IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 94/10
5274490

	BETWEEN	VIVIENNE HEANEY Applicant
	A N D	GUY HERBERT T/A EQUESTRIAN HOTEL First Respondent
		COUNTRY HOSPITALITY MANAGEMENT (NZ) LTD Second Respondent

Member of Authority:	Philip Cheyne
Representatives:	Scott Fairclough, Counsel for Applicant Guy Herbert, Advocate for Respondents
Investigation Meeting:	21 January 2010 at Christchurch
Determination:	20 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Vivienne Heaney worked as a part time bar cleaner at the Equestrian Hotel from 2007 until her employment was terminated in June 2009. Mrs Heaney says that she was unjustifiably dismissed and she seeks reimbursement of lost wages and compensation for distress as a result. Mrs Heaney also says that a penalty should be imposed against the respondent for failing to provide her with a written employment agreement. The final aspect to this problem is whether these proceedings should lie against Guy Herbert personally rather than the company, Country Hospitality Management (NZ) Ltd. The statement of problem as originally lodged named only Guy Herbert as the respondent but, following the statement in reply referring to the company, counsel sought to add the company as an additional party.

[2] Guy Herbert is the sole shareholder and director in the company which since 2002 has owned the property at Tower Street, Hornby and the hotel business there, known as the Equestrian Hotel. Mr Herbert is based elsewhere and the company had employed managers to manage the hotel. Mr Herbert says that Mrs Heaney can have no claim against him personally as he never represented himself as a sole trader. Mr Herbert also says that Mrs Heaney's employment was justifiably terminated by the company for redundancy and that the circumstances do not call for the imposition of a penalty despite the lack of a written employment agreement.

[3] To resolve these matters I will set out more fully what happened when Mrs Heaney was employed and then dismissed.

Mrs Heaney's employment

[4] Daniel Heaney is Mrs Heaney's husband. He worked at the Equestrian Hotel as a night porter for eight years until his employment ended in September 2009. Mrs Heaney is deaf and often Mr Heaney interprets for her. By agreement he did so during the investigation meeting.

[5] The manager of the Equestrian Hotel when both Mr and Mrs Heaney were employed was Stephen McCullough. The only evidence about their original employment was Mr Herbert's evidence that it was Mr McCullough who dealt with Mr and Mrs Heaney over their employment. There is no reason to doubt that evidence.

[6] As is required of licensed premises copies of the On-Licence and Off-Licence were displayed at the front entrance of the hotel. Similarly, the Christchurch City Council *Building Warrant of Fitness* was also displayed on the wall at the front reception counter. These documents identified the company *Country Hospitality Management (NZ) Ltd* as the licensee and the owner respectively. Mr and Mrs Heaney's evidence is that neither of them actually saw the name of the company on these documents.

[7] The Equestrian Hotel was also required to have and display a certificate of registration as food premises. That certificate was also on display. The current certificate (1 July 2009 – 30 June 2010) identifies the business trading under the name as *MJJ Hospitality* and the occupier as *Equestrian Motel Hotel Ltd,* names that date

prior to the company's ownership of the premises and business. There is no reason to disbelieve Mr and Mrs Heaney's evidence mentioned above.

[8] Mrs Heaney (and I infer Mr Heaney) received wages each week paid by direct credit into a bank account. I had been given part of Mrs Heaney's bank statement for April 2009 which identifies wages deposits as coming from *Equestrian Hotel Wages*. I have also been given a pay slip from June 2009 headed *Equestrian Hotel.* I infer that all of Mrs Heaney's wages were similarly identified.

[9] The company has had recent financial difficulties that included a mortgagee sale process which was eventually resolved short of a sale. Mr Herbert's evidence, which I accept, is that this included publication of the company name and that the proceedings were well known to staff generally. However, I also accept that the company name did not specifically come to the attention of Mr and Mrs Heaney as a result of this process.

[10] I have been given a copy of a letter dated 2 July 2009 on printed letterhead. The letterhead is for the *Equestrian Hotel* and there is no mention of the company. I infer that all business stationery, at least such stationery as might have been seen by Mr and Mrs Heaney, was similarly branded. The 2 July 2009 letter itself is in the name of the company but that does not assist resolution of the problem since the letter post dates the issue over identity arising.

[11] I have been provided with copies of a *new employee details* form and the Inland Revenue tax code declaration for Mrs Heaney. Neither form conveys any information about the identity of the employer. Mr and Mrs Heaney's evidence, which I accept, is that neither of them ever received a written employment agreement. Mrs Heaney's evidence is that she understood that the Equestrian Hotel business is owned by an Auckland lawyer called *Guy*, while Mr Heaney's evidence is that he knew the owner to be Guy Herbert.

