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Kilgour v Spinnaker Investments No1 Ltd CA 60/07 (Christchurch) [2007] NZERA 542 (14 June 2007)

Last Updated: 16 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 60/07

5077547

BETWEEN ANDREA JANE KILGOUR Applicant

AND SPINNAKER INVESTMENTS No 1 LIMITED

Respondent

Member of Authority: James Crichton

Representatives: Andrea Kilgour, in person

Christopher Ginders, for Respondent

Interview Meetings: 26 April 2007 at Westport

4 May 2007 at Blenheim

Determination: 14 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In her statement of problem, the applicant (Ms Kilgour) alleged that she was due unpaid wages in the sum of \$3,000 from her employment with the respondent (Spinnaker). Spinnaker resists that claim by denying there was an agreement to pay that sum which, it is common ground, was additional to the basic remuneration, about which there was no dispute.

[2] I formed the view, on the papers, that Ms Kilgour had not disclosed a basis on which she could legally claim payment of the sum in question. I convened a telephone conference with the parties on 26 March 2007 at which I indicated to the parties my intention to interview Ms Kilgour first to establish if she could satisfy me that there was in fact a basis for her claim.

[3] If Ms Kilgour could satisfy me that she had a viable claim, then I intended to engage with Spinnaker. In the result, as I describe briefly in this determination, I did

consider that Ms Kilgour raised matters with me which, in equity and good conscience, I needed to put to Spinnaker. I chose to do that in a direct interview with Spinnaker and, as a consequence of those two separate interviews, I have formed a view about the nature of Ms Kilgour's claim and in particular its sustainability.

[4] In all the circumstances, I am not persuaded that an investigation meeting which would bring both parties together before me is either necessary to assist me in reaching an appropriate conclusion on the matters before me, or required to give the

parties an opportunity to test each other's points of view in the usual way. I understand both parties accept the approach I have adopted in this matter.

[4] Ms Kilgour worked for Spinnaker on and from 1 July 2004 as manager of the Last Resort Motel and Restaurant in Karamea. Spinnaker had actually contracted with Ms Kilgour and her partner as what is often referred to in the hospitality industry as a managing couple. However, for the purposes of the dispute between the parties, Ms Kilgour's partner is not involved and so I do not refer to him in the balance of this determination.

[5] The employment relationship between the parties seems to have taken its ordinary course with both parties speaking well of the other until Easter of 2006 when there was a relevant exchange between them.

[6] Mr Ginders of Spinnaker was shortly to travel overseas with his family for an extended period. There was discussion between the parties about the payment to Ms Kilgour of an additional sum (additional to her daily wages, that is) for what the parties came to refer as a management fee.

[7] This management fee was to be paid by Spinnaker to Ms Kilgour for the period from 25 April 2006 down to 31 July 2006 and was in the sum of \$4,000. There is dispute between the parties as to the way in which that sum was negotiated but that is not germane to the present dispute.

[8] The essence of Ms Kilgour's claim is that she is entitled to receive a payment for the period 1 August 2006 down to 31 October 2006 which is analogous to the payment agreed to by Spinnaker for the earlier period from 25 April 2006 to 31 July 2006.

[9] Spinnaker says that there was a clear agreement to pay the management fee for the first period but not for the second. Ms Kilgour, on the other hand, relies on a conversation which she recalls having with Mr Ginders of Spinnaker in which she claims that Mr Ginders promised to pay the management fee for the second period.

Issues

[10] The only issue for determination is whether in fact Ms Kilgour has made out her claim that there is an enforceable promise by Spinnaker to pay her a management fee for the period from 1 August to 31 October 2006 (the second period).

The management fee for the second period

[11] Spinnaker says that, while it agreed to pay a management fee of \$4,000 for the period from 25 April down to 31 July 2006, it never agreed to pay a management fee for the second period and that Ms Kilgour cannot produce any evidence to support her contention that Spinnaker has agreed to a payment for the second period.

[12] Spinnaker also says that the factual matrix does not support Ms Kilgour's contention. Spinnaker refers to the fact that a management fee for the second period was not raised by Ms Kilgour until 24 October 2006, that is, seven days before the end of the period for which the management fee, if it had been agreed to, would have applied.

[13] When I interviewed Ms Kilgour I asked her why she did not raise it until

24 October and she replied as follows:

I assumed that because we had agreed the earlier payment (that is the payment for the first period) it would continue. I don't know why I didn't raise it earlier.

[14] What Ms Kilgour says in her email to Mr Ginders of 24 October 2006 is as follows:

Is there any payment for the additional time spent managing the resort from

31 July to 28 October?

It is common ground that Mr Ginders, for Spinnaker, did not reply to that question.

[15] Ms Kilgour then followed that email up with a subsequent email dated

1 November 2006 which contains the following statement:

*You haven't responded to my question regarding management fee from
1 August to 31 October.*

Again, there was no response from Mr Ginders.

[16] It is plain that the matter of the management fee for the second period was not raised until 24 October and that

Spinnaker did not respond to Ms Kilgour's initial requests for the matter to be considered.

