

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 168/10
5290588

BETWEEN	DANIEL HEANEY Applicant
A N D	GUY HERBERT t/a EQUESTRIAN HOTEL First Respondent
A N D	COUNTRY HOSPITALITY MANAGEMENT (NEW ZEALAND) LIMITED Second Respondent

Member of Authority: James Crichton

Representatives: Scott Fairclough, Counsel for Applicant
Guy Herbert, for First and Second Respondents

Investigation Meeting: 12 July 2010 at Christchurch

Determination: 31 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Heaney) alleges that his employment with the respondent (The Equestrian Hotel) came to an end by means of an unjustified dismissal. Mr Heaney also contends that he was not provided with an individual employment agreement. The Equestrian Hotel denies that the dismissal of Mr Heaney was unjustified saying that it was the result of a legitimate restructure which resulted in the disestablishing of the position that Mr Heaney previously occupied. However, the claim that Mr Heaney was not provided with an employment agreement is conceded.

[2] Because of the failure of The Equestrian Hotel to provide an employment agreement in writing to Mr Heaney, the issue of who the employer actually is is more

problematic than would otherwise be the case. However, for the avoidance of doubt, I determine that the employer is the second respondent, Country Hospitality Management (New Zealand) Limited which owns and operates The Equestrian Hotel where the employment was provided. Mr Guy Herbert, the first respondent, is not the employer of Mr Heaney but he is the managing director of the second respondent. While the proceedings have always been entitled so as to include both first and second respondents, I am satisfied that the employment relationship subsisted between Mr Heaney and the second respondent. As the name of the business in which Mr Heaney worked was The Equestrian Hotel, I shall refer throughout this determination to the employer as The Equestrian Hotel.

[3] Mr Heaney was a night porter at The Equestrian Hotel working Saturday to Thursday from 11pm to 7am. Mr Heaney's wife had also been employed at The Equestrian Hotel.

[4] On Thursday, 13 August 2009, Mr Heaney was called to a staff meeting at which all of the affected staff were given a presentation which included the employer's logic for the restructuring. A written proposal was handed out to all the affected staff and the material provided at the meeting included proposed job descriptions for the new roles together with the assessment criteria which The Equestrian Hotel would use to make the appointments.

[5] An opportunity was provided for the affected staff to make submissions on the employer's proposal; Mr Heaney made no such submissions.

[6] The employer then decided to proceed with its restructuring proposal, as a consequence of which all of the affected persons on The Equestrian Hotel's staff were given the option of applying for the new roles. By letter dated 9 September 2009, Mr Heaney indicated his wish to apply for both new positions. According to The Equestrian Hotel, during the subsequent interview process, Mr Heaney withdrew his interest in the part time position although that contention is hotly resisted by Mr Heaney.

[7] In any event, Mr Heaney was ranked the least suitable of the three applicants for either job and was subsequently declared surplus to The Equestrian Hotel's requirements.

[8] A personal grievance was promptly raised on Mr Heaney's behalf by letter dated 4 November 2009.

Issues

[9] The first question for the Authority to determine is whether this redundancy was a genuine one or not. Next, the Authority needs to consider the process adopted by the employer in progressing the restructuring plan and in particular determine whether Mr Heaney's allegations of improper motives are made out.

Was the redundancy genuine?

[10] I am satisfied on the evidence before the Authority that the redundancy was genuine. The evidence given by Mr Herbert on behalf of The Equestrian Hotel was that the business had been losing money for a significant period of time and was effectively being propped up by personal resources invested in it. The thrust of the restructure was to bring together the night portering role with the maintenance role. Submissions for Mr Heaney maintained that the real change was in the maintenance area and that in fact the night portering role did not change at all. Mr Fairclough, counsel for Mr Heaney, submitted that there was *fat* in the maintenance area but nothing to be saved in the night portering which was the work that Mr Heaney performed. It was submitted for Mr Heaney that the difference between the two roles (the old and the new), was essentially in respect of the maintenance aspect rather than the night portering.

[11] Conversely, Mr Herbert for The Equestrian Hotel maintained throughout his evidence and in his subsequent submissions that the business needed to reduce the total number of hours it was paying for and get greater productivity from the remaining staff for the hours invested. He said in his evidence that:

... the skill sets for the new positions (was) wider than either the old night porter or maintenance positions as they incorporate a blend of the old skill sets for both the old night porter and maintenance positions and a higher level of administrative responsibility to meet regulatory compliance obligations relating to the building.

