

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Susan Robin Cortesi (Applicant)

AND Global Energy Limited trading as North Shore Motels and Holiday Park (Respondent)

REPRESENTATIVES Susan Robin Cortesi In person
Managing Director, Advocate for Respondent

MEMBER OF AUTHORITY Marija Urlich

INVESTIGATION MEETING 4 October 2005

DATE OF DETERMINATION 18 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Global Energy Limited took possession of North Shore Motels and Holiday Park on 17 January 2004. At the time of sale Susan Cortesi was employed at the holiday park as a house maid. GEL offered Ms Cortesi a written employment agreement prior to the possession date. She made some amendments to this document and handed it to a representative of GEL. She heard nothing further regarding the employment agreement. The parties were unable to provide me with a copy of the employment agreement. There is no dispute that from the possession date Ms Cortesi's continued to work her usual duties and was paid at the same rate.

[2] On 30 January Ms Cortesi was presented with a dismissal letter by Bernd Wartenburg. Mr Wartenburg manages the holiday park on GEL's behalf. Ms Cortesi says her dismissal was unjustified and seeks reimbursement of wages lost as a consequence of her dismissal. She also seeks an apology. The Authority may award remedies as set out in section 123 of the Act. These remedies do not include an apology.

[3] GEL says Ms Cortesi's dismissal was justified but that in any event she was not an employee.

[4] I record that at the investigation meeting Mr Wartenburg advised that the name of the respondent is Global Energy Limited trading as North Shore Motels and Holiday Park. The intituling is altered accordingly.

[5] GEL filed a witness statement on behalf of Ami Rajasekar, who was employed as the housemaid supervisor at the time of Ms Cortesi's dismissal. Ms Rajasekar did not attend the scheduled investigation meeting. With the consent of the parties the Authority took Ms Rajasekar's evidence by telephone on 10 October. I record that I was assisted in the taking of Ms Rajasekar's evidence by an interpreter of the Tamil language.

Grounds of Ms Cortesi's dismissal

[6] The grounds of dismissal are set out in Mr Wartenburg's letter of 30 January, they are:

- (i) that two unacceptable cleaning results had been drawn to Ms Cortesi's attention in the week preceding her dismissal;
- (ii) that Ms Cortesi attended work intoxicated on 27 January and had to be taken home;
- (iii) that Ms Cortesi did not explain her absence from work on 28 and 29 January when an explanation had been sought; and
- (iv) GEL concluded Ms Cortesi could not be relied upon in this peak season period.

(i) two unacceptable cleans

[7] In the week beginning 17 January Mr Wartenburg asked Ms Rajasekar to talk to Ms Cortesi about glass fragments found on the carpet in one motel unit and small coloured balls found in another. Ms Rajasekar said she spoke to Ms Cortesi about these incidents, advised her to use a more powerful vacuum cleaner and to take her time to complete a clean. Ms Rajasekar did not advise Mr Wartenburg of the outcome of her discussions with Ms Cortesi.

[8] I do not accept that these discussions were disciplinary in nature; Ms Cortesi was not told her employment was in jeopardy or that there could be a disciplinary outcome if her performance did not improve.

(ii) intoxicated at work

[9] I accept that Ms Cortesi was not in a fit state to complete her duty on 27 January. This was observed by Mr Wartenburg and Ms Rajasekar and Ms Cortesi did not object to being advised she was to be driven home by Ms Rajasekar's husband, who also works at the holiday park.

[10] Mr Wartenburg concluded Ms Cortesi was intoxicated. He said he formed this view because she was unsteady on her feet and he smelt alcohol when she passed by him. These issues were never put to Ms Cortesi and she was not given an opportunity to provide an explanation either at the time or subsequently. Ms Cortesi denied she was intoxicated.

(iii) absent without explanation

[11] On 28 and 29 January Ms Cortesi did not attend work because she was affronted at being sent home. Ms Cortesi telephoned Ms Rajasekar prior to the start of each duty and advised she would not attend work that particular day. Ms Rajasekar confirmed this and said she passed this information onto Mr Wartenburg. Mr Wartenburg accepted this was the usual process for reporting absence from work and that Ms Cortesi had not been advised otherwise.

