

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 132
5594091

BETWEEN LINDA FELLOWES
 Applicant

AND BAKKER MOTELS LTD
 Respondent

Member of Authority: Michele Ryan

Representatives: Jessica Sebastian, Counsel for Applicant
 George Bakker, on behalf of the Respondent

Investigation Meeting: 20 September 2016 at Wellington

Submissions On the day of the investigation meeting

Determination: 3 November 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Linda Fellowes claims she was unjustifiably dismissed following a disagreement with her employer, Bakker Motels Ltd (BML).

[2] BML owns the AAA Mana Motel (the motel). It denies Ms Fellowes was dismissed. George Bakker is the Managing Director of BML. He says at the end of April 2015 BML no longer had sufficient work for Ms Fellowes, and as she was a casual employee the employment relationship simply came to an end.

Background

[3] Ms Fellowes began working at the motel in 2010 when it was owned by another entity. She was one of two employees who regularly performed housekeeping and cleaning tasks each week. A third employee would be called in for housekeeping

duties when the motel was particularly busy. Ms Fellowes says her employer regarded her (and the other housekeepers) as part-time casual employees.

[4] On 1 August 2014 the motel was sold to BML. In the lead up to the sale it was agreed that the housekeepers would transfer to BML and that “*nothing would change*”.

[5] Ms Fellowes did not have a written employment agreement with either employer.

[6] The practice by which work was allocated to the housekeepers did not alter significantly when BML took over the motel.

[7] At some point each week Mr Bakker and the two regular housekeepers would review the motel’s forecasted occupancy for the upcoming week and the level of housekeeping that might be required. Ms Fellowes and her colleague would, with Mr Bakker’s agreement, then apportion which days each of them would work, particularly if it was anticipated only one housekeeper was needed on a given day. By this method Ms Fellowes says she was able to gauge which days she would likely be working. Mr Bakker would frequently confirm the day before whether she and/or her colleague was needed.

[8] It was apparent from the evidence that over the course of an average week there would be days where BML required both housekeepers, days where only one was needed and often a day where neither housekeeper was needed.

[9] As regards hours of work, Ms Fellowes would start at 9am (or thereabouts) and continue until the work was completed, usually until 1pm, but this could be earlier or later. Ms Fellowes accepts that motel bookings altered at short notice and therefore her anticipated days and hours of work could change.

[10] A disagreement between Ms Fellowes and Mr Bakker developed over ANZAC weekend in 2015. Ms Fellowes contended she was entitled to be paid time and a half for work on ANZAC day (Saturday, 25 April 2015) whereas Mr Bakker did not. In evidence both parties reported the other displayed a poor attitude over the issue. Ms Fellowes says given the rising tension between them she left work on Sunday, 26 April 2015 without discussing housekeeping requirements for the following week.

[11] There was no contact between the parties the following week. Ms Fellowes says she waiting for Mr Bakker to call her.

[12] On Sunday, 3 May 2015 Ms Fellowes rang Mr Bakker to ask if there was work available the following day. He advised there was not. She rang again on Wednesday, 6 May 2016. Mr Bakker reiterated she would not be paid public holiday pay rates for Saturday 25 April, and further advised there was not much work and she should find another job.

[13] On 11 May 2015, Ms Fellowes called Mr Bakker once more. There is no real dispute about the content of their conversation. Mr Bakker advised that there was no work available for Ms Fellowes but that work remained for the other regular housekeeper. Ms Fellowes asked if she was being sacked. Mr Bakker confirmed she was. When Ms Fellowes asked for reasons Mr Bakker said her work was not up to standard and that complaints from customers had been made. Ms Fellowes disputed that assessment and told Mr Bakker that he couldn't sack her (in this way). Mr Bakker advised he could because she was a casual employee. The discussion ended by Mr Bakker hanging up the phone.

[14] Two days later Ms Fellowes raised a personal grievance.

The issues

[15] The Authority is required to determine;

- whether Ms Fellowes' employment was casual or permanent part-time;
- if Ms Fellowes was a permanent part-time employee, was she dismissed unjustifiably;
- if Ms Fellowes was dismissed unjustifiably, is she entitled to remedies.

