

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 2
5279656

BETWEEN NICHOLAS GOODHEW and
 PHILIPPA GOODHEW
 Applicants

A N D GREEN TULIP BOX LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Garry Pollak, Counsel for Applicants
 Noel McArthur and Don Robertson, Advocates for
 Respondent

Investigation Meeting: 11 November 2010 at Nelson

Further Information: 17 November 2010 from the Respondent
 22 November 2010 from the Applicants

Date of Determination: 10 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Green Tulip Box Limited is the current name of the company known when these proceedings were initiated as Raetihi Lodge Limited. With the consent of the parties I made an order identifying the company by its new name in these proceedings. However it is convenient to refer to the company as Raetihi Lodge in the body of this determination.

[2] The company owned and operated a business called Raetihi Lodge based at Pelorus Sound. It employed Nicholas Goodhew and Philippa Goodhew there from December 2006 until September 2009 as managers. Towards the end of the employment issues arose concerning unpaid wages and holiday pay and unreimbursed

expenses apparently caused by poor trading conditions. Mr & Mrs Goodhew left the property on 9 September 2009 effectively resigning. Sometime later the business was sold but there remain unresolved issues about arrears.

[3] It is useful to set out some relevant terms of employment before explaining and resolving the problems.

Terms of employment

[4] There are separate but materially identical written employment agreements applicable to Mr & Mrs Goodhew.

[5] Clause 4 covers times and hours of work. In particular clause 4.4 says that the employer is not required to make any extra payment above normal salary where the employee is required to work overtime and clause 4.5 recognises that the hours of work are flexible and the employee may be required to make themselves available for work outside normal hours.

[6] Clause 7 provides for the salary to be paid monthly by direct credit no later than the second day of each month. Clause 7.5 permits the employer to make rateable deductions for time lost through the employee's default or absence without good reason.

[7] Clause 9 requires the employer to reimburse expenses properly incurred in the exercise of the employee's duties.

[8] Clause 12 provides for four weeks paid annual holidays in accordance with the Holidays Act 2004. Clause 12.2 states that the entitlement remains in force until the employee has taken all of it as paid holidays. Clause 12.3 provides for holidays to be taken at a time agreed between the employer and the employee; but failing agreement as directed by the employer on not less than two weeks notice.

[9] A schedule to each agreement provides for a salary and benefits package totalling \$56,000 pa comprising a base cash salary (\$45,000 pa) and benefits being accommodation (\$6,500 pa), power (\$600 pa) and food (\$3,900 pa). There is also a discretionary bonus of \$5,000 jointly each six months.

[10] The agreements were signed in January 2007 but are expressed to apply from 4 December 2006, the date the employment commenced.

How the problem arose

[11] Following an interview for the positions but before the employment commenced there was an email exchange in November 2006 between Mr & Mrs Goodhew and Gilbert Robertson, one of the company principals. Mr & Mrs Goodhew asked *if we are unable to take time off due to work load at the lodge is this accumulated to be taken at a later date* and received the response *Yes, if the season gets really busy and you are unable to take days off then this can be accumulated to a later date.* Other aspects of the email exchange found expression in the employment agreements but not this arrangement.

[12] Once they commenced employment Mr & Mrs Goodhew managed the lodge on a day to day basis. For the most part they communicated with Gilbert Robertson who with the other company principals lived and worked elsewhere. Their reports to Gilbert Robertson included details of days off taken and those untaken but accumulated to be taken at a later date.

[13] A considerable number of untaken days accumulated at different times. For example, in February 2009 the company overpaid Mr & Mrs Goodhew by about \$5,800.00 and instead of attempting to recover the overpayment proposed reducing the outstanding accumulated days off balance by 14.5 days each which Mr & Mrs Goodhew accepted. Despite this, Mr & Mrs Goodhew say they were still entitled to a further 25.06 days in total when their employment ended. Part of the present problem is their claim for payment for these untaken days off.

[14] Raetihi Lodge did not pay Mr & Mrs Goodhew their salary for the months of July and August 2009 or September 2009 up to the date of their resignations. Nor did Raetihi Lodge pay any outstanding holiday pay or reimburse outstanding expenses.

[15] The final issue for resolution is a personal grievance claim of unjustified dismissal arising from the circumstances in which Mr & Mrs Goodhew resigned. I will deal with that first.

Personal grievances

[16] These proceedings were initially lodged on 14 October 2009 by Mr & Mrs Goodhew personally. They identified the problem as *Non payment of salary, days in lieu & holiday pay outstanding* and wanted the problem resolved by being paid for

salary, days off and holidays owing. There was no mention of any personal grievance concerning the termination of the employment. In December 2009 the Authority was advised that counsel had been appointed but there was still no mention of any personal grievance. There was a phone conference on 4 March 2009 which resulted in a direction to mediation and the scheduling of a back up date for an investigation meeting in case the matter was not resolved. There was no mention of any personal grievance at this time. An amended statement of problem was lodged in the Authority on 3 September 2010 which included reference to personal grievances of unjustified dismissal and associated claims for compensation. That document was also served on the company at about the same time, nearly a year after when any grievances would have arisen.

[17] The only other material before the Authority indicating that Mr & Mrs Goodhew may have raised with the company their personal grievances about the termination of their employment is an email dated 18 February 2010 from counsel to Don Robertson which says *Potentially there is a constructive dismissal as well*. That email is marked *without prejudice* but no objection has been taken to it being before the Authority. It is probably insufficient to amount to the proper raising of personal grievances but in any event it came more than two months after the end of the 90 day period within which Mr & Mrs Goodhew had to raise their personal grievances.

[18] I am left to conclude that no grievances were raised within time. There are no applications to extend time due to exceptional circumstances. Accordingly there are no personal grievances concerning the termination of the employment of Mr & Mrs Goodhew properly before the Authority.

Salary Arrears

[19] It is accepted that no salary payments were made after 1 July 2009 when \$5,834.82 was paid by direct credit into Mr & Mrs Goodhew's bank account, being their combined cash salary after tax due for the month of June 2009. I note that by January 2008 it had been agreed that the discretionary bonus identified in the employment agreements would be paid monthly as part of the regular salary. Benefits (accommodation, power and food) continued to be provided in accordance with the agreements. Therefore, as at July 2009 the gross per annum cash salary (excluding benefits) was \$50,000.00 pa or \$4,166.67 per month.

[20] The arrears of cash salary owed to Mr & Mrs Goodhew are 2 months and 9 days at \$4,166.67 per month, a sum of \$9,583.34 (gross) each.

[21] The company says that there was agreement from about June 2009 that Mr & Mrs Goodhew would record their actual hours of work and only be paid for time worked. I do not accept that there was an agreement to replace the salaried employment reflected in the written employment agreements with hourly rate employment. Mr & Mrs Goodhew remained entitled to their full salaries until they resigned on 9 September 2009.

Untaken days off

[22] This claim is based on the email exchange between Mr & Mrs Goodhew and Gilbert Robertson that predated the employment agreements. I do not accept that there is any valid claim for payment of untaken days off for the following reasons.

[23] The employment agreements, by reference to the provisions mentioned above, make it clear that there is no entitlement for extra payments in addition to the normal salaries where the employees are required to work overtime.

[24] Assuming that the arrangement between Mr & Mrs Goodhew and Gilbert Robertson as reflected in the emails amounted to a contractually binding term of employment, there is nothing in it to entitle Mr & Mrs Goodhew to a payment at the conclusion of the employment for any untaken days off.

[25] In light of the conclusion that there was no promise to pay for untaken days off at the end of the employment, it is not necessary to deal with the point raised by the company that many if not all the untaken days off did not meet the conditions for accumulation explained in Gilbert Robertson's email. I would simply observe that there is no evidence before the Authority that would allow me to reach a conclusion on this one way or the other. The largely unsupervised nature of the employment and the informality of the arrangement add to the conclusion that it was never in contemplation that there would be any additional payment beyond salary.

[26] I am asked by the company to discount against salary for time worked in July and August the value of untaken days off that the company recognised during the employment but which it now says fell outside the criteria in Gilbert Robertson's email. As noted there is no evidential basis for doing this. In addition, any

dissatisfaction with Mr & Mrs Goodhew accumulating untaken days off should have been dealt with at the time.

Holiday pay

[27] The company's MYOB payroll system shows that \$4,307.54 (gross) was owed to Mrs Goodhew in holiday pay as at 31 August 2009. I infer that the same amount is showed as owing to Mr Goodhew.

[28] There is no evidence to indicate that there was any inaccuracy in the recording of annual holidays taken during the employment. Accordingly I accept that these amounts were owed as at the end of August 2009. To those sums must be added proportionate holiday pay at 8% for the salary payable with respect to September 2009, a sum of \$100.00 each. The amount owed to each applicant is therefore \$4,407.54.

[29] For the reasons explained above there will be no adjustment up or down to these amounts with respect to the untaken days off.

Reimbursements

[30] I accept the evidence of Mr & Mrs Goodhew that they were jointly owed \$1,110.25 as reimbursement for mileage and other expenses in accordance with their employment agreements. In evidence they accepted that \$280.00 in cash and \$300.00 for alcohol taken by them with the company's consent should be brought to account. They are therefore owed \$530.25 in reimbursements.

Penalties

[31] Although not claimed in the original statement of problem, there is a claim in the amended statement of problem for penalties for the breach of the employment agreements arising from the failure to pay salaries, the failure by the respondent to give notice, the failure to pay holiday pay and the *many breaches of their individual employment agreements*.

[32] The evidence indicates that it was the trading difficulties encountered by the respondent that caused it not to pay the salaries that should have been paid in early August and early September 2009. The company (or possibly company principals) borrowed money to keep the property operating while they attempted to sell the

business prior to July 2009. This does not appear to be a case of wilful breach of obligations by the company so I will decline to impose any penalties.

[33] There is reference in the evidence for the company that Mr & Mrs Goodhew commenced work for a competitor in breach of the restraint of trade provision in the employment agreements. However, I was not asked to enforce these restraints so nothing more needs to be said on this point.

Orders

[34] The respondent is to pay to Mr Goodhew the sum of \$13,990.88 (gross) in arrears of salary and holiday pay.

[35] The respondent is to pay to Mrs Goodhew the sum of \$13,990.88 (gross) in arrears of salary and holiday pay.

[36] The respondent is to pay to Mr & Mrs Goodhew jointly the sum of \$530.25 as reimbursement for expenses.

[37] Mr & Mrs Goodhew seek interest. They should be compensated for not having use of their wages, holiday pay and reimbursements all of which should have been paid in terms of the employment agreements when their employment ended. The respondent is to pay interest on the sums mentioned in paragraphs [34] to [36] at the rate of 5% per annum commencing on 9 September 2009 until the sums are paid in full.

[38] Costs are reserved. Any claim for costs should be lodged with the Authority and served on the other party within 28 days who may then lodge and serve a response within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority