



# New Zealand Employment Relations Authority Decisions

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## Briskie v McHannigan AA474/10 (Auckland) [2010] NZERA 861 (8 November 2010)

Last Updated: 23 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 474/10 5104257

BETWEEN CATHERINE BRISKIE

Applicant

AND MICHAEL McHANNIGAN &

KATHLEEN PARKER

Respondent

Member of Authority: Representatives:

Investigation Meeting: Witness Interview Submissions received:

Eleanor Robinson

Alex Hope for Applicant Dan Gardiner for Respondent

27 July at Hamilton

30 September 2010

7 October 2010 from Applicant 18 October 2010 from Respondent

Determination:

8 November 2010

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] In a Statement of Problem received by the Authority on 29 October 2007, the applicant, Mrs Catherine Briskie, claims that she was unjustifiably dismissed from the employment of the respondents, Mr Michael McHannigan and Ms Kathleen Parker.

[2] The respondents deny employing Mrs Briskie and consequently deny that she had been dismissed.

#### Issues for Determination

[3] The following issues require determination:

o Was the applicant employed by the respondents?

o If the applicant was employed by the respondents, was she unjustifiably dismissed?

#### Background

[4] Mrs Briskie says that she was employed by Mr McHannigan and Ms Parker as a cleaner at Oasis Lodge ("the Lodge") in

Huntly during the period from September 2006 until 6 February 2007, when her employment was summarily terminated by Ms Parker.

[5] The Lodge is a property covering an area of approximately 5 acres, consisting of a house, which at the relevant time was occupied by Mr McHannigan and Ms Parker, and 6 units, each unit consisting of approximately 8 bedrooms. There are additionally a number of garages.

[6] Although there is potential accommodation for between 40 and 50 occupants at the Lodge, at the relevant time Mr McHannigan and Ms Parker stated that the property was rundown, and many of the units were not in a suitable condition to be rented.

[7] The parties agree that during the time Mrs Briskie lived at the Lodge there were approximately 20 occupants in 2 of the units, including Mrs Briskie and her husband, Mr Tony Briskie. Mr Briskie commenced employment at the Huntly Power Station and had moved into the Lodge on or about June 2006, prior to Mrs Briskie joining him there.

[8] Mrs Briskie said that she was telephoned by Ms Parker in September 2006 and offered the position of Cleaner at the Lodge on a wage of \$12 per hour, with hours consisting of 9 a.m. to 3 p.m., Monday to Friday. Mrs Briskie said she was told her duties were to vacuum the unit rooms, mop the floors, make the beds, and clean the toilets and showers. On this basis, Mrs Briskie said she resigned from her employment as a Kitchen Assistant in Hawera and moved to join her husband at the Lodge.

[9] Initially Mr Briskie paid the sum of \$200 per week rent for his accommodation. However sometime after September 2006 when Mrs Briskie moved into the Lodge, the rent increased to \$250 per week.

[10] Mrs Briskie says that she was paid a weekly wage of \$360 per week, from which the rent of \$250 was deducted, and the outstanding amount of \$110 was paid to her in cash by Ms Parker. Although Mrs Briskie says she requested an employment agreement and pay slips, both at the time of starting work and subsequently, these were not provided to her.

[11] Mrs Briskie said that her employment was terminated on 6 February 2007 by Ms Parker, following complaints about her work, and after having been being accused by Ms Parker of stealing pillow cases from the Lodge.

## **Determination**

### **Was Mrs Briskie employed by Mr McHannigan and Ms Parker**

#### *Employment Agreement*

[12] There is no documentation to substantiate the assertion of an employment relationship between the parties: there is no offer letter, no written employment agreement, no pay slips, no bank statements showing a regular incoming payment. Consequently the credibility of the parties is pivotal to a determination.

[13] Mrs Briskie said that she believed Mr McHannigan and Ms Parker ran the Lodge. Consequently when Ms Parker allegedly telephoned her to discuss the job of Cleaner at the Lodge, Mrs Briskie said she believed that Ms Parker had the authority to do so. Mrs Briskie said that Ms Parker had discussed with her the terms and conditions of the employment.