Was Ms Fellowes a casual or permanent employee?

[16] Mr Bakker says work requirements in the motel industry are determined on a daily basis because it is difficult to forecast occupancy. For this reason he says BML employs all staff on a casual basis. He produced a copy of a casual employment

agreement signed by Ms Fellowes' colleague as evidence that the role is regarded as casual.

[17] BML's written agreement with another employee does not assist me in establishing the intentions between the parties as to Ms Fellowes' employment status, particularly where it is accepted Ms Fellowes was never provided with a written employment agreement.

[18] Notwithstanding that at various points of Ms Fellowes' employment one or other of the parties expressed the relationship to be casual, that description is not necessarily determinative. In assessing whether Ms Fellowes was a casual or permanent employee the real nature of the relationship between the parties needs to be examined. In *Jinkinson v Oceana Gold (NZ) Ltd*, the Court held "*if the result of the inquiry is that the nature of the relationship is at odds with the label given to it by the parties, substance should prevail over form*".¹ The law also recognises the true nature of an employment relationship can change over time.²

[19] There is no statutory classification that distinguishes a casual employee from a permanent employer. A key element of casual employment is that each period of work is a separate and distinct employment.

[20] In assessing whether a period of work is a separate engagement or part of an ongoing relationship, the law looks at the conduct of the parties. Relevant to this application I need to examine:

- the nature of the work performed by Ms Fellowes and whether or not the work was integral to the business;³
- whether Ms Fellowes work pattern was intermittent and unpredictable or consistent and regular;⁴
- whether the parties' conduct gave rise to legitimate mutual expectations that further work will be provided and accepted;⁵

¹ *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37]

² *Barnes v Whangarei RSA (Inc)* [1998] ERNZ 626

³ n1 at [66]

⁴ n2 at pp 636-637

⁵ n1 at [52]

[21] Looking firstly at the nature of the work, I find BML's requirement to maintain housekeeping was a fundamental necessity to the operation of the business. There is no suggestion that there were any individuals other than Ms Fellowes and her colleague who routinely undertook the housekeeping and cleaning chores and activities. The foreseeable nature of the work Ms Fellowes performed is a factor that lends itself to a conclusion that her employment was never truly casual. My finding is further reinforced when I consider Ms Fellowes' pattern of work.

[22] It is accepted that Ms Fellowes did not have set days or hours of work. It is clear that for duration of her employment of almost 10 months with BML she worked every week.⁶ I agree hours of work were variable but looking at the entirety of her employment she predominantly worked 12-15 hours per week, usually over 3-4 days per week. I am satisfied that Ms Fellowes' work pattern was continuous and sufficiently predictable and regular from week to week.

[23] Mr Bakker says it was not until either the day before the work became available or at the beginning of that day that he would offer work. He submits there was no obligation for the housekeepers to accept the offer. In contrast, I consider the weekly forecasting discussions held between Mr Bakker and the two housekeepers created an expectation that the housekeepers would make themselves available according to the motel's requirements and that work would be provided and accepted. I consider that methodology of scheduling demonstrates there were mutual obligations amongst the parties between periods of work.

[24] I find the housekeepers' practice of then advising BML which of them would be available was an informal means of rostering and did not alter the mutual expectation that when work was offered to Ms Fellowes it would be accepted. Mr Bakker's evidence that he didn't mind "*who did the work as long as it was done*" is telling. It reflects, in my view, BML's expectation that if one employee was not available the obligation was on the other to work if needed.

[25] Nor do I do not view Mr Bakker's confirmation with Ms Fellowes (or her colleague) that work was available that day (or the following) as a discrete offer of employment. I consider this was a routine practice of how BML organised its day to day business requirements and was accepted by the housekeepers as part and parcel of

⁶ BML's Employee Summary Report

their respective conditions of employment. Ms Fellowes' unchallenged evidence that the housekeepers gave a week's notice if they were unavailable for work on a particular day reinforces my view that there were ongoing obligations between the parties.

