

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 139  
5432195

BETWEEN            NICOLETTE GLADDING  
                                 Applicant

A N D                 SOFTAIL SERVICES LIMITED  
                                 trading as THE LODGE  
                                 GLENORCHY  
                                 Respondent

Member of Authority:    M B Loftus

Representatives:        Nicolette Gladding on her own behalf  
                                 Graham Dunstan on behalf of the Respondent

Investigation Meeting:    4 September 2014 at Queenstown

Submissions Received:    At the investigation meeting

Date of Determination:    9 September 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Nicolette Gladding, claims she had what she say were set hours of work unilaterally removed. She says this was, at best, an unjustified disadvantage but really amounted to an unjustified dismissal.

[2]     The respondent, Softail Services Limited (Softail), contends Ms Gladding resigned but adds, in the alternative and should I disagree, she was employed as a *casual* and her hours could be altered to suit the employer's needs.

**Citation of the Respondent**

[3]     The Statement of Problem identified Graham Dunstan as the respondent. Reference to the respondent later changed to *The Lodge Glenorchy*, but papers

attached to witness statements indicate Ms Gladding was employed by a company, Softail Services Limited (Softail).

[4] Softail has a single director, Mr Dunstan's brother Philip, and uses *The Lodge Glenorchy* (The Lodge) as a trading name. According to Ms Gladding, Philip Dunstan appointed Mr Dunstan (Graham) to manage The Lodge.

[5] After some discussion Ms Gladding and Mr Dunstan agreed the employer was *Softail Services Limited trading as The Lodge Glenorchy*. The citation has been changed by consent.

### **Background**

[6] Ms Gladding commenced at The Lodge on 30 June 2013. The Lodge claims she was employed as a bar person on a casual basis.

[7] Ms Gladding disagrees. She says she was a duty manager employed on a part-time basis. She says she was required to commence at 6pm on Thursday, Friday and Saturday and remain until closing. She says there were additional hours with, for example, four weeks of Wednesday work when The Lodge was running a quiz night in which Mr Dunstan chose to participate leaving his shift to be filled.

[8] There is no written employment agreement to back either position and while Mr Dunstan says he prepared rosters on a weekly basis and placed them in a folder which contained the staffs timesheets, Ms Gladding denies ever noticing them and says Mr Dunstan always telephoned to discuss additional hours.

[9] The incident that led to Ms Gladding's cessation occurred on Saturday 7 September 2013. That night she was the named the duty manager. No other staff were on duty though Mr Dunstan was present and drinking with some of the patrons. Ms Gladding says she refused to serve a patron who was making inappropriate comments and asked him to leave at approximately 11.45pm. He apparently did.

[10] She says she then turned to Mr Dunstan who, she claims, was standing nearby and advised she was going to fry some chips for the clientele at large. Ms Gladding says Mr Dunstan said *no* as he was not prepared to feed people who had been drinking at a competing establishment (and who were now at The Lodge). Ms Gladding says Mr Dunstan was quite angry so while she thought the decision wrong, she conceded.

She did, however, say *I will talk to you about this when you haven't been drinking*. By *this* she says she was referring to Mr Dunstan shouting at her about the chips in front of customers.

[11] Ms Gladding says shortly thereafter Mr Dunstan came to her and asked for a 7 ounce glass. She says he then gave it to the customer she had previously evicted but who had since returned. She says she found that undermining and unsupportive. Her reaction was to replace her name with Mr Dunstan's as duty manager.

[12] Ms Gladding says only three customers left by 1.10am. None were drinking and all were about to leave. She says she clocked off (but wrote 1am on the timesheet), and said *bye* to Mr Dunstan who responded *thank you*. She says she would not normally leave while customers remained but wanted to avoid further confrontation given the tension she had felt since the dispute over the chips.

[13] Mr Dunstan has a different view about some of the above points. He takes exception to a claim he drunk with the evicted patron and states he was negotiating a departure without further incident. He also takes exception with what he claims was a comment Ms Gladding made earlier in the evening about his having watered down the beer. Finally, he differs over the time Ms Gladding left and what was said. He says she went about 12.35am and says her comment was *I will talk to you on Monday about this when you haven't been drinking*.

