefer the evidence of Mr & Mrs Loader to the contrary.

Employment arrangements

[6] Mr Glen's statement of problem says that he was treated as *full-time and on a permanent basis*. His written evidence is that he worked as a *permanent part time employee*. That conflicts with Mr & Mrs Loader's evidence that Mr Glen was a casual employee throughout the employment. Mr Glen said on oath that he could not remember what had been discussed at the outset about the terms of employment. However he did say that he was paid to do function work and if there were no functions he was not employed. That is consistent with Mr & Mrs Loader's evidence and is supported by the time and wage records.

[7] In part, Mr Glen's claim is based on regular work that was done by him on Sundays. He was never paid for this work and he makes no claim now for payment. What is clear is that it was understood between Mr & Mrs Loader and Mr Glen that

the work he performed on Sundays was the *quid pro quo* for free board as part of their family arrangement. Mr & Mrs Loader took Mr Glen in to their home when he was looking to minimise his living costs. They did that simply because of the family relationship. In return he helped out on Sundays. The Sunday arrangement was never part of the work for hire or reward done under the contract of service commencing soon after Mr Glen moved in. The Sunday work stopped as soon as Mr Glen moved out. It would be unfair now to say it is relevant to the resolution of the dispute about the cessation of his paid function work.

[8] That brings us back to the agreed position that Mr Glen worked only when there was function work available for him to perform. For that he was paid $18.00 per hour. It was clearly casual employment.

Termination of the relationship

[9] While there is a dispute between the parties about precisely what was said by Mrs Loader to Mr Glen before he vacated the premises it is common ground that it related solely to ending the living arrangements. At the time Mr Glen did not think his employment was being terminated and I accept the evidence of Mr & Mrs Loader that they were not terminating the employment relationship by asking him to leave their house. This happened about the end of July and Mr Glen actually moved out on 4 August 2007.

[10] On 9 August 2007 Mrs Loader received a phone call from her aunty, Mr Glen's mother. Mr Glen's mother took a dim view of her niece having told her son to leave and said some hurtful things to Mrs Loader. Mrs Loader did not say anything to dismiss Mr Glen during this exchange with his mother.

[11] After this call Mr Loader decided to phone Mr Glen and let him know that the only forthcoming function on 18 August 2007 was a small function and they did not require him to work. Again, it is not suggested that Mr Loader dismissed Mr Glen during this call.

[12] The next thing to happen was that Mr Glen contacted an advocate who wrote on 1 October 2007 to Mr & Mrs Loader asking for the reasons in writing for the dismissal and also alleging an unjustified dismissal personal grievance. The basis of that claim was as follows:

> *Our client instructs that he lived on site. Our client also instructs that on 27 July 2007 he was requested to vacate the property. Our client has not been offered further work since he was requested to leave. However, he was contacted almost immediately after his departure and told by Mr Loader that there were only two small functions and he was not required. The request by his employer to leave and not offer further work will be viewed as a dismissal.*

[13] The evidence of Mr & Mrs Loader is that there were no other functions requiring staff between August and early October 2007. There is no reason to doubt this evidence and it explains why Mr Glen was not offered any work up to 1 October 2007. In response to the letter alleging dismissal Mr & Mrs Loader promptly replied saying that they had not dismissed Mr Glen from his casual employment. Responses were also given to other points raised in the 1 October letter. The next correspondence from the representative was on 21 November 2007 continuing with the dismissal claim.

[14] All of this makes it clear that there was no sending away of Mr Glen from the employment by Mr & Mrs Loader: see *Wellington Clerical Union v Greenwich* [1983] ACJ 965. I find that there was no dismissal; rather it was Mr Glen who ended the employment relationship sometime prior to 1 October 2007. There is no suggestion of a constructive dismissal. The personal grievance claim therefore fails.

Penalty

[15] There is a claim for a penalty *for the failure to provide the applicant with an Employment Agreement*. I am not asked to make the penalty payable to Mr Glen.

[16] The relevant obligations are set out in s.63A(2) of the Employment Relations Act 2000. Mr & Mrs Loader should have provided Mr Glen with a copy of an intended employment agreement, advised him of his right and given him an opportunity to seek independent advice and considered any issues raised by him; but none of this was done. Mr & Mrs Loader have rendered themselves liable for a penalty of up to $5,000.00.

[17] The failure left room for the assertion that the employment was something other than casual. The pursuit of this unmeritorious claim against them has been a salutary lesson for Mr & Mrs Loader about the importance of written employment

agreements. I am told that they have now provided employment agreements for all their staff. While that suggests that other staff were not provided with written agreement, the only breach before me is that relating to Mrs Loader's cousin. There is an overlay of a family arrangement to the employment. In light of these points I accept counsel's submission that no penalty should be imposed.

Conclusion

[18] There being no dismissal there is no grievance.

[19] No penalty will be imposed for the breach of s.63A(2) of the Employment Relations Act 2000.

[20] Costs are reserved. The parties should endeavour to resolve this but any claim to the Authority must be made within 28 days and any response within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority