

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 120/09  
5149838

BETWEEN                      FRASER DONALDSON  
   Applicant  
  
AND                              ADVENTURE TRAVEL  
   SPECIALISTS  
   Respondent

Member of Authority:     James Crichton  
  
Representatives:           Fraser Donaldson in person  
   Jan and Rob Nichol for Respondent  
  
Investigation Meeting:    23 July 2009 at Christchurch  
  
Determination:            31 July 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Donaldson) applied for a position as a driver with the respondent (Adventure Travel), and in December 2008 the parties discussed Mr Donaldson commencing the employment. There was some discussion about a trial period but no reference to that appeared in the employment agreement which the parties subsequently discussed.

[2]     It was decided that Mr Donaldson would work some shifts for Adventure Travel at the end of December 2008 and then commence regular employment in January 2009. The original start date was to be 4 January but this subsequently went back to 5 January.

[3]     Adventure Travel organises its work on a month-to-month roster and supplied such a roster to Mr Donaldson for the calendar month of January.

[4]     A proposed employment agreement was provided to Mr Donaldson by Adventure Travel about 24 December 2008, and about 5 or 6 January 2009,

Mr Donaldson returned the employment agreement to Adventure Travel with some suggested alterations.

[5] There were email exchanges between the parties around 9 January to set up a meeting at which the employment agreement could be discussed. It was agreed that the meeting would take place