[12] Ms Cortesi returned to work on 30 January. At the start of her duty Mr Wartenburg approached her. His recollection of the exchange that followed is that he said "Don't you think we need to talk?", Ms Cortesi replied "No, do you?" and Mr Wartenburg said "Okay, I don't have to speak with you." Ms Cortesi recalls Mr Wartenburg approached her and said "Do you want to talk about anything?", she replied "No, do you want to talk to me?" and Mr Wartenburg said "No, not yet" and left. Mr Wartenburg says this exchange was the request for an explanation for Ms Cortesi's absence referred to in the letter of dismissal.

[13] At the end of her duty on 30 July Mr Wartenburg approached Ms Cortesi, and handed her the

letter of dismissal. She collected her belongings and left the holiday park. There was no discussion.

Was Ms Cortesi's dismissal justified?

[14] Mr Wartenburg has challenged the Authority's jurisdiction to determine this employment relationship problem. He relies on the fact that the employment agreement was not signed by the parties. This issue has very recently been addressed by the Court of Appeal¹ which has held an employment agreement does not have to be in writing to be enforceable. The question is whether the terms of the agreement were certain and there has been no suggestion that this was not the case; Ms Cortesi was performing her duties and her terms and conditions of employment continued.

[15] Further, given the nature of Ms Cortesi's position the provisions of Part 6A of the Employment Relations Act applied. These provisions give employees, whose employment falls within the specified sectors, facilities or places of work set out in schedule 1A of the Act, the right, in the event of a restructuring of their employer's business (which may include the sale of that business) to elect to transfer to the new employer on the same terms and conditions of employment. I received little evidence as to the degree to which Ms Cortesi's employer preceding GEL complied with the terms of Part 6A. However, I am satisfied that the provisions of Part 6A apply to Ms Cortesi, that her employment did transfer to GEL upon the sale of the business and that her terms and conditions of employment remained identical. For these reasons there can be no doubt that Ms Cortesi was an employee of GEL.

[16] Mr Wartenburg could not reasonably rely on the grounds set out in his letter of 30 January to justifiably dismiss Ms Cortesi because:

- (i) while I accept the unacceptable cleaning results had been drawn to Ms Cortesi's attention Ms Cortesi had not been advised that her employment was in jeopardy due to poor performance;
- (ii) the conclusion that Ms Cortesi was intoxicated at work could not reasonably be made by Mr Wartenburg. He had not put this to Ms Cortesi or given her an opportunity to give an explanation either at the time or subsequently. Clearly there were reasonable grounds to form the view that Ms Cortesi was unable to perform her duties and it was incumbent on the employer to take reasonable steps to avoid a potentially dangerous, however, it was a further step to conclude Ms Cortesi was intoxicated;
- (iii) Ms Cortesi had notified Ms Rajasekar of her absence in the accepted manner; and
- (iv) the exchange between Mr Wartenburg and Ms Cortesi on 30 January, by either account, was not a fair putting of tentative conclusions to Ms Cortesi to enable her to provide an explanation.

[17] For these reasons Ms Cortesi's dismissal was unjustified.

Remedies

[18] Ms Cortesi seeks remedies of lost wages from the date of her dismissal until she secured alternative employment just after Easter, being Tuesday 29 March 2005.

[19] Ms Cortesi was summarily dismissed. She is entitled to one week's notice, which I was advised is the notice period under the employment agreement, to be paid at the rate of \$11 per hour for 22 hours per week. **Global Energy Limited is ordered to pay Ms Cortesi one weeks notice**

¹ *Warwick Henderson Gallery Limited v Emma Weston* CA 80/04, 14 November 2005.

calculated on that basis.

[20] Ms Cortesi said she started looking for another position two days after her dismissal; she looked in the local paper and supermarket notice boards, applied for positions through WINZ and approached motels in her area. I am satisfied Ms Cortesi has taken reasonable steps to mitigate losses consequent to her dismissal.

[21] Ms Cortesi is entitled to be reimbursed for lost wages from 7 February 2005 until 28 March 2005 at her usual rate and hours of work, \$11 per hour for 22 hours per week. **Global Energy Limited is ordered to reimburse Ms Cortesi those wages calculated on that basis.**

Costs

[22] **Global Energy Limited is ordered to reimburse Ms Cortesi the cost of lodging her application in the Authority which amounts to \$70.**

Marija Urlich
Member of Employment Relations Authority