[14] Mr McHannigan and Ms Parker said that the Lodge was owned and operated by a company controlled by Mr Michael McGurk. Mr McHannigan explained that his business, McHannigan Contracting Limited, provided contracting services to various businesses, including one of Mr McGurk's companies, the Spa & Pool Company Limited. Mr McHannigan said that he had known Mr McGurk for many years and that he had initially stayed at the Lodge at the request of Mr McGurk, on a rent free basis. Ms Parker also stayed at the Lodge with Mr McHannigan in her capacity as his partner. Ms Parker explained that Mr McGurk had asked her and Mr McHannigan to look after the Lodge as favour to him until he found someone to do it.

[15] The initial arrangement had turned into a more long-term arrangement as Ms Parker had found the facilities at the Lodge ideal for the dogs and other animals she kept, and Mr McHannigan was able to operate his business from there.

[16] Mr McHannigan and Ms Parker say that they were not employed to operate or manage the Lodge, nor during the 7 years that they lived there was anyone employed to work there. Ms Parker said there was someone called John who lived at the Lodge, also on a rent-free basis, who did some gardening and maintenance work. Mr McHannigan said that his contracting services duties involved him being away from the Lodge on a frequent basis and he had no involvement whatsoever with the running of the Lodge

[17] The evidence of Mr McHannigan and Ms Parker was that there was no management contract between them and Mr McGurk, and no employment relationship, other than the contractual relationship in respect of McHannigan's business, McHannigan Contracting Limited.

[18] Ms Parker said that she had collected rent from the tenants, on an informal basis in order to assist Mr McGurk, as she and Mr McHannigan were friends with Mr McGurk. Ms Parker stated that Mr McGurk set the level of rent payments, and that she recorded the details of the rent collected in a rent book, issued receipts, and locked the rent monies in a safe until these were collected, usually on a weekly basis, by Mr McGurk. In addition to collecting the rents, Ms Parker also says that she

showed the tenants to their rooms and completed basic rental agreements for each tenant. Ms Parker's evidence, as supported by Mr McHannigan, was that she performed the rent collection services as a result of the friendly relationship she and Mr McHannigan had with Mr McGurk, and not on the basis of any employment relationship or management contract.

[19] Additionally Ms Parker says she performed some cleaning duties in the units as required, again on an informal friendship basis, to assist Mr McGurk. As the tenants were responsible for the cleaning of their own rooms and their laundry, this cleaning was only of the communal areas. Occasionally her mother, when staying at the Lodge, would carry out some cleaning duties. Ms Parker said that Mr McGurk paid for any cleaning materials required for the Lodge and he had these delivered to the Lodge by an external cleaning supplies company.

[20] Whilst there is insufficient evidence to establish an employment relationship rather than contractual relationship between Mr McHannigan and Mr McGurk, I do find that there was an employment relationship between Ms Parker and Mr McGurk in relation to the management of the Lodge, such that Ms Parker performed rent collection and cleaning duties at the Lodge in respect of which she received payment in kind in the form of rent free accommodation.

#### *Lease*

[21] It was claimed by Mrs Briskie at the Investigation Meeting that the Lodge had been leased by Mr McGurk to Mr McHannigan's company, McHannigan Contracting Limited, and that consequently Mr McHannigan and Ms Parker were in effect operating the Lodge on their own account.

[22] Mr McHannigan and Ms Parker denied the existence of such a lease. Oasis Properties Limited, the company which owned the Lodge, is now in liquidation. Enquiries made by the Authority of both the Receiver and the Liquidator produced no evidence of any lease being registered against the Lodge. I therefore find no tangible evidence to support this claim. However I have determined on the preceding basis that there was an employment relationship between Ms Parker and Mr McGurk,

#### *Offer of employment*

[23] Mrs Briskie claimed that Ms Parker telephoned her in September 2006 prior to her arrival at the Lodge, and offered her the position of cleaner.

[24] Ms Parker denied having telephoned Mrs Briskie to offer her a job, having employed Mrs Briskie, or having paid her in cash or in kind as represented by the rent payment.