[14] This last point was to have a bearing on subsequent events as Mr Dunstan took issue with the fact Ms Gladding did not speak to him on Monday as promised.

[15] The next source of tension arose on Wednesday 11 September. Mr Dunstan claims Ms Gladding was rostered to work but failed to either appear or notify her absence. He worked the shift instead.

[16] Ms Gladding disagrees. She says she worked the four prior Wednesdays due to the quiz nights. She claimed to have been unaware of a requirement to work 11 September as the quizzes were over but adds she would willingly have done so if asked. As already said she denies knowledge of the rosters but adds it would not matter in any event. Mr Dunstan says a week's roster is placed in the folder at the beginning of the week to which it applies (either Sunday or Monday). Ms Gladding notes she would normally work neither of those days or Tuesday and asks how she

could therefore have been aware of the need to work Wednesday if this was the means of communicating the requirement.

[17] Ms Gladding's failure to speak to Mr Dunstan on the Monday or work the Wednesday shift led to another employee being asked to work her Thursday shift.

[18] Ms Gladding states she when she arrived for her Thursday shift Mr Dunstan told to go home as he had filled the shift with another employee. She says Mr Dunstan then said he was not firing her but as she was a casual he would now only give her shifts when he needed her. She says she asked why and was told it was because she had walked out on Saturday the 7th.

[19] About the conversation, Mr Dunstan says ... *I explained the position she had left me in and that I have covered her shift for that evening. I explained that I was going to make some changes on the roster.*

[20] Mr Dunstan goes on to say *On reviewing the timesheets she had written in a request for holiday pay I took this as she Ms Gladding was resigning.*

[21] Ms Gladding accepts she wrote the note which reads *please pay out all holiday pay owing thanks*. She says she did not do so until the following Monday and only after Mr Dunstan had refused to allow paid leave. She says she made both requests as the loss of her shifts meant she had no income. Holiday pay was her only potential source of money which she needed.

[22] Ms Gladding says Mr Dunstan must have been aware she had no intention of resigning as he never asked whether or not that was her intention and she had, on a number of occasions over the following weeks advised, both orally and in writing, that she sought the reinstatement of her previous shifts. There were no responses which led to today's investigation meeting.

### **Determination**

[23] There are three questions which potentially require determination. They are:

- a. What was the nature of Ms Gladding's employment; permanent part time as she claims or casual as alleged by Softail;
- b. If Ms Gladding was permanent part time was she dismissed?; and

- c. If so, was the dismissal unjustified or was it nullified by Ms Gladding's alleged resignation?

[24] Softail contends Ms Gladding was a casual employee thus allowing it to change her hours as it chose. That claim faces some difficulties. First is the absence of an employment agreement which supports Softail's position and while Mr Dunstan says he left some out for staff to sign, he accepts he did not pursue a failure to do so.

[25] Second is Ms Gladding's evidence about the hours she was required to work. Her claims were not undermined by either her timesheets or Mr Dunstan's evidence about the agreed hours. Mr Dunstan said he was unaware whether or not the two discussed specific shifts. He said he was on *learning curve* and trying to get a feel for the business so just let things go. The timesheets show that with two exceptions attributable to illness Ms Gladding worked the core hours claimed.

[26] Even if the original agreement was that Ms Gladding be engaged as a casual or, more correctly given the evidence, Softail intended she be so engaged, it is well established such arrangements can change (see, for example, *Barnes (formerly Kissell) v Whangarei RSA (Inc.)* [1997] ERNZ 626 and, more recently, *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225).

[27] Ms Gladding's work pattern was simply not that of a casual. Casual implies irregularity in terms of both hours available and times at which they might be worked. Here there was regularity and I conclude Ms Gladding was, as claimed, a part time employee.

[28] That raises the question of whether or not she was dismissed. I conclude she was.

[29] Ms Gladding claims the dismissal was constructive. A constructive dismissal will occur when there is a breach of duty by the employer which causes the employee to resign (see *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)).

