IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 259
5410597

BETWEEN	KRISTINE SUZANNE HELLIER Applicant	
A N D	CEDAR MOTOR LODGE LIMITED Respondent	

Member of Authority:	M B Loftus
Representatives:	Janie Kilkelly, Counsel for Applicant Lesley Brook, Counsel for Respondent
Investigation meeting:	18 and 19 September 2013 at Dunedin
Submissions Received:	At the investigation
Date of Determination:	19 December 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Kristine Hellier, claims the respondent, Cedar Motor Lodge Limited, owes various sums by way of unpaid wages. In particular, she claims she has not been paid an amount commensurate with the requirements of the Minimum Wage Act 1983 and did not receive a loading for working statutory holidays as required by the Holidays Act 2003. Ms Hellier also seeks leave to raise a personal grievance out of time pursuant to s.114(3) of the Employment Relations Act 2000 (the Act). There is also an application for a penalty given Cedar's alleged breach of the Minimum Wages Act.

[2] Cedar Motor Lodge Limited (Cedar) denies there is any validity to the wage claim. It strongly objects to the s.114 application on the grounds the personal

grievance, which was first raised via a statement of problem filed in the Authority on 14 February 2013, is, some four years after the event complained of, grossly out of time.

Background

[3] Cedar is part owned by its sole director, Lynnton Brooker. In June 2004, Mr Brooker engaged Ms Hellier, his long term domestic partner, as Cedar's manager.

[4] There was no written employment agreement. Ms Hellier was paid $200 net per week. This increased to $400 net in May 2006. The gross value of the payment has changed from time to time due to variations to tax rates but it was, give or take, around $500 gross per week.

[5] Around the time of her engagement at Cedar Ms Hellier and Mr Brooker reviewed and amended an agreement recording their wish to contract out of the Property (Relationship) Act 1976. Contained therein, and pertinent to this dispute, is a provision which reads:

> *In consideration for financial and non financial work undertaken by Kristine in and around the motel and further contributions by Kristine to the relationship, it is agreed that Kristine shall receive a sum to be calculated on the basis of the duration of the relationship.*
>
> *The sum to be received by Kristine shall accrue at the rate of $757.57 per month commencing on 1 July 2004 and shall continue until either:*
> *(a) 1 July 2015 when Lynnton shall owe Kristine the sum of $99,999.24; or*
> *(b) The relationship ends, at which time Lynnton shall owe Kristine a sum calculated from 1 July 2004 At $757.57 per month until the first day of the month on which the relationship ends; or*
> *(c) The death of either party …*

[6] It further records:

> *In the event that the relationship endures until 2015, then Kristine shall be entitled to receive the sum of $99,999.24 whether or not the relationship continues beyond that time. In the event that the relationship continues beyond 2015, then the said sum of $99,999.24 shall be paid to Kristine and she shall have no further entitlement to any settlement arising from the relationship regardless of the further duration of that relationship.*

[7] Notwithstanding the words of the agreement, the above sum was paid monthly as opposed to accrued.

[8] Ms Hellier claims it soon became evident Mr Brooker did not want to spend time at, or put effort into, the motels. She claims he was often in need of breaks which he used for recreational purposes and left the running of the motel to her. She says she did not mind initially but over time it and the hours she was required to work began to aggravate. Mr Brooker denies the claim.

[9] Ms Hellier claims she was required to work from 6am to 10pm. During the intervening period (10pm to 6am) she says she was on-call and had to meet customer needs as and when required. She says:

> *There were very few occasions during my working "day", where I was away from the Lodge for purely recreation purposes with my time unfettered by the Lodge employment requirements, usually my time away would be for banking and associated Lodge work.*

[10] Ms Hellier's disquiet led to her maintaining a record of the days upon which either she or Mr Brooker were absent from the Lodge. She says she did have some days off but these were sporadic and very few. She also claims to have worked most statutory holidays.

[11] Mr Brooker's response is the value of the remuneration package has been underestimated and the hours of work overestimated.