[26] I find Ms Fellowes' employment status, during the period in which Ms Fellowes was employed by the original owners of the motel and throughout her employment with BML, was always of a permanent part-time nature, albeit with variable hours. I do not accept that Ms Fellowes was a casual employee.

Was Ms Fellowes' dismissal justified?

[27] Mr Bakker's testimony before the Authority is that Ms Fellowes' employment came to an end because there was no work for her. He accepts however that when he confirmed her employment was terminated he advised this was due to poor work performance and that complaints had been made about her.

[28] Whether a dismissal is justifiable is determined by the Authority inquiring into the employer's actions, both as to whether there were reasonable grounds for the dismissal and whether the process taken to reach that decision was fair (including whether minimum standards of procedural fairness as set out at s.103A(3) of the Act were met). The Authority is required to objectively assess whether those actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.⁷

[29] Mr Bakker says in the last week of April 2014 a large booking of roading contractors, who had previously stayed at the motel for several months, came to a premature end. Ms Fellowes agreed in oral evidence that the loss of contract had been foreshadowed although the contractors remained guests at the motel at the time of her dismissal.

[30] I view with scepticism Mr Bakker's denial that the disagreement over pay rates on ANZAC day had anything to do with the termination of Ms Fellowes' employment. In any event, no matter which of the possible reasons advanced either by Mr Bakker or Ms Fellowes, that prompted the decision to dismiss, BML's obligation of good faith required it to put all relevant matters to Ms Fellowes and

⁷ Section 103A employment Relations Act 2000

allow her an opportunity to comment on the issues before it did so. Those obligations were not met. The failure to do so was not the action of a fair and reasonable employer in all the circumstances.

[31] On balance I find that Ms Fellowes was dismissed at some point relatively soon after ANZAC day but she was not advised of this until she pressed the point on 11 May 2015. I find BML's dismissal of Ms Fellowes was substantively and procedurally unjustified.

What remedies should be awarded?

Lost Wages

[32] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost "*as a result of the grievance*". That section is qualified by s 128(2) which, subject to any reduction that the Authority may make under s 124 for contributory behaviour, provides that the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration, or 3 months' ordinary time remuneration.

[33] I am satisfied Ms Fellowes did not contribute in a blameworthy or causative way to the situation that led to her dismissal. There is no basis to reduce remedies on grounds of contribution.

[34] Ms Fellowes began alternative employment 8 weeks after she was dismissed. She appropriately sought to mitigate her losses.

[35] She seeks \$1,995.84 (gross) comprising lost wages and the benefit of holiday pay, for the period between her dismissal and starting new employment.⁸ She is entitled to be reimbursed for that sum.

Compensation

[36] Ms Fellowes seeks compensation of \$4,000. Ms Fellowes' evidence is that she felt increasingly anxious when Mr Bakker's did not contact her after ANZAC day. I accept, having sought to discuss when she could work on several occasions, that when she was finally advised she was no longer employed, she felt both humiliated

⁸ That sum has been calculated by averaging out her weekly wages for the 12 weeks preceding her dismissal plus 8% for holiday pay.

and distressed, particularly where there was an appearance that the dismissal was decided in response to her assertion she be paid according to the law as it relates to working on a public holiday.⁹

[37] Bakkers Motel Limited is order to pay Ms Fellows seeks \$4,000 for the humiliation, loss of dignity and injury to feelings that she suffered as a result of her unjustified dismissal.

Costs

[38] Costs are reserved.

Orders

[39] Pursuant to the Employment Relations Act 2000 Bakkers Motel Limited is ordered to reimburse Ms Linda Fellowes:

- (i) \$1,995.84 (gross) comprising lost wages¹⁰ and lost holiday pay¹¹; and
- (ii) \$4,000 in compensation.¹²

Michele Ryan
Member of the Employment Relations Authority

⁹ s 50(1)(a) Holidays Act 2003

¹⁰ s 123(1)(a)

¹¹ s 123(1)(c)(ii)

¹² s 123 (1)(c)(i)