[12] The final bit of evidence about this issue is that both Mr Herbert and the hotel manager at the time that Mrs Heaney's employment ended (Chris Casserly) say that Mr and Mrs Heaney's employer at all relevant times was the company rather than Mr Herbert personally. It is not disputed that the business in which Mr and Mrs Heaney worked was owned and operated by the company at all relevant times.

[13] In *Colosimo v. Parker* (2007) 8 NZELC 98622 the Employment Court discussed principles applicable to a case of this type. The Court refers to an earlier case, *Mehta v. Elliott (Labour Inspector)* [2003] 1 ERNZ 451 where it was held that the question of who was the employer must be determined as at the outset of the employment, subject to proof of mutual agreement to any change during the employment. The onus of proving the respondent employer's identity is on the applicant; see *Service Workers Union of Aotearoa v. Chan* [1991] 3 ERNZ 15.

[14] Helpfully to the resolution of the present case, the Court in *Colosimo* said:

> *[30] Much has been made in this case of the fact that Mr Parker was never made aware that Taffy's Bar Limited was the employer. However, the real issue is whether Mr Colosimo ever held himself out to be the employer and if so, the circumstances which would entitle the Court to say he personally entered into binding legal relations with Mr Parker. While it is desirable that the true identity of the employer should be made known to the employee at the outset, that unfortunately is not always the case. That is so in the present case. The Court is then placed in the position of having to make an objective assessment.*

[15] Guy Herbert had no personal involvement in the employment of Mrs Heaney. He never personally held himself out to be her employer when she was employed or subsequently. The evidence is that he had no dealings with Mrs Heaney. Mr Herbert has never personally owned or operated the business known as the Equestrian Hotel. While it is clear that the person who offered Mrs Heaney employment failed to disclose to her the existence of the company on whose behalf he was employing her, that person was the hotel manager at the time not Mr Herbert.

[16] It follows that Mrs Heaney cannot succeed with any claim against Mr Herbert personally.

[17] It remains to resolve the personal grievance and penalty claim against the company as Mrs Heaney's employer.

Dismissal

[18] When Mr Heaney arrived at work at about 11pm on 8 June 2009 Mr Casserley told him that he wanted to meet with Mrs Heaney and that he wanted Mr Heaney to be present. Mr Casserley lived on site. He asked Mr Heaney to wake him when Mrs Heaney arrived for work. Mr Heaney did so and they all met at about 4.45am in

Mr Casserley's office. To that point Mr Casserley had not said anything to either Mr Heaney or Mrs Heaney about the purpose of this meeting.

[19] Mr Casserley stated as General Manager at the Equestrian Hotel in January 2009, his brief was to restore the hotel to profitability and to ensure it operated efficiently. I accept that staff (including Mr and Mrs Heaney) would have had a general understanding that the Equestrian Hotel faced financial difficulties and that Mr Casserley was employed to help resolve those problems. As part of his focus on profitability and efficiency, Mr Casserley came to think that there was some duplication between the duties of the bar cleaner (Mrs Heaney) and the duties of the night porter (Mr Heaney and another person who relieved on his days off). His evidence is that he saw absolutely no need for the bar cleaner's position; that he believed the bar cleaner position had not existed prior to Mrs Heaney's employment in 2007; and that there were no good reasons why the night porters could not do the necessary work.

[20] Mr Casserley's evidence (which I accept) is that he canvassed Mr Herbert and the assistant manager about these views before meeting Mr and Mrs Heaney. Mr Casserley also says that he had firm views but an open mind about these things. I will return to that later.

[21] The foregoing is the context in which Mr Casserley organised to meet with Mr and Mrs Heaney. As to the meeting itself, Mr Casserley's evidence is that he opened by saying that it seemed that the bar cleaner job was a duplication of tasks with the night porters duties *and accordingly the applicant's position is redundant.* It is common ground that there was some discussion between the two men about the duplication point and who might do the duties. Mr Heaney then relayed to Mrs Heaney Mr Casserley's message about her job. When questioned during the investigation meeting, Mr Casserley said that he heard Mr Heaney tell Mrs Heaney that he (Mr Casserley) was making her redundant and giving her two weeks notice. It is also common ground that Mr Casserley corrected Mr Heaney's message to his wife but there is some disagreement about the precise nature of the correction. On Mr Heaney's account, Mr Casserley said it was Mr Herbert making Mrs Heaney redundant, while on Mr Casserley's account he said it was the Equestrian Hotel making her redundant. When pressed, Mr Casserley acknowledged that he might have mentioned Mr Herbert by name. The difference is immaterial for present

purposes. What is not disputed is that Mr Casserley heard Mr Heaney tell Mrs Heaney that she was being made redundant on two weeks notice. Mr Casserley also told Mrs Heaney that she could finish up early and receive pay in lieu of notice if she wanted. Again it is common ground that there was some further disagreement between Mr Heaney and Mr Casserley about whether the night porters had sufficient time to cover Mrs Heaney's duties. The meeting then ended.

