

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Leonie Dawn Gutsell (Applicant)
AND Koru Blue Limited t/a Airport Lodge Motel (Respondent)
REPRESENTATIVES Rob Davidson, Counsel for Applicant
Anthony J Shaw, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING Christchurch
7 July 2006
13 July 2006
DATE OF DETERMINATION 2 October 2006

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Ms Gutsell began her employment at the motels in February 2004. At that time the motels were operated by two couples who were shareholders in the company which actually owned the motels. On 1 April 2005 the motels were purchased by Mr and Mrs Sutton whose company is Koru Blue Limited.

[2] Ms Gutsell alleges she has been unjustifiably dismissed from her employment as a motel cleaner at the Airport Lodge. She seeks wages lost as a result of her alleged personal grievance, compensation for hurt and humiliation in the sum of \$10,000 and costs.

[3] The respondent says the dismissal was not unjustified, but resulted from a legitimate business decision to realign the scheduling of staff for cleaning the motels. It says the applicant was unable to meet the changed scheduling, was given the required notice under the individual employment agreement and hence declines to meet the applicant's claims.

A brief history

[4] When the applicant began her employment at the motels, no written employment agreement was offered to her. Ms Gutsell worked with the then owners on a consistent monthly roster, although her hours of work varied according to occupancy rates.

[5] The then owners offered a written employment agreement. That agreement has a front page which says – *Casual employment agreement*. Ms Gutsell signed that agreement.

[6] In March 2005 the applicant was offered another agreement by the previous owners said to be necessary to meet changes to the Employment Relations Act 2000 which were to come into effect on 1 April 2005. It, too, had a cover which stated – *Casual employment agreement*. Ms Gutsell says Mrs Wilson, representing the then owners, told her that it was the same as the earlier one but was to comply with the legislative changes. Mrs Wilson says that although she gave the applicant the opportunity to take this document away for advice or consideration, the applicant signed it straightaway.

[7] It is common ground that the staff of the motel were aware the business was on the market and had been so for some time.

[8] The business was purchased by Mr and Mrs Sutton, directors and shareholders of Koru Blue Limited and a sale and purchase agreement was completed. Included in the sale and purchase agreement between the vendor and the purchaser was the following clause:

22.0 Employees

22.1 Staff for the Vendor's business (the "Employees") are provided by the Vendor. The Vendor and Purchaser acknowledge that pursuant to the Employment Relations Act 2000 the Employees are entitled to elect to transfer to the Purchaser.

22.2 The Vendor will require the employees to make their election one week prior to possession date of this agreement.

22.3 The Purchaser shall employ such of the Employees who elect to transfer to the Purchaser on the same terms and conditions as provided by the Vendor and with continuous service.

22.4 The Vendor agrees that the Vendor shall pay all holiday pay owing as at the date of possession, to any staff who elect to transfer their employment to the Purchaser.

[9] In March 2005, Ms Gutsell underwent surgery and undertook time off for that purpose and for a period of recuperation. When she started back at the motels she said that Mrs Wilson urged her to take it easy, and so the applicant worked three days each week rather than her previously usual five. That was the situation when Mr and Mrs Sutton took over the management of the business.

[10] In reliance on the clause in the sale and purchase agreement Mr and Mrs Sutton believed they had Ms Gutsell's election to remain employed on the same terms and conditions that she had previous to their arrival. Their belief was that the applicant had customarily worked three days whereas in fact prior to surgery and recuperation, Ms Gutsell had worked five days. The new owners went about their business and over the first few weeks observed how the cleaning schedule was working. Having considered the needs of the business as they perceived it, Mr and Mrs Sutton decided to realign the cleaning having some staff work week days only and others work weekends only.

[11] On 27 April 2005 Mr Sutton approached Ms Gutsell who had just finished her work for the day and told her that they had to *let her go* as she was unable to work the five week days required by the business. Ms Gutsell's response, it appears, was linguistically animated and direct. She left the premises telling Mr Sutton that he'd better get her pay into her bank account with some haste.

