

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Sonja Adamek and Jeremy Morrison (Applicants)

**AND** Judy Coburn (Respondent)

**REPRESENTATIVES** Sonja Adamek and Jeremy Morrison, In person  
Judy Coburn, In Person

**MEMBER OF AUTHORITY** James Crichton

**INVESTIGATION MEETING** 9 September 2005

**DATE OF DETERMINATION** 29 November 2005

DETERMINATION OF THE AUTHORITY

***Employment Relationship Problem***

[1] The applicants, (Ms Adamek and Mr Morrison or simply the applicants) alleged that they are due unpaid wages from an employment relationship they had with the respondent (Ms Coburn) and they seek recovery of those wages.

[2] Ms Coburn says that there was never an employment relationship and the relationship was of a commercial nature, either a straight contractual relationship between a principal and a contractor or a joint venture arrangement.

[3] The applicants, caused an advertisement to be placed on the Budget Backpacker Hostel's website on 24 April 2004 in the following terms: "...*Jeremy and I (a reference to the applicants) would really like to have our own little backpackers ... I know that there are always adds for backpackers for sale and for jobs on the BBH website but do you by any chance know any other sources where you can find out about hotels for sale or jobs? I thought as you have been in the business for a while you might have some ideas ... or maybe you know someone who is looking for managers.*"

[4] Ms Coburn responded to that advertisement on the same day. That response is in the following terms: "*we are looking for a couple to set up and run new BBH ...*".

[5] There was then an extensive period of e-mail and telephone exchanges between the parties culminating in a visit by the applicants to Ms Coburn on the 18 May 2004 during which there was a discussion about the terms under which the parties might engage with each other.

[6] The evidence from the applicants is that what they were offered on the 18 May 2004 was employment whereas the evidence of Ms Coburn is that what was on offer was an opportunity to develop a backpackers' facility as part of a wider complex.

[7] Ms Coburn's evidence was that she and her husband were developing a complex which had a motel element and a backpacker element and they sought to contract with a couple who could take principal responsibility for the backpacker facility.

[8] There is significant dispute about precisely what was discussed at the 18 May meeting with disagreement centring around whether there would be payment of a food and petrol allowance and Ms Coburn denying the matter was even raised.

[9] There seems to be agreement that the applicants were to receive 50 percent of the backpacker takings together with free accommodation and associated benefits.

[10] Ms Coburn was adamant that it was not an employment situation. She described a large property styled Mt Richmond Estate which had the opportunity to have developed on it a variety of different uses including the motel complex and the backpacker complex that I have already referred to.

[11] Ms Coburn said it was completely impossible for one person or indeed one couple to run all of the possible businesses generated by the wider campus and that was why she sought to involve other people.

*[12] She was absolutely adamant that it was not an employment situation. She said "if I said it once I said it ten times, there was no job. I would have done a much more extensive exercise if I was going to hire someone. I think they (the applicants) understood perfectly well at the time what the 18 May proposal was all about. It was only later that I think they got it wrong."*

[13] It is important to note that none of the evidence (including the evidence from the applicants) suggests that at this point that the parties were indeed talking about an employment relationship. There is no discussion of wage or salary payments, indeed no indication at all that the applicants were to be remunerated on the basis of a wage or salary or any other payment analogous to a payment that would be made to an employee.

[14] Nor was there any evidence that the applicants were to be directly managed by Ms Coburn. Indeed the evidence suggested the reverse namely that the applicants were to be their own masters and, within a complex that was clearly managed by Ms Coburn and her family, the applicants were to do their own thing to develop the business part that had been allocated to them, namely the backpackers facilities.

[15] Further and finally, none of the other normal incidents of employment such as agreements as to annual leave or other forms of leave or any other benefits of an employment relationship seems to have been discussed at all, even on the applicants' evidence.

[16] In any event, based on the discussions that the parties had between them, the applicants decided they would engage with the respondent and they indicated as much to Ms Coburn shortly after their visit on the 18 May.

[17] There were various continuing exchanges between the parties until Mr Morrison moved to Mt Richmond Estate early in September.

[18] On Mr Morrison's arrival, he was not allocated any duties as one would expect if he was employed nor is there any evidence from either party of any discussion which would suggest an employment relationship was being created.

[19] The applicants' evidence is that Ms Coburn did ask Mr Morrison to run the motels as well but again there is no suggestion that this was for payment as if he were an employee.

[20] Ms Adamek arrived at Mt Richmond Estate on 13 September and there seems to have been agreement that Ms Adamek would perform a range of functions revolving around the business of operating the accommodation facility (by this time both the motel complex and the backpacker complex) but still no suggestion on anyone's evidence that there was anything in the nature of an employment relationship being discussed, described or even contemplated.

[21] Matters seem to have continued in that way until November when there were discussions about money. Ms Coburn's evidence is that she became aware that the applicants were financially embarrassed and that was a variance from her earlier understanding. She referred to being told originally by Mr Morrison that Ms Adamek had money and she assumed that that was what the couple were to live on.

[22] In any event, there were undoubtedly discussions in November 2004 and at that meeting, there seems to have been agreement on certain payments which were to be made to the applicants by Ms Coburn.

[23] But even on the applicants' own evidence, they record Ms Coburn as saying "I can't afford to pay any wages. I can pay you a one off payment of \$300.00 and I can promise you \$150.00 as a food allowance for the next six weeks plus an amount for each motel unit cleaned. I also want six weeks notice before you leave."