[12] He says the wage claim fails to include the monthly payments of $757 and nor does it recognise the provision of all living expenses comprising accommodation, meals, phone and internet access which he estimates as being worth approximately $12,000 per year. Mr Brooker initially added full personal use of a car which he also valued at approximately $12,000 per year but resiled from that position during the investigation.

[13] With respect to the hours Mr Brooker says Cedar's office was open between 7.30am to 9.30pm and the only work required outside those hours was the delivery of newspapers at 7.00am and preparation of the occasional breakfast between then and 7.30am. He says he, and not Ms Hellier, dealt with any night calls when he was there but adds they were rare.

[14] Mr Brooker goes on to say the lodge employed cleaners on site for approximately four hours each day and while they were present both he and Ms Hellier were free to leave. He claims they frequently did and had long lunches or indulged in other recreational activities.

[15] He says Ms Hellier regularly took days off as well and only worked an average of five days a week. He also claims there were absences she does not record such as one where the two of them travelled to Australia on holiday.

[16] Towards the end of March 2009, the domestic relationship broke down irrevocably. At the time, Mr Brooker was in Australia and Ms Hellier remained at the Lodge until 19 April 2009. On that day she departed and with that the employment relationship also ended.

[17] Ms Hellier claims the domestic issues had a direct effect on the workplace as Mr Brooker was her employer, as well as her partner. She claims he pushed all Lodge work her way and left her without support in the workplace. Add various actions in respect to the domestic relationship and the workplace became increasingly toxic which meant her departure amounted to a constructive dismissal.

[18] Ms Hellier claims she was so traumatised by the ending of all three of her pivotal relationships (employment, domestic and the loss of a place to live) she was unable to consider pursuing a grievance. She says she was so debilitated she had a breakdown requiring medical care and, as a result, reintegration into the workforce became a stepped process undertaken through the acquisition of an increasing number of part time work hours over a period of years. To that she adds the trauma of an ongoing, and ultimately unsuccessful, property relationship dispute.

Determination

The wage claim

[19] In essence, Ms Hellier's claim is she should be paid for all 24 hours of each and every day she was present at the Lodge. This is a combination of the hours she claims to have actually worked and, in reliance on *Idea Services Ltd v Dickson* [2011] ERNZ 192, additional hours during which she may have been required to attend to a client's request. Her claims total some $190,000 gross though it was initially greater. That was because she claimed for alleged losses beyond the six year limitation

imposed by the Limitation Act 2010. That portion of the claim was subsequently withdrawn.

[20] As already said, Cedar contends the working hours have been overstated and the value of the remuneration package understated. Cedar denies liability in respect to the alleged *on-call* component.

[21] To address the bulk of the claim I need to consider four questions. They are:

(a) What hours were actually worked?

(b) Should the *on-call* hours also be paid?

(c) Should the monthly payment be considered remuneration? and

(d) Should an allowance be made for the provision of accommodation?

[22] Ms Hellier initially claimed she was required to work from 6.00am to 10.00pm each day. Cedar's response was 7.00am to 9.30pm with lengthy breaks in the middle of the day.

[23] With respect to the start and finish times I prefer Cedar's evidence. When answering questions about this Ms Hellier started to resile from her initial claim. It transpired she arose around 6.00am and went to bed around 10pm. When asked when she actually started work her first answer was 6-6.30am and this later altered again. There was then her acceptance most guests were settled by 9.30pm and little was required after that time. I also noted the evidence of one of Ms Hellier's witnesses who stated that when relieving she got up around 6.30am, delivered the papers just before 7am and finished when she closed the office at 9.30pm.

[24] Turning to the alleged breaks during the middle of the day. Mr Brooker says these were frequent and long and even if that were incorrect Ms Hellier had the option of giving the phone to one of the staff and leaving if she so wished. Ms Hellier disagrees. She says she rarely left the premises when Mr Brooker was absent and their joint departures were not as common or long as alleged.

