

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 612
3032431

BETWEEN	NICOLA COLVILLE Applicant
AND	ERIN FEGAN First Respondent
AND	DENNIS NOLAN trading as NELSON WINDOW CLEANING Second Respondent
AND	BEACH HOSTEL LIMITED Third Respondent

Member of Authority:	Andrew Dallas
Representatives:	Luke Acland, counsel for the Applicant Steven Zindel and Sophie Day, counsel for the Respondent
Investigation Meeting:	20 March 2019 at Nelson
Submissions	5 April 2019 for the Applicant and 19 March 2019 and 16 April 2019 for the Respondent with further information received up to and including 26 June 2019
Determination:	25 October 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nicola Colville worked as the manager of the Beach Hostel in Nelson. Ms Colville said she was employed by Erin Fegan. Ms Colville says she was unjustifiably dismissed, or constructively so, subject to an unjustified action to her disadvantage and was owed wages and holiday pay.

[2] Ms Fegan and Mr Nolan, who operate a number of business ventures between them, said Ms Colville was actually employed by Beach Hotel Limited and in all other respects denied her claims.

Issues

[3] The following are the issues for investigation and determination:

- (i) Who was Ms Colville's employer;
- (ii) Was Ms Colville's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time;
- (iii) If Ms Colville's employer's actions were not justified, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s 123(1)(c)(i) of the Act;
- (iv) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Colville that contributed to the situation giving rise to her grievances;
- (v) Is Ms Colville owed arrears of wages and minimum entitlements;
- (vi) If so, should a penalty be imposed on Ms Colville's employer and if so, in what amount and should this be made payable to Ms Colville; and
- (vii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[4] At the meeting, I heard evidence from Ms Colville; Ms Fegan, Mr Nolan and their friend, Bonita Wilkinson.

[5] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. Further, while I have not referred to all the submissions of the parties in this determination, I record I have fully considered them.

[6] This determination is issued outside of the statutory three month timeframe. To the extent that exceptional circumstances are required to exist for it to be issued, these do exist.

What caused Ms Colville's employment relationship problem?

[7] On Ms Colville's account she said she commenced as the accommodation manager of the Beach Hostel in Tahunanui, Nelson in September 2016. She said she had previously worked at the hostel as a cleaner. Ms Fegan said Ms Colville was employed as a cleaner who helped out with accommodation issues, which was similar to the role she performed with several others, and this did not change.

[8] Ms Colville said she worked different hours in the winter and summer. Between May and November, she worked 11 hours per week on Tuesday and Fridays and between December and April, she worked 30 hours per week, five days per week. Ms Colville said she was paid \$18 per hour. Ms Fegan said Ms Colville also worked flexibly to enable her to undertake other employment at United Video.

[9] Ms Colville said while she was employed by Ms Fegan she was paid by Mr Nolan. Ms Fegan and Mr Nolan say that Ms Colville was employed by Beach Hostel Limited. An unsigned employment agreement existed. Ms Fegan said she asked Ms Colville to sign the agreement and leave it in the hostel's office. She said this did not happen.

[10] Ms Colville claimed her role changed to "onsite manager" in December 2016, which meant she was required to live onsite at the hostel and be available on-call hours and overnight. However, Ms Fegan said, in contrast, Ms Colville was not "onsite manager" but rather approached her and asked her if she could locate her campervan at the hostel due to some personal circumstances extant. Ms Fegan said she accepted that Ms Colville would be living in the campervan for a few weeks while someone was renting her house. Ms Fegan said the arrangement became prolonged due to the ongoing need for the person to live in Ms Colville's house. Ms Fegan made various other allegations about Ms Colville during this period. These allegations were denied and, indeed, do not appear to be particularly relevant.

[11] Ms Fegan did, however, observe that Ms Colville did not get on with one of her colleagues who performed the same or similar role. In or about February 2017, that person resigned their employment.

[12] Ms Fegan said at some point Ms Colville moved into one of the vacant cabins located on the site. Mr Nolan said he believed this was because Ms Colville was finding the campervan too cold. Ms Colville said she actually moved into the cabin at Ms Fegan's suggestion.

[13] In July 2017, there was a fire at Ms Colville's house. This was reported in the newspaper. Ms Fegan said it actually transpired Ms Colville's house was a "state house" and she was renting it "illegally". Ms Colville said there was nothing illegal about the arrangement she had made. In any event, as a consequence of the fire the house was unliveable and Ms Fegan said she allowed Ms Colville to continue living in the cabin.

[14] Ms Fegan said Ms Colville then moved into the hostel and ultimately occupied "Room Three". Ms Colville said she stayed in Room Three with Ms Fegan's full knowledge. Ms Fegan denied this and was supported by Mr Nolan and Ms Wilkinson.

[15] Ms Fegan and Mr Nolan said they became increasingly concerned about who was living at the hostel from July 2017 onwards after the police became involved. A number of examples of problematic behaviour were provided. Ms Colville accepted that one resident in particular was quite troublesome.

[16] In October 2017, a "Facebook" advertisement seeking a replacement for the employee who departed in February 2017 was placed by Ms Wilkinson on behalf of Ms Fegan. Ms Colville upon discovery of this advertisement claimed that it was really for her job.

[17] Ms Fegan said she asked Ms Colville to take some annual leave as her leave balance was quite high and due to the hostel requiring major renovation and cleaning for the pending summer season. Ms Colville agreed to this. Ms Fegan said she assumed Ms Colville would vacate Room Three because her house was again available for her to live in, but she did not. However, Ms Colville did remove her campervan; another vehicle belonging to her was subsequently towed away from the hostel. Ms Colville

said she did not expect to vacate the room as she planned to move back in after her leave but did move out on 4 November 2017.

