

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Nicola Kate Kelly (Applicant)
AND Judith Howman trading as Serenada Country Lodge (Respondent)
REPRESENTATIVES Nicola Kate Kelly In person
Judith Howman, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 22 February 2006
DATE OF DETERMINATION 23 February 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nicola Kelly worked at the Serenada Country Lodge. Judith Howman is the owner and operator of that business as was Ms Kelly's employer. A company was involved in administration of the pay but Ms Howman and Ms Kelly agreed that the correct identity of the respondent is Ms Howman trading as the Serenada Country Lodge.

[2] In early May 2005, Ms Howman closed the business for 6 weeks. Ms Kelly and the several other staff were told that Ms Howman would continue to pay them during the closure. Ms Howman said that she gave that undertaking on the basis that the staff would return to work for her when the business reopened in Mid June 2005.

[3] Ms Kelly gave 2 weeks notice of resignation on 1 June 2005. As a result, Ms Howman did not pay during the period of notice. By lodging her statement of problem, Ms Kelly seeks to recover two week's wages that relate to the notice period.

[4] To resolve the problem, I need to consider relevant provisions from the employment agreement and resolve an apparent dispute between Ms Kelly and Ms Howman about the basis on which payment during the close down was made.

Employment Agreement

[5] There is a written employment agreement dated 22 September 2004. It says *Your basic remuneration is \$15.00 per hour*. On hours of work it says *The minimum number of hours which you undertake to work in any week will be 35*. It permits the employer to require Ms Kelly to work up to 50 hours per week. There is a general provision at clause 28 which says *Either party may terminate this agreement on not less than 14 days notice in writing* The gist of that is repeated in clause 29 *Resignation* which also entitles the employer during the notice period to direct the employee as to particular duties, or not report for work or to terminate the employment earlier by making a payment in lieu of the balance of the notice period.

Ms Kelly's alternative work

[6] During the closedown, Ms Kelly worked at another business (the Flight Centre). That business is not in competition with Serenada Country Lodge so provisions in the employment agreement concerning other interests or work during the employment are not applicable. Ms Howman told me that she had no objection to Ms Kelly or the other employees working elsewhere during the closedown. However, before the closedown, Ms Howman had heard rumours that Ms Kelly was looking for other employment. That is why she stipulated (as I accept she did) that Ms Kelly and the others would receive their usual wage during the closedown provide they resumed their employment when the business reopened.

[7] Ms Kelly told me that she initially worked on a temporary basis at the Flight Centre, and when they offered her permanent employment, she then provided Ms Howman's office with her written resignation. Ms Howman believes that Ms Kelly took the position on a permanent basis from the outset but did not put in her resignation until two weeks before the reopening. She thinks there is an element of deceit or calculation behind Ms Kelly's actions. However, I have concluded that the claim must be determined by the application of terms in the employment agreement so it is not necessary to resolve whether Ms Howman is right.

Application of the employment agreement

[8] The employment agreement was not for casual employment but rather a minimum of 35 hours per week. It was for Ms Howman to decide how to deploy Ms Kelly's services for those 35 hours or additional hours if required. Under the express terms of the agreement, Ms Howman did not need to have Ms Kelly actually perform work but she was obliged to pay Ms Kelly at least the minimum hours each week.

[9] That being the effect of the employment agreement, Ms Howman could not insist on Ms Kelly's return to work as a condition of payment for the duration of the closedown. Ms Howman's rights under the agreement upon receipt of Ms Kelly's notice of resignation are referred to above. They do not include withholding payment for the notice period. Ms Kelly might have been in a difficult situation if Ms Howman had required her to actually work on some task during the notice period but that is not what happened. The result is that Ms Kelly is entitled to payment of her minimum hours for the two weeks notice period.

Conclusion

[10] Ms Howman is to pay Ms Kelly \$1,050.00.

[11] Costs were not sought nor would I have made any order.

Philip Cheyne
Member of Employment Relations Authority