[12] In the end, it is difficult to see how the employer can be impeached for seeking to restructure its business so as to ensure its survival. I accept as truthful Mr Herbert's evidence that he had invested significant personal money in The Equestrian Hotel to ensure its survival. I also accept Mr Herbert's evidence that, as the director of the

employer, he had formed the view that the restructuring of the positions discussed above would result in cost savings and improved efficiencies. I am not persuaded then that the redundancy declarations which followed were not the result of a genuine restructure for proper business purposes.

Was the process adopted by employer fair and just?

[13] Mr Heaney maintains that the restructure was just a sham to get rid of him. I have already found that the restructure was genuine and based on proper business motives. However, Mr Heaney says that he was selected for redundancy because of an improper process which was infected by bias and/or predetermination.

[14] The first basis on which Mr Heaney makes this contention is related to his wife's former employment with The Equestrian Hotel. The circumstances in which Mrs Heaney ceased her employment with The Equestrian Hotel are not before the Authority and are not relevant to the present proceeding. However, the Authority was told that Mr Heaney assisted his wife in a personal grievance that she brought against The Equestrian Hotel. He alleges simply that The Equestrian Hotel sought to *get rid of* him because of that involvement.

[15] Mr Herbert told me in his oral evidence that it was only appropriate that Mr Heaney defended his wife when she brought her personal grievance against The Equestrian Hotel and that he, as The Equestrian Hotel's governing director, absolutely denied holding that fact against Mr Heaney. I should say that I accepted Mr Herbert's evidence on this point. I thought that he was completely sanguine about Mr Heaney's earlier involvement and he did not strike me as a mean spirited man who would take vengeance in such circumstances.

[16] Accordingly, I absolutely reject Mr Heaney's contention that he was got rid of because of his involvement in his wife's personal grievance.

[17] Throughout his evidence, Mr Heaney persisted with statements suggesting that the dye was cast and that the restructure had been determined, could not be influenced, and was designed to result in his demise. In the context of the initial consultation meeting when the restructuring document was presented to the affected staff, he says:

It became apparent to me at that meeting that the decision had already been made and nothing that was said could change that.

[18] In consequence, Mr Heaney made no submissions on the document and he explains that view in these comments:

I did not make any submissions because as I said, it was clear to me that a decision has been made. Interestingly, neither Eddy nor Larry (the two other workers affected by the restructure) made any submissions because I believe they knew what the outcome would be.

[19] Finally, in the summary of where he thought the matter concluded, Mr Heaney says:

I am clearly of the view that this was not a genuine redundancy notwithstanding my employer's attempt to dress it up as such. It was a restructuring that was intended to achieve the termination of my employment.

[20] From Mr Heaney's standpoint then, the redundancy was wholly a sham. But the principal basis on which he alleges that seems to be his conviction that he was penalised for being involved in his wife's earlier personal grievance. I have already made clear the Authority's findings, first that the restructuring proposal had a genuine genesis and second that the contention that Mr Heaney was penalised for his support for his wife is absolutely rejected on the evidence. The various observations he made in his own evidence which I have quoted in the preceding paragraphs, amount to no more than unsupported contentions. There is no evidence whatever to demonstrate the truth of any of those propositions.

[21] The process adopted by The Equestrian Hotel involved a standard restructuring sequence with first a consultation period where the nature of the preliminary conclusion was discussed both in an oral presentation to the three affected staff members and then in a written document which was provided to the affected staff members for them to take away and consider. Submissions were requested but, as Mr Heaney notes, none were forthcoming. The implication for Mr Heaney that any submissions he made would not be considered I simply reject as fanciful. I heard Mr Herbert give his evidence and thought him straightforward and honourable. Even Mr Heaney agreed that he had had no conflict with Mr Herbert and that Mr Herbert had always tried to be fair. In those circumstances, having made those concessions during the investigation meeting, the suggestion that any submissions he made would effectively be ignored is able to be comprehensively rejected.

[22] When it came to the consideration of participating in the selection process, I have already noted that Mr Heaney asked to be considered for both jobs, one of which was full time and the other of which was part time. There is conflict in the evidence between the parties about whether Mr Heaney subsequently withdrew his interest in the part time job during the selection process. Mr Heaney said that he never withdrew his interest in the part time position, although he acknowledges that he did propose an alternative strategy whereby the part time position would have added to it *breakfast cheffing* duties to build up the hours.