[30] To reduce someone's hours and thereby affect their earnings without justification is a breach that can justify the response of resignation (see, for example, *Gorrie Fuel (SI) v Gittoes EmpC Christchurch* CC21/07, 8 November 2007). There is, given Mr Dunstan's answers, no dispute the changes he was contemplating would

see Ms Gladding's hours reduce. So would her pay. Therefore, and if she did resign on the 15<sup>th</sup>, I would conclude she was constructively dismissed.

[31] In the alternative I note a dismissal is an act of an employer that amounts to a sending away. Mr Dunstan arbitrarily removed Ms Gladding's regular hours on September 11. His answers confirm he made it clear she could no longer expect any specific hours in the future and he also removed an immediate ability to earn by not allowing paid leave when she asked for it that evening. He says he did so as she had not been dismissed and was not therefore entitled to her holiday pay. To me the removal of income that would otherwise have been expected in such a fashion amounts to a sending away. This was, effectively, an actual dismissal.

[32] Whichever way I look at it my conclusion is the same. Ms Gladding was dismissed.

[33] That raises the question of whether or not the dismissal was justified. An employer who dismisses is required to justify their action. In doing so they must show they raised their concerns/issues, allowed the employee an opportunity to comment and considered the response with an open mind. There is absolutely no evidence that occurred here.

[34] All Mr Dunstan says is the business could no longer sustain Ms Gladding's hours. If that were the case it would mean Softail's concerns could potentially result in Ms Gladding's redundancy given my conclusion she was a part time employee. That these requirements, in the form of a consultation process, remain in the redundancy setting is expressly confirmed by s.4(1a)(c) of the Employment Relations Act 2000 (the Act) and the relationship between that section and the requirements of s.103A has been confirmed by the Court (*Jinkinson v. Oceana Gold (NZ) Ltd* [2010] NZEmpC 102).

[35] There is no evidence of consultation here. The evidence of both Ms Gladding and Mr Dunstan is the latter simply advised an outcome. That, I must say, is not surprising given a number of unsubstantiated accusations he levelled at Ms Gladding and his admission he felt relief at the resignations discovery. I conclude Mr Dunstan wanted rid of Ms Gladding.

[36] Finally I turn to the question of whether Ms Gladding's purported resignation nullifies the conclusion she was unjustifiably dismissed. The answer is no. If it was a

resignation it amounted to a constructive one for reasons already outlined. In any event I note it occurred after actions which, in my view, amounted to an actual dismissal (see [31] above).

[37] The conclusion the dismissal is unjustified raises the question of remedies. Ms Gladding seeks lost wages and an unspecified amount as compensation under s.123(1)(c)(i) of the Act.

[38] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of that actually lost or 3 months ordinary time remuneration. The Authority may recompense a greater loss but that requires evidence of attempts to mitigate. Ms Gladding remains unemployed and her income has been limited to a couple of casual engagements. That said, she has limited her attempts to mitigate due to family circumstances so I conclude her award is limited to that prescribed by statute.

[39] The parties agree that had Ms Gladding continued to work a similar number of hours to those she had while employed at the Lodge she would have earned \$4,251.00 over the next 3 months. That is payable.

[40] Ms Gladding also gave evidence of the hurt she felt. While not comprehensive it is clear she was hurt and humiliated. Having considered her evidence I consider an award of \$3,000 appropriate.

[41] The conclusion remedies accrue means I must, in accordance with s.124 of the Act, address whether or not Ms Gladding contributed to her dismissal in any material way. I have no evidence she did so the answer is no.

### **Costs**

[42] Ms Gladding has been successful. She is therefore entitled to a contribution towards the costs she incurred in pursuing her claim. There is no legal representation and recoverable costs are limited to the Authority's filing fee of \$71.56. I believe it appropriate she be recompensed and will order payment accordingly.

### **Conclusion and Orders**

[43] For the above reasons I conclude Ms Gladding has a personal grievance in that she was unjustifiably dismissed.

[44] Softail Services Limited is therefore ordered to pay Ms Gladding:

- i. \$4,251.00 (four thousand, two hundred and fifty one dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$3,000.00 (three thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further \$71.56 (seventy one dollars and fifty six cents) being reimbursement of the costs incurred in making the application.

M B Loftus  
Member of the Employment Relations Authority