[25] I find that there is no evidence to support Mrs Briskie's assertion that there was a telephone call between her and Ms Parker, or that Ms Parker had discussed terms and conditions of employment in such a call, or that an employment relationship was formed between them at that stage. It is necessary therefore to look at the relationship during the time Mrs Briskie was resident at the Lodge to ascertain if an employment relationship was established.

#### *The cleaning*

[26] Mrs Briskie says that her duties were to vacuum the unit rooms, mop the floors, make the beds, and clean the toilets and showers.

[27] Ms Parker said that Mrs Briskie was not employed to clean the tenants' rooms as all the tenants at the Lodge were required to clean their own rooms; a statement which was supported by the evidence of Mr Chris McGrath, who was a tenant during the period Mr and Mrs Briskie were resident at the Lodge, and who still resides at the Lodge.

[28] Ms Parker denied that Mrs Briskie was employed to clean the communal areas, but said that she herself did some cleaning of the communal areas and that occasionally her mother also did some cleaning when she stayed with Ms Parker at the Lodge.

[29] Mr McGrath confirmed Ms Parker's statement that all the tenants were responsible for cleaning their own rooms and additionally were expected to clean up after themselves in the kitchen. Mr McGrath stated that he had not seen Ms Parker doing any cleaning of the communal areas, but that this could be explained by the fact that he was at work most days. Mr McGrath confirmed he had seen Ms Parker's mother doing some cleaning, and stated that another tenant, John, who also lived at the Lodge, carried out the cleaning of the toilets and hallway. Mr McGrath said he did not know if John was paid for this work, but that he understood that John lived at the Lodge on a rent-free basis.

[30] Mr McGrath gave evidence that while Mrs Briskie cleaned her own room and that of another tenant, Graham, she had never cleaned his room or to his knowledge any of the other tenants' rooms. Mr McGrath said Graham was a friend of Mr and Mrs Briskie from Taranaki, and that they had come to the Lodge together.

[31] In order to carry out her cleaning duties, Mrs Briskie said that she had access to room keys in order that she could clean the tenants' rooms. The keys were kept in the house occupied by Mr McHannigan and Ms Parker. Mrs Briskie said she would either get the keys from the house or from Ms Parker.

[32] As previously stated, Ms Parker denied employing Mrs Briskie as a cleaner but also had described Mr and Mrs Briskie as tenants of unsatisfactory conduct and emphatically denied that she would have given Mrs Briskie keys to the tenants' rooms.

[33] Mr McGrath's evidence supports Mrs Briskie's claim that she was cleaning, but only to the extent of cleaning the room of one other tenant, with whom she was on friendly terms. Mr McGrath was clear in his evidence that Mrs Briskie did not clean any other tenant rooms and confirmed that the tenants were responsible for cleaning their own rooms and for cleaning up after themselves in the kitchen. Moreover Mr McGrath stated that the individual named John was responsible for cleaning the toilets and hallway communal areas, and that he had from time to time seen Ms Parker's mother doing some cleaning.

[34] I find the evidence given by Ms Parker is supported by the corresponding independent statements of Mr McGrath, and is more credible than the evidence of Mrs Briskie on this point. There is insufficient evidence that Mrs Briskie was performing any cleaning duties other than those she was expected to do as a tenant. The cleaning of Graham's (another resident) room can be explained purely on the basis of a personal relationship between Mrs Briskie and Graham rather than as a duty under an employment contract.

#### *Rent reimbursement*

[35] Prior to Mrs Briskie's arrival at the Lodge, Mr Briskie's rent was \$200.00 per week, which appeared to be the standard rate for a single room. Mrs Briskie said that the rent increased after she arrived at the Lodge to \$250.00 per week, the extra \$50.00 allegedly being in respect of an additional room.

[36] Ms Parker explained that while most of the tenants were male, from time to time their wives or girlfriends would arrive to spend the weekend at the Lodge. There was no extra cost for these visits. However when Ms Parker realised Mrs Briskie was staying at the Lodge on a longer term basis, she discussed this with Mr McGurk and the rent for Mr Briskie was increased by \$50.00 per week. Ms Parker said that an extra room had not been provided, and that Mr and Mrs Briskie shared the one room.