[25] A number of witnesses were called and on this the evidence strongly supported Ms Hellier's position she was rarely absent during the day. There was then an allegation from Cedar that while she may have remained she performed non-

business tasks such as cleaning the house she and Mr Brooker used. Ms Hellier accepted that but countered with a claim she remained available to address any work issues that may arise as a priority. Again the evidence of witnesses tended to support Ms Hellier on this.

[26] There is then section 132 of the Employment Relations Act 2000 which provides that where there is a failure to keep or produce wage records I may accept the claim unless the respondent can prove it is unwarranted. There are no records showing Ms Hellier's actual work hours and while the witnesses supported Cedar's view regarding the start and finish times, the same could not be said about the breaks. The evidence leaves me unable to conclude Ms Hellier's position on the breaks is unwarranted and to that I add the fact I have no way of quantifying those she took.

[27] For the above reasons I conclude the daily hours were fourteen and a half. They were worked between 7.00am and 9.30pm and there can be no deduction for breaks.

[28] Turning to the on-call component of the claim. Ms Hellier's claim these hours be paid is based on a submission they constitute a sleep over in accordance with the decision in *Idea Services Ltd v Dickson*. I disagree.

[29] For a start there is a real a distinction between the two cases. Ms Hellier was accommodated in what was, at the time, her home and this is confirmed by her comment about losing three pivotal relationships (refer paragraph 18 above). On the other hand Mr Dickson was required to travel from his home and stay at his employers premises.

[30] There is then the fact the conclusion Mr Dickson was working was based on three factors. They were:

(a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;

(b) the nature and extent of the responsibilities placed on the employee; and

(c) the benefit to the employer of having the employee perform the role.

[31] Here it is difficult to conclude Ms Hellier's freedom was constrained. She was free to decide to absent herself on any given night if she so chose and did so, though normally to visit family in Dunedin. The evidence and particularly that of the reliever supports a conclusion out of hour calls were few and far between. In other words the nature and extent of the responsibilities was nothing like that Mr Dickson faced. There is then the benefit of having the employee on site. Aside from the fact she lived there, there is strong evidence out of hour calls could actually be ignored.

[32] For the above reasons I conclude this situation is vastly different from that canvassed in *Idea Services v Dickson* and this time did not constitute payable work.

[33] The third question relates to the monthly payment of $757. Cedar claims it formed part of Ms Hellier's remuneration. She disagrees and says:

> *Although the Agreement stated that it had the dual purpose of recognising work at the motels and contributions to the relationship, it was never part of my terms of employment; this was in consideration for my agreeing to forego any claim to his property in the event of break up.* (Emphasis is Ms Hellier's).

[34] I struggle to go past the words in the agreement, especially as the evidence is there was considerable legal input when it was entered into. It was amended in response to Ms Hellier's decision to join Mr Brooker and work at Cedar. While part of the payment relates to Ms Hellier's contribution to the relationship the agreement clearly states it also provides consideration for work performed in and around Cedar. Consideration for work is remuneration and I therefore conclude this payment formed part of the package.

[35] Cedar claims there should also be some recognition it contributed toward Ms Hellier's living expenses. She denies that should be the case and says the issue was never discussed. On this I prefer Ms Hellier's position. There is no contractual evidence supporting the claim and the value thereof was not treated as remuneration for tax purposes. Mr Brooker then had to concede this was not discussed and put the assertion down to fairness. When I consider fairness I also favour Ms Hellier on this. Cedar cannot have it both ways. On one hand it asserts there was domestic relationship and that was part of the successful argument in respect to the sleepover component of the claim. I struggle to accept the opposite now applies to this part of the claim.

[36] There are then the claims regarding holiday payments. Putting aside the disagreement over what leave Ms Hellier actually took, there can now be no doubt she received various sums as payment for annual leave. Both the documentary evidence and Ms Hellier's admissions support this conclusion. While the payments may not have been made at the time stipulated by s.27 of the Act that is off-set by the fact caselaw recognises the requirement payments can be offset with earlier recognition (*Drake Personnel (New Zealand) Ltd v Taylor* [1996] 2 NZLR 644) and the fact it was Ms Hellier who was responsible for, and in fact did make, the payments. Here it should be noted I accept Ms Brook's calculations showing the amount paid exceeded that due.