[22] Mrs Heaney consulted her solicitor who wrote to the Equestrian Hotel on 15 June 2009. The letter raises concerns about the genuineness of the redundancy and the lack of any consultation and requests the withdrawal of the notice of dismissal. When there was no response, and following a telephone conversation between the solicitor and Mr Herbert on 24 June, the solicitor wrote again on 1 July raising Mrs Heaney's grievance. That was responded to on 2 July. By that time Mrs Heaney had finished up in accordance with the notice given to her during the meeting.

Justification for dismissal

[23] Whether the dismissal was justified must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[24] I accept the evidence for the company to the effect that the decision to terminate Mrs Heaney's employment resulted from a restructuring of its business intended to save money rather than any other reason. Mrs Heaney is critical of her employer for spending money on a vehicle and some capital works around the time of her dismissal, rather than continuing her employment. However, the first matter related to contractual obligations to another employee and the second matter was the exercise of the company's commercial judgment. Neither matter displaces the clear picture of a genuine redundancy situation.

[25] There was no written employment agreement. The company was required to give Mrs Heaney reasonable notice of termination of her employment. A requirement for four weeks notice of dismissal in redundancy circumstances has often been implied as reasonable notice in the absence of a contractually agreed notice period. I conclude that a fair and reasonable employer would have given four weeks' notice of dismissal in the present circumstances.

[26] There is a statutory requirement for an employer to properly consult with an employee in circumstances such as the present: see s.4(1A) of the Employment Relations Act 2000. The position for the company is that it met this obligation by Mr Casserley's meeting with Mrs Heaney on 9 June 2009, hence the significance in Mr Casserley's evidence about approaching the meeting with *firm views but not a closed mind.*

[27] I find that matters had gone further than that. Ultimately, it was Mr Herbert's decision to proceed with the restructuring as proposed by Mr Casserley. Prior to meeting with Mrs Heaney, Mr Casserley had received Mr Herbert's approval to proceed. For reasons that Mr Casserley explained by reference to the hotel's convenience, he decided to give Mrs Heaney two weeks notice of dismissal due to redundancy and that is what he did on 9 June. If all that had been intended was the opening of a consultation phase with Mrs Heaney about the proposal, notice of dismissal would not have been given to her and there would have been a timely response to the solicitor's letter that followed shortly after the meeting. I find that there was a failure by the company to properly consult with Mrs Heaney.

[28] In summary, while there was a genuine redundancy situation, Mrs Heaney was dismissed wrongfully because of inadequate notice and the company did not consult with her prior to making its decision, thereby breaching the statute. For these reasons the dismissal is unjustified.

Remedies

[29] Mrs Heaney did not contribute in a blameworthy way to the situation giving rise to her grievance.

[30] There is a claim for lost remuneration but that cannot survive the finding that a genuine redundancy situation existed. However, the company must pay Mrs Heaney a further two weeks pay in lieu of reasonable notice. Leave is reserved in case of difficulty in quantifying this sum.

[31] There is a claim for compensation for $6,000 for distress. I accept the evidence that Mrs Heaney was very upset about the way she lost her job. The resulting financial difficulties for her could have been ameliorated somewhat by proper notice and Mrs Heaney in any event was entitled to better treatment with more respect and dignity. The compensation claim is not extravagant and I order it in full.

Penalties

[32] There is a claim for a penalty for the employer's failure to provide a written employment agreement. Although not specifically referred to, that invokes s.63A of the Act.

[33] There is a fundamental flaw in the evidence supporting this claim. The alleged breach of the Act arose in 2007 when Mrs Heaney was first employed. Any claim for a penalty must be initiated within 12 months of the date when the cause of action became known to the claimant, or 12 months of the date when the cause of action should reasonably have become known to the claimant, wherever is the earlier. There is no evidence about when Mrs Heaney learned of this cause of action. She may have known about the breach of law when she was employed. Since I cannot identify which is the earlier of the two dates, I cannot make any finding about liability for a penalty. The claim is therefore dismissed.

Summary

[34] Mrs Heaney has a personal grievance by way of unjustifiable dismissal.

[35] The company is to pay Mrs Heaney two weeks pay in lieu of notice. Leave is reserved in case of difficulty with calculation.

[36] Pursuant to s.123(1)(c)(i) of the Act the company is to pay Mrs Heaney compensation in the sum of $6,000.

Costs

[37] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days. The other party may then have 14 days to lodge and serve any memorandum in reply.

Philip Cheyne
Member of the Employment Relations Authority