[18] As Ms Fegan wanted to get the hostel under control, it was agreed the new employee would live onsite for a temporary period (which she did and then subsequently moved out). This employee requested an ensuited room and had agreed to pay rent for it. Ms Fegan believed Room Three was available but the room could not be egressed due to furniture being stacked against the door and Ms Colville not returning the key. Eventually access was achieved and the evidence of Ms Fegan, Mr Nolan and Ms Wilkinson was the room was in a very unfit state of repair. Ms Fegan said the room required extensive cleaning. Pictures said to be of the room at the time were provided to the Authority. Ms Colville said she left the room in a good condition.

[19] Ms Colville was due to return to work at the hostel on 4 December 2017. However, she said she was too unwell to attend for work and provided a medical certificate to that effect. Ms Colville was due to return to work in January 2018, when her medical certificate expired but she never did return to her employment. Ms Fegan claimed that Ms Colville worked at United Video during this period. Ms Colville did not appear to deny this.

[20] On 19 December 2018, Ms Colville raised a personal grievance. She alleged she was unjustifiably dismissed (or constructively dismissed) because she was not allowed to live at the hostel as onsite manager. Ms Colville also alleged she was owed holiday pay, unpaid public holiday pay, unpaid sick leave and \$30,420 for “on-call” work performed at the hostel between December 2016 and November 2018 on the basis of the following calculation: 338 days x \$18 per hour x 5 hours per day.

[21] Ms Fegan and Mr Nolan denied all of Ms Colville’s claims. In addition they said while a personal grievance was raised against Beach Hostel (and Ms Fegan, personally), that legal entity was not named in Ms Colville’s statement of problem. Ms Colville said Beach Hostel was a “sham”.

The Authority's view of Ms Colville's employment relationship problem

Who was Ms Colville's employer?

[22] Having considered the evidence, I find, on the balance of probabilities, that Beach Hostel was Ms Colville's employer. While the matter of respondentcy was slightly complicated by Beach Hostel Limited being removed from the Companies Register, the company was subsequently restored. I accept the submission advanced on behalf of Ms Fegan that the effect of restoration had the effect of deeming the company to be in continuous existence therefore not affecting Ms Colville's employment relationship with it. In this regard, reliance was placed, correctly in my view, on the decision of the High Court in *Commercial Management Limited v CIR*.¹

[23] To ensure Ms Colville is not disadvantaged by her mistaken belief that she was directly employed by Ms Fegan and/or Mr Nolan, I join Beach Hostel Limited to these proceedings under s 221(a) of the Act.

[24] For the avoidance of doubt, I find none of Ms Colville's claims lie against Mr Nolan. Indeed, it is unclear why he was proceeded against. While he could be struck out as a respondent, it is, in any event, unnecessary in the circumstances of this finding.

Was Ms Colville unjustifiably or constructively dismissed?

[25] Having carefully reflected on the evidence and the submissions advanced by representatives for the parties, I find that Ms Colville was not unjustifiably or constructively dismissed by Beach Hostel Limited due to unilateral variation of her contract of employment through the removal of free accommodation. The reasons for this finding are as follows:

- (i) I accept Ms Fegan's evidence that the initial approach by Ms Colville was to live in a campervan parked at the hostel;
- (ii) I further accept Ms Fegan's evidence that she did not give consent to Ms Colville to move into one of the hostel's vacant cabins and subsequently one of its vacant rooms;

¹ [2018] NZHC 2224

- (iii) the accommodation, however described, was provided to Ms Colville on a “grace and favour” basis to help her deal with certain matters including a fire at her house rather than as a term or condition of her employment;
- (iv) This “grace and favour” went so far as to allow Ms Colville to rent out her house while living in free accommodation provided by Beach Hostel Limited;
- (v) Ms Colville could not point to any express terms which provided for free accommodation; and
- (vi) there is no basis upon which it would be necessary to apply such a term.²

[26] Ms Colville’s access to accommodation was terminable by Beach Hostel Limited, and probably reasonably on notice, as it was, without affecting her employment. That Ms Colville believed she had a right to such accommodation as part of her employment is not supported by the evidence and any actions she took in response to the ending of her access to the accommodation including alleging unjustifiable dismissal or unjustifiable constructive dismissal – but more accurately, and more likely, abandoning her own employment – are a matter for her and cannot be attributed to her former employer.

So what then of Ms Colville’s on-call wages claim?

[27] In light of the finding that Ms Colville was not required to live at the hostel or otherwise be present outside her established pattern hours of work, her claim for “on-call” wages is unsustainable.

Claims for holiday pay, public holiday pay and unpaid sick leave

[28] There is a significant disagreement about the correct calculation of Ms Colville’s minimum entitlements. While there were initially some irregularities in Beach Hostel Limited’s records, these were reviewed by a third party. I am satisfied, having reviewed the evidence put before the Authority, that Ms Colville was correctly remunerated by Beach Hostel Limited and received her correct entitlements.

² See, for example, *Edminstin v Sandord Limited* [2017] NZEmpC 70

[29] In light of the above findings, there is no basis upon which to impose penalties on Beach Hostel Limited.

Costs

[30] Costs are reserved. I understand both parties have had a grant of legal aid to bring, and defend, these proceedings in the Authority. Consequently, the question of costs may be subject to the requirements of ss 45 and 46 of the Legal Services Act 2011.

[31] If a determination of the Authority is required on costs, Ms Fegan and Mr Nolan may lodge a memorandum within 28 days of the date of this determination and Ms Colville would then have 14 days from the date of service to lodge a memorandum in reply. No submissions on costs will be considered outside this timetable, unless prior leave has been sought.

Andrew Dallas
Chief of the Employment Relations Authority