[17] However, Ms Kilgour alleges that she had a conversation with Mr Ginders of Spinnaker on or about 2 November 2006 (that is the day after the second email just referred to) in which she alleges that Mr Ginders made a verbal commitment to pay the management fee for the second period. It was the making of this allegation by Ms Kilgour in my interview with her on 26 April 2007 which was one of the two bases on which I decided that I needed to talk further with Mr Ginders.

[18] Ms Kilgour says that in this conversation, in response to her inquiry about the management fee, Mr Ginders said that he *would sort it out after the final bills had been paid*. This latter remark was a reference to the settlement of the business as a going concern on 31 October 2006.

[19] When pressed by me as to what she understood by the expression *would sort it out*, Ms Kilgour indicated that she thought that Mr Ginders was making a verbal commitment to pay a management fee for the second period.

[20] I asked Mr Ginders about his recollection of this conversation when I met with him. He was adamant that he only spoke to Ms Kilgour once in the period towards the end of the employment relationship and that was around 20 or 22

October. He certainly recalls using the words Ms Kilgour refers to of *sorting it out* but he says that he meant the days in lieu and the holiday pay that she was entitled to, and certainly not any management fee.

[21] On 9 November 2006 there was another email from Ms Kilgour to Mr Ginders primarily concerned with stock take issues, consequent upon the settlement on 31 October 2006 but adding at the end the following question: *when should I be expecting my management fee payment?*

[22] On the only occasion on which the evidence discloses that Mr Ginders actually responded to this persistent inquiry from Ms Kilgour, it is common ground

that he rang Ms Kilgour that same day and made it abundantly clear that he was not paying a management fee for the second period.

[23] I am satisfied on the balance of probabilities that there was never an agreement by Spinnaker to pay Ms Kilgour a management fee for the second period. Even on Ms Kilgour's evidence, the only basis on which there could be any agreement is the telephone conversation which Ms Kilgour says happened on or about

2 November 2006.

[24] Mr Ginders' evidence is that he did not speak with Ms Kilgour on or about that date but that he did speak with her on an earlier date and he recalled using the phrase that Ms Kilgour relies upon, namely that he would *sort it out* which she says relates to the payment of the management fee for the second period. I do not accept that the evidence supports Ms Kilgour's conviction that Mr Ginders was talking about the management fee for the second period. I think it more likely that Mr Ginders was talking about holiday pay and days off in lieu (as he contends). There is dispute about the date of the conversation as well and, if Mr Ginders is correct about the date, then it is inconceivable that the parties were talking about the management fee because on 20 or 22 October the management fee had not even been raised by Ms Kilgour.

[25] Neither party claims that the management fee for the second period was raised until 24 October 2006. As I have already indicated, that is barely seven days before the end of the period for which payment is sought. Even on Ms Kilgour's evidence, it seems almost an afterthought which came to her more or less at the eleventh hour.

[26] Ms Kilgour asked the question on a number of occasions over a short period following 24 October 2006 and, on the view of the evidence which I prefer, Mr Ginders did not respond at all to that question until 9 November 2006, by which time the employment relationship had come to an end. Then, his response was unequivocal and clear on both parties' recollection of what happened.

[27] For all these reasons, I am satisfied that there was no agreement on which Ms Kilgour can rely. However, the matter does not end there because in the interview that I had with Ms Kilgour on 26 April 2007, another matter arose which had not been referred to in the papers filed in the Authority. This was the contention that there

might be a breach of the [Minimum Wage Act 1983](#) in relation to the employment by

Spinnaker of Ms Kilgour.

[28] In essence, Ms Kilgour says that during the summer months which she regarded as October through to the following Easter, she worked an average of 12 hours a day whereas in the winter months she worked an average of 10 to 11 hours a day. The remuneration was fixed at a daily rate of \$130 gross.

[29] Spinnaker resists the claim for a breach of the [Minimum Wage Act](#) on a number of bases. The first is that, given that Ms Kilgour was the manager and the directors of Spinnaker were physically remote from the place of the employment, it was Ms

Kilgour's responsibility to control her own hours. Second, Spinnaker says that the duties required of Ms Kilgour are not in fact duties which, on the face of it, ought to generate the kinds of hours which Ms Kilgour claims, particularly when Spinnaker would expect that Ms Kilgour would not work at all during the quiet periods, say in mid afternoon (the split shift arrangement common in the hospitality industry).

[30] Further, and perhaps most critically, Spinnaker points out that whenever Ms Kilgour wished to increase the number of days a week on which she was to work (and thus attract the daily rate), the practice was that Ms Kilgour would write to Spinnaker and seek authorisation.

[31] In all these circumstances then, I am not persuaded that on the evidence I heard there has been a breach of the [Minimum Wage Act](#).

Determination

[32] For reasons I have earlier articulated, I am not persuaded that Ms Kilgour has any viable claim against Spinnaker.

Costs

[33] Costs are to lie where they fall.

J Crichton

Member of the Employment Relations Authority