[12] The applicant, by her solicitor, notified her alleged personal grievance to the respondent by way of a letter dated 29 April 2005. The parties attended mediation but were unable to resolve the employment relationship problem.

The investigation meeting

[13] The Authority was assisted by the applicant herself and by the evidence of Mr and Mrs Sutton. The atmosphere, while a little tense, did not prevent the parties expressing their views in an honest and open manner.

[14] As Mrs Wilson was unable to attend the investigation meeting and give evidence regarding the applicant's employment circumstances under the previous owners, her evidence was taken at a distance by teleconference call on a later date. Both Mr and Mrs Sutton were parties to that call, as were counsel for each party.

The issues

[15] The Authority is tasked with determining the following issues:

- What was the true employment status of the applicant before and after the change of the motel's ownership?; and
- Was the respondent entitled, having reviewed its requirements for cleaners, to dismiss the applicant without consulting her about that proposal?; and
- If the applicant has proved her claim, what, if any, remedies are due to her?

Analysis and discussion

[16] Essentially, this is a redundancy issue. The Suttons, through their company, took over the ownership and operation of the motel. Reliant on a clause in the sale and purchase agreement and an election by the applicant to remain on the same terms and conditions enjoyed under the previous owners, the Suttons mistakenly assumed that Ms Gutsell's days of work at the time were those she had always worked. They were not. Mrs Wilson clearly did not tell the Suttons why Ms Gutsell was working reduced hours and they, without checking earlier rosters or with Ms Gutsell, assumed she was unable to meet the business's realigned cleaning schedule.

[17] The process of consultation with potentially affected employees is now well enshrined in employment law in New Zealand; *Coutts Cars Ltd v Baguley* [2001] 2 NZLR 533 (CA). The basis of selection of potentially affected people needs to be transparent and the canvassing of the employee's views or alternatives is essential even if the employer decides later, for justified commercial reasons, to proceed with declaring a given employee's position surplus to requirements.

[18] In this case, apart from the applicant's election to remain employed by the Suttons on the same conditions she had previously enjoyed, there was no written employment agreement between the Suttons' company and Ms Gutsell. The applicant believed the Suttons knew which days she usually had worked; the Suttons believed that the days Ms Gutsell was currently working at the time they took over the management were the days she had previously worked for the vendors.

[19] That is very unfortunate, but in the last analysis, the law puts the onus of justifying a dismissal on the employer.

[20] It needs to be said that the Authority accepts that Mr and Mrs Sutton are inexperienced employers and took advice from the Motel Association on this matter. I would also comment that the Suttons are an honest younger couple making their way in the business world and are by no means malicious in this matter.

[21] I also observe that the period of employment of the applicant by the respondent was of short duration, some three weeks.

The determination

[22] I find the correct designation of Ms Gutsell's employment was that of a permanent part time worker with variable hours. Rosters put before the Authority confirm this. I find the respondent was entitled to realign its cleaning to best suit its business needs, but was obliged to consult with the applicant before declaring her surplus to its requirements. It failed to do so and as a result unjustifiably dismissed Ms Gutsell.

[23] Having made this determination I need to consider remedies, but before doing so I acknowledge that Mr and Mrs Sutton are genuine people new to employing staff. It needs to be made clear that remedies are not to be punitive but to compensate a wronged applicant for loss and distress arising from an unjustified dismissal. I have borne in mind the brief period of the employment relationship between the parties in setting the remedies.

Remedies

[24] I order the respondent to pay the applicant the sum of \$500 gross as lost remuneration for the period of three weeks prior to her finding alternative employment.

[25] I order the respondent to pay holiday pay to the applicant calculated at the rate of 6% of the above figure.

[26] I order the respondent to pay the applicant the sum of \$2,500 as compensation under section 123(1)(c) of the Employment Relations Act 2000.

Costs

[27] Costs are reserved. The parties are to attempt to resolve the matter of costs between them. If that is not achieved, Mr Davidson is to lodge and serve his memorandum fourteen days following the date of issue of this determination. Mr Shaw is to lodge and serve his memorandum fourteen days thereafter.