[37] Mr McGrath said that Mrs Briskie had told him she was cleaning in respect of a rental arrangement whereby she and her husband would have two rooms instead of one at a reduced price, that Mrs Briskie had said that she was cleaning "*in lieu of rent so she and her husband could have another room*".

[38] The rent for a room was \$200.00, which would indicate that the rent for 2 rooms would be \$400.00. Had Mrs Briskie been cleaning daily Monday to Friday, this may have accounted for the reduction in rent for a second room. However I find that there is no evidence that Mrs Briskie was carrying out cleaning, other than for her husband and herself as required of all tenants, and for Graham who was a family friend, to account for a rent reduction on this basis.

[39] Mrs Briskie produced cash receipts in support of her claim that she and Mr Briskie were paying rent for adjoining rooms. These receipts are in two different formats and cover the period from 21 June 2006 to 8 February 2007. Not all the receipts are dated and those that have been produced do not represent the payments for the whole of that period. All but the last receipt are addressed to '*Tony*', the last receipt is addressed to '*Tony andKathy*'.

[40] Ms Parker asserts that the receipts are forgeries, and highlights the fact that the signature on the receipts is '*Kath*', which she does not use when signing her name and which is not her signature as it appears on her driving licence which was produced in evidence.

[41] I find it is not necessary for me to determine the authenticity of the receipts as I do not find that Mrs Briskie was carrying out cleaning in return for a rent deduction. However even if it was accepted that the receipts were genuine, I do not find that they support a finding that Mrs Briskie was being paid in kind by virtue of an additional room at a low rental in exchange for cleaning.

#### *Cash payment*

[42] Mrs Briskie said that she was paid \$360.00 per week, from which \$250.00 was deducted for rent and that she was paid \$110.00 in cash, a claim which Ms Parker and Mr McHannigan strongly refute. To substantiate this assertion, Mrs Briskie pointed to the fact that with effect from 11 September 2006, she came off the Invalid Benefit which she had been receiving from WINZ.

[43] Mrs Briskie was receiving Invalid Benefit from 12 April 2006 to 11 September 2006. On 24 April 2007, the payment of Invalid Benefit to Mrs Briskie resumed. Mrs Briskie stated that the reason the benefit payments stopped during the period from 11 September 2006 to 24 April 2007 was because that was the period when she was employed by Mr McHannigan and Ms Parker, and her income level was then over the limit allowed by WINZ for benefit allowance.

[44] However a file entry by WINZ states in respect of the cancellation request: *Reason for cancellation: partner has had pay increase*." This entry does not support Mrs Briskie's assertion that her income had risen due to her receiving a wage payment from Mr McHannigan and Ms Parker.

[45] Mr McGrath, when asked by the Authority, confirmed that he had not had any conversation with Mrs Briskie about her

being paid for the cleaning work.

[46] I find the documentation from WINZ insufficient to support the claim by Mrs Briskie that her reason for coming off Invalid Benefit was as a result of her receiving wages from Mr McHannigan and Ms Parker. I also believe it to be illuminative that when the conversation between Mr McGrath and Mrs Briskie took place about her cleaning, Mrs Briskie said that she was cleaning so she could have another room, but did not mention that she was employed and being paid for the cleaning.

#### *Conclusion*

[47] Having considered all the aspects of this issue as outlined in the preceding sections, I find that there is no evidence to support Mrs Briskie's claim that she was employed to clean at the Lodge.

#### **Was Mrs Briskie unjustifiably dismissed**

[48] Having determined that there was no employment relationship between Mrs Briskie and Mr McHannigan and Ms Parker, there is no issue of unjustifiable dismissal to determine.

#### **Costs**

[45] Costs are reserved. I note that the applicant is legally aided and while it is unlikely that a recovery of a contribution to its costs is available, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority should it wish to do so. In this event, the applicant has a further 14 days to file and serve submissions in response.

Eleanor Robinson

Member of the Employment Relations Authority

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