

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 71/08
5087990

BETWEEN BELINDA AUSTIN
Applicant
AND WAIKENE ADVENTURES
LIMITED
Respondent

Member of Authority: Philip Cheyne
Representatives: Glenn Jones, Counsel for Applicant
Tim McGinn, Counsel for Respondent
Investigation Meeting: 11 and 12 March 2008 at Christchurch
Determination: 21 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mark Edwards and Andrew Edwards are brothers who are the principals and directors of Waikene Adventures Limited, a company which owns Waikene Station. Waikene Station is a farm, lodge and hunting estate near Kaikoura.

[2] Waikene Adventures Limited employed Belinda Austin from January 2006 until she was dismissed as redundant in March 2007. Belinda Austin married Rob Ballantyne some time after the end of her employment and is now called Belinda Ballantyne. Mr and Mrs Ballantyne were employed by Waikene Adventures Limited as a couple, he as farm manager and she as lodge manager. Mr Ballantyne was dismissed in February 2007 for misconduct.

[3] Both Mr and Mrs Ballantyne initiated proceedings related to their dismissals and other issues. By agreement, one consolidated investigation meeting was held to

canvass the evidence and submissions for both proceedings, but it is convenient to issue separate determinations focusing on the separate issues.

[4] Mrs Ballantyne says that she was dismissed as a result of the difficulties between Waikene Adventures Limited and Mr Ballantyne and that there was no genuine redundancy situation. She also says that Waikene Adventures Limited did not consult her about any redundancy situation before giving her notice of dismissal. There are two other aspects to Mrs Ballantyne's employment relationship problem. She says that she should have been paid a bonus and that she is also entitled to some holiday pay.

[5] All these claims are rejected by Waikene Adventures Limited. In particular, Waikene Adventures Limited says that there was a genuine redundancy situation, that it complied with Mrs Ballantyne's employment agreement and that Mrs Ballantyne was treated fairly.

The dismissal

[6] I do not intend to repeat here the findings made in Mr Ballantyne's claim against the company. It is sufficient for present purposes that Mrs Ballantyne was not seen by the company as having any blame for the incident on 21 February 2007 that preceded Mr Ballantyne's dismissal. If anything, the company's attitude to Mrs Ballantyne became protective and solicitous. The starting point for considering Mrs Ballantyne's grievance is several weeks earlier.

[7] Gary Joll had been engaged as a consultant to Waikene Adventures Limited and from February 2007 he took over as general manager. Mr Joll met with the company principals in Auckland where they discussed a variety of issues about the business. Mr Joll then sent an email to Mr and Mrs Ballantyne summarising these discussions. Much of the email deals with farming issues but the second item says *the lodge is to be mothballed*.

[8] The email was responded to by Mr Ballantyne who commented *good. It will make our lives much easier*. Mrs Ballantyne acknowledged in evidence that she was aware of this communication. I infer that the proposal to mothball the lodge had not come out of the blue and that there had been some discussion to which Mrs Ballantyne was privy about the possibility of such a decision.

[9] Mr Joll says that he had some discussion following on from this in late February with Mrs Ballantyne about the lodge closing. Mr Edwards gave evidence about having told Mrs Ballantyne in late February that there would be consultation with her about the lodge closing and he says that Mr Joll did conduct this consultation. That puts an unwarranted spin on what happened. There may have been these passing references by Mr Joll and Mr Edwards to Mrs Ballantyne about the lodge being mothballed, but it was never intended to be nor was it presented to her as a process of consultation about her being made redundant.

[10] On or about 5 March 2007, Mrs Ballantyne received a letter dated 1 March 2007 from Mr Edwards. It reads:

Dear Belinda,

As Gary has already indicated to you in previous discussions, following an analysis of the Waikene Lodge business we have decided to close down the lodge at the end of March.

This letter is your 30 day notice period, you will be paid through to the end of March. We hope that you will elect to work out your notice period and assist with the close-down of the lodge business.

Thank you for all your efforts in trying to get the Waikene Lodge business off the ground and we wish you all the best in your future endeavours.

*Sincerely,
Signed
Mark Edwards
Director*

[11] Mr Joll met Mrs Ballantyne at Waikene on 6 March 2007. There was some discussion about Mrs Ballantyne's tasks during the notice period. Mr Joll encouraged her to stay on at the lodge until the end of the notice period. Mrs Ballantyne told him that she and Mr Ballantyne were apart and that she was looking for work in Kaikoura. At that time, Mr Ballantyne was in Christchurch.

[12] Mrs Ballantyne left Waikene Station near the end of March 2007. There is a dispute in the evidence about whether Mr Ballantyne helped her to move out despite him having been told not to return to the property, but it is not necessary to resolve that dispute.

[13] Mrs Ballantyne's written employment agreement makes no mention of redundancy. It does provide for a notice period of 30 days.

[14] Mrs Ballantyne's salary was paid monthly so she received pay to 31 March 2007.

Personal grievance

[15] Justification for the dismissal must be assessed objectively 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 of the dismissal.

[16] I accept that there existed a genuine redundancy situation. No one was employed to take over Mrs Ballantyne's responsibilities once she left and the lodge business has remained dormant since March 2007 except for a little use in connection with the hunting side of the business. Mrs Ballantyne's position was superfluous to the company's needs.

[17] Mrs Ballantyne suggested that the state of dormancy might have been instituted solely for the duration of these proceedings as a front but that is unlikely. It must be remembered that the decision to mothball the lodge was announced on 14 February 2007 before Mr Ballantyne's dismissal arose and the decision was welcomed at that time by Mr and Mrs Ballantyne.

[18] Even in the circumstances of a genuine redundancy, an employer is obliged to treat the employee in a fair and reasonable manner. This was especially important in the current case because of the risk that Mrs Ballantyne might be left thinking that she had been caught up in the dismissal of Mr Ballantyne. Counsel submitted that there was no detailed evidential chain of consultation with Mrs Ballantyne but there was some evidence of consultation. However, as mentioned above, I do not accept that there was any element of consultation even if Mr Joll or Mr Edwards did speak to Mrs Ballantyne about the decision to mothball the lodge.

[19] It follows that Waikene Adventures Limited did not treat Mrs Ballantyne in a fair and reasonable manner in deciding to dismiss for redundancy and she has a personal grievance.

Remedies

[20] There was no blameworthy contribution by Mrs Ballantyne to the situation giving rise to the grievance.

[21] Mrs Ballantyne seeks \$6,000 compensation for distress. Her evidence, which I accept, is that she found the termination of her employment and the manner in which it was carried out very distressing. In the circumstances, the compensation claim is modest and I award it in full.

[22] Because of the finding that there existed a genuine redundancy situation, there can be no remedies for lost remuneration or lost benefits relating to the loss of the position.

Bonus

[23] There is a letter dated 23 May 2006 setting out Mrs Ballantyne's entitlement to a bonus payment. It reads:

Dear Belinda,

Per our previous discussions this letter confirms the following changes to your original offer of employment letter with Waikene Adventures Ltd, namely:

Reporting to: Rob Ballantyne, Farm Manager

Holidays: Three weeks annually (non-accruing, to be taken at a time to be mutually agreed with the Farm Manager)

Working week: As determined with Farm Manager.

We have also set the following goals for FY07 (April 06 to March 07):

- 1. Waikene Lodge achieves Qualmark 4 star rating.*
- 2. Waikene Lodge to join Heritage Inns association and get at least 20 room nights booked via the Heritage Inns website (www.heritageinns.co.nz)*

While your original offer of employment letter detailed your ability to earn a 15% commission, we need to acknowledge it is unlikely you will reach the required revenue levels in order to activate the commission levels. We are therefore willing to offer you an annual bonus (while still leaving in place your ability to earn commissions) of \$2,500 (gross pay). In order to be eligible to receive this annual bonus, both of these goals will need to be achieved by March 2007. Note that Rob shares both your goals and the first goal is shared with Wayne.

Your success is vital to achieving our goals at Waikene and Rob and I both want to help you and the team be successful so look forward to your ideas and continued efforts to this end.

*Sincerely,
signed
Mark Edwards
Director*

[24] There is no dispute that Mrs Ballantyne did what was necessary for Waikene Lodge to achieve a Qualmark four star rating. The dispute is about whether the second condition was satisfied, waived or varied.

[25] It is common ground that Mrs Ballantyne found out that Waikene Lodge was ineligible to join the Heritage Inns association because of restrictions in the rules that could not be overcome. Mrs Ballantyne discussed that with Mr Edwards. I accept Mr Edwards' evidence that he indicated that she should get 20 paid room nights from elsewhere. That effectively varied the goal. However, the evidence is that Mrs Ballantyne did not achieve the goal as varied. It follows that Mrs Ballantyne is not entitled to the bonus payment.

Holiday pay

[26] Mrs Ballantyne was not paid any holiday pay when her employment ended. However, it may be that she was not owed any holidays. I will leave it to counsel to reach an agreement about what, if anything, is owed but leave is reserved. Mrs Ballantyne should be taken as having had annual holidays in advance at the same time as Mr Ballantyne.

[27] I should also note that there may be a shortfall in terms of notice. Mrs Ballantyne's employment agreement specified 30 days' notice of dismissal which she received on 5 March 2007. However, it appears that Mrs Ballantyne was only paid to 31 March 2007.

Summary

[28] Mrs Ballantyne has a personal grievance of unjustified dismissal. Waikene Adventures Limited is to pay Mrs Ballantyne compensation of \$6,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[29] Mrs Ballantyne is not entitled to the bonus payment.

[30] Mrs Ballantyne may be entitled to holiday pay and any balance of the notice period, leave being reserved in case of any disagreement. If anything is owed, Mrs Ballantyne is also entitled to interest on such arrears at the rate of 10% per annum starting 1 April 2007.

Costs

[31] Costs are reserved. An open offer was made during the investigation meeting to resolve this and Mr Ballantyne's proceeding. The impact of the offer and the different outcomes of the two proceedings will need to be considered.

Philip Cheyne
Member of the Employment Relations Authority