[24] These payments were made against invoices generated by Ms Adamek and entitled gardening and secretarial work.

[25] On the applicants' evidence, there were four payments made in total, from the 4 November 2004 to 15 December 2004.

[26] There was never any written agreement of any description between the parties. Certainly there was discussion about the need for such an agreement with both parties being prepared to contemplate reducing the arrangement to writing but nothing was ever finalised.

[27] Ms Coburn indicates that she asked the applicants to obtain a template for an agreement from friends who ran an accommodation facility, but it seems that did not eventuate, for whatever reason.

[28] After this November discussion, the evidence is that the demand for accommodation at Mt Richmond Estate grew with the onset of Christmas and Ms Adamek was extremely busy looking after the needs of guests in what was effectively a sole charge situation, Mr Morrison having taken a job off site in order to provide the couple with income which they were not getting from the relationship with Ms Coburn.

[29] Matters came to a head on the 3 January 2005 when after an altercation between the applicants and Ms Coburn the previous day, the applicants walked out.

### ***Issues***

[30] Before I can determine whether wages are in truth owed to the applicants by Ms Coburn, I need to decide if there is an employment relationship in place. Without that, there can be no wages owing although of course there may be monies owing to the applicants which are not in the nature of wages.

[31] If that is the position, then that is a matter outside the jurisdiction of the Authority.

[32] The first issue then is whether there is an employment relationship or not and if the answer to that is in the affirmative then the next question is what wages are actually owed.

*Is there an employment relationship?*

[33] It is clear that the Authority's obligation, addressing this issue, goes further than simply discerning the parties' intentions. The effect of section 6 of The Employment Relations Act is to require the Authority to look at "the real nature of the relationship".

[34] Further, in considering that "real nature", the Authority must consider all relevant matters including matters that indicate the intention of the parties but without placing undue weight on the statement of any party that is descriptive of the relationship.

[35] It follows then that the Authority must take a dispassionate view of the facts that are able to be discerned in respect to the relationship and to review critically statements offered by the parties as to what they considered the relationship actually to be.

[36] In that latter regard in particular, the Authority in this case is confronted with the two clearly expressed views of the nature of the relationship. For their part, the applicants say they were employees and that they regarded themselves as having taken a job when they entered into an arrangement with Ms Coburn.

[37] For her part, Ms Coburn is equally adamant "that there was no job". This was a commercial arrangement where Ms Coburn says that the original agreement was that the applicants were to receive 50% of the net takings from the backpacker units. In addition they were to receive certain other benefits associated with living on the premises but all of that, Ms Coburn suggests, simply goes to reinforce the suggestion that this is not an employment relationship.

[38] For the purposes of analysing whether or not there is an employment relationship, I have decided to look at two distinct points in the short history of the parties' dealing with each other. The first is the discussion on the 18 May 2004 and the second is the discussion in November 2004.

[39] Dealing with the May discussion first, I am very clear that none of the evidence suggests an employment relationship. In my view, the evidence from both parties strongly suggests that what was in contemplation was some sort of commercial arrangement where to use the old phrase there was "the chance of a profit and the risk of a loss".

[40] This view of the evidence is in my opinion reinforced by the intention which both parties refer to of the applicants receiving 50% of the net takings from the backpacker facility and by the absence of any evidence of a payment analogous to wage or salary.

[41] I accept that the applicants' evidence refers to a food and petrol allowance but even if such an allowance had been discussed or even agreed to (and Ms Coburn says it was neither discussed or agreed to) such a payment does not in my opinion suggest or connote an employment relationship.

[42] Having reached that conclusion, I then need to consider whether the position is different in relation to the November discussion between the parties. Here, it seems as if Ms Coburn has relented somewhat on her earlier decision not to contemplate any form of payment in the nature of a "retainer" principally because she discerned that the applicants had financial difficulties.

[43] Of course, the fact that the payments were made against invoices generated by Ms Adamek is neither here or there. The effect of the statutory requirement that the Authority consider "the real nature" of the relationship means that even if there is what appears to be a contract for services, a contract of service (an employment relationship) can still be identified.

[44] The payments which were made against these invoices are, according to the invoices, for gardening and secretarial work.

[45] However, in actual fact, the work performed by Ms Adamek seems to have been for a variety of things including what Ms Adamek understood was a food allowance and payments for cleaning individual motel units at \$15.00 per unit.

[46] The question is whether this November discussion varied the arrangement between the parties so as to create an employment relationship from that point onwards. I think on the balance of probabilities that all that happened in November was that Ms Coburn decided to pay a kind of retainer to satisfy the applicants in respect to their financial situation. I do not accept that the clear evidence for this change in the arrangement necessarily carries with it a change in the fundamental nature of the relationship.

### ***Determination***

[47] I find that there was no employment relationship between the parties, that the parties entered into a commercial arrangements of sorts in May of 2004 and although the commercial arrangement was altered in November 2004, there was never an offer of employment which was accepted and performed and the relationship was always outside of the ambit of employment.

[48] It follows that the applicants' claim fails.

### ***Costs***

[49] Both parties appeared in person and accordingly costs are to lie where they fall.

James Crichton  
Member of Employment Relations Authority