[23] Mr Herbert acknowledges that the alternative suggestion was made by Mr Heaney but is adamant that Mr Heaney said that, in the absence of the additional hours that might be provided were The Equestrian Hotel to accept his alternative strategy, he was not interested in the part time position by itself because there would simply not be enough hours available for him to sustain himself.

[24] In the end, the Authority does not need to determine this dispute. The evidence for The Equestrian Hotel is clear that Mr Heaney was found to be the least suitable of the three applicants for either position.

[25] The process adopted by The Equestrian Hotel to make the selection involved, in Mr Heaney's case, two interviews. The first interview was just with Mr Herbert with whom it is common ground Mr Heaney had a good relationship. It was apparently during this first interview that the question of whether Mr Heaney was still interested in the part time position or not was canvassed. Either way, Mr Herbert gave evidence that each of the three candidates were assessed against the assessment criteria that had already been disclosed to the affected staff, and as I have previously noted, Mr Heaney placed third for each position.

[26] It was during this first interview that Mr Heaney also advanced the proposition, to make the part time position more attractive, it might be possible to add to the hours some additional hours for breakfast cheffing. Mr Herbert undertook to investigate this proposal. In order to do that, Mr Herbert had to speak to his then general manager, Mr Casserly. Mr Herbert's evidence is that he discussed the alternative strategy with Mr Casserly and, in the course of that discussion, Mr Casserly indicated there were some performance concerns with Mr Heaney. Mr Herbert quite properly put those concerns to Mr Heaney in order that he could respond to them, and Mr Heaney did so. Mr Herbert decided that the performance

concerns were irrelevant to the consideration of the restructuring and he told me (and I accept) that he dismissed them from his mind.

[27] In the result, Mr Herbert was satisfied that the alternative strategy proposed by Mr Heaney was *not practical* and, on that basis, the assessments were done strictly on the basis of The Equestrian Hotel's original proposal and Mr Heaney was unsuccessful.

[28] Mr Heaney further protests this decision on the basis that he was more experienced than either of the other candidates and that reliance was placed on the fact that he did not hold a bar manager's licence although he had been given opportunities to get that licence in the past. There is no doubt on the evidence that Mr Heaney was given every indulgence to obtain his bar manager's licence. As a matter of fact, he had not obtained the licence notwithstanding those indulgences. I am satisfied it was available to the employer, in the relevant assessment process, to take those circumstances into account. Mr Heaney's particular concern appears to be the employer's assumption that one of the two successful candidates would have a bar manager's licence (or be able to get one quickly), when in actual fact, as at the date of the investigation meeting, it was suggested by Mr Heaney in evidence that that individual had not been successful in obtaining a bar manager's licence. Mr Herbert's evidence on the point was that the individual concerned had run bars in hotels in Europe and was therefore much more experienced than Mr Heaney in the wider hospitality industry. Mr Herbert conceded that this individual had not been successful in obtaining a New Zealand bar manager's licence as quickly as The Equestrian Hotel would have liked.

[29] In the end, I am satisfied that The Equestrian Hotel adopted a proper process, provided the affected employees with all the information they could reasonably expect about the process, and then applied that process fairly and equitably. In particular, The Equestrian Hotel provided job descriptions for the new roles, provided job assessment criteria which it then followed in its assessment, made judgments about the relative strengths of the candidates which were available for it to make, and dealt appropriately with matters that arose during the course of the assessment process, notably the suggestion of a different alternative job structure and the suggested performance deficits of Mr Heaney.

[30] I am not persuaded that Mr Heaney has demonstrated any bias or predetermination by The Equestrian Hotel or shown any evidence of improper motives tainting the whole process. I am satisfied that The Equestrian Hotel did nothing improper in its management of the restructuring process.

Determination

[31] Mr Heaney, having failed to persuade me that he has a personal grievance by reason of having been unjustifiably dismissed, is not successful in his application to the Authority and his case is dismissed.

[32] The only other matter that requires to be dealt with is the claim for a penalty as a consequence of the failure of The Equestrian Hotel to provide a written employment agreement. Mr Herbert's evidence on this point was that all the other staff had a written employment agreement and he was at a loss to understand why Mr Heaney did not. However, he accepted that there was no written employment agreement in respect of Mr Heaney.

[33] This is not the sort of case where I think it appropriate for the Authority to impose a penalty. The Equestrian Hotel did not strike me as a callous employer which routinely ignored its obligations to its staff. I am satisfied the absence of a written employment agreement for Mr Heaney was an inadvertent oversight. I decline to award any penalty.

Costs

[34] Costs are reserved.

James Crichton
Member of the Employment Relations Authority