[37] There is then the claim under s.50 of the Holiday Act for unpaid statutory loadings and I note Ms Brook's calculations and the conclusion Ms Hellier is due the sum of $1,358.56. Here, though, I do not accept the offset argument given s.51 of the Act. This amount remains payable and should be increased by an amount commensurate with the applicable portion of the monthly payment. For reasons explained in paragraph 39 I am, however, unable to calculate the amount.

[38] In summary I conclude Ms Hellier worked and should therefore be remunerated for 14½ hours a day. There is no liability in respect to the sleepover claim. She should have the monthly payment included in her remuneration but there should be no value placed on the accommodation.

[39] I am unable to complete an accurate wage calculation as the monthly payments were not taxed and I do not know their gross value. That said, the rough calculation I performed using the payments net value would suggest Ms Hellier has, in fact, received more than she would be required under the Minimum Wage Act 1993 and is owed nothing further. I leave it to the parties to confirm this conclusion but if they have difficulties agreeing they may return to the Authority for a determination.

[40] The conclusion it is likely nothing is owing under the Minimum Wages Act nullifies the penalty application.

Section 114 application

[41] Section 114 of the Employment Relations Act 2000 (the Act) provides an employee must raise a grievance within 90 days of the event being complained about (or gaining knowledge there-of). A failure to do so can be addressed through either

employer consent of an application to the Authority. Such an application may be granted:

> *... if the Authority—*
>
> *(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and*
>
> *(b) considers it just to do so.*

[42] Section 115 of the Act says:

> *For the purposes of section 114(4)(a), exceptional circumstances include—*
>
> *...*
>
> *(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or ...*

[43] In her evidence Ms Hellier says:

> *It is my evidence that there was a period subsequent to the end of the employment when my emotional condition made it impossible for me to seek advice in relation to my rights both in relation to my employment and in relation to the breakdown of the domestic relationship.*
>
> *I was represented by Counsel subsequent to my being well enough to advise Counsel concerning the breakdown in my relationship with my employer partner and throughout my battle with him to resolve the relationship property issues.*
>
> *...*
>
> *However, once I sought the advice of Counsel, it is my further evidence that I was inadequately advised of my rights in relation to my employment in relation to wages and not advised of my rights in relation to raising a Personal Grievance.*

[44] The legal argument is I need only consider her condition over the 90 period and what then followed, and the fact she failed to address the issue for some considerable time despite regaining the ability to do so is irrelevant. I accept, given the evidence, Ms Hellier was in no condition to address a possible personal grievance in the ninety days following her departure (which, I add, occurred on 13 April and not the later date originally claimed).

[45] What I do not accept is the rest of the argument. Ms Hellier's assertions about her lawyer's alleged failings were undermined by the fact she stated, when answering questions, discussions with counsel in question had covered *the whole thing* including employment issues. There is no further explanation as to why the issue was not pursued for some considerable time. Instead the argument is it need not be as I should only consider Ms Hellier's condition during the initial 90 days. When I consider that, the extreme delay including the fact the maximum permissible period of three years (s.114(6)) has also been exceeded and the case law (*Creedy v Commissioner of Police* [2008] ERNZ 109 (SC)) I decline the application.

Conclusions

[46] For the above reasons I have concluded Ms Hellier worked and should be remunerated for 14½ hours each day she worked. There is no liability in respect to the sleepover claim. Her remuneration includes the monthly payment of $757.57 net but there should be no value placed on the accommodation.

[47] The above conclusions mean it is unlikely the Minimum Wage Act has been breached. The parties are asked to confirm this but leave is reserved for them to return to the Authority should issues arise.

[48] Annual holidays have been paid but there is an amount owing under section 50 of the Holidays Act. It is, for reason already explained, left to the parties to calculate but, again, leave is reserved for the parties to return should difficulties arise.

[49] The s.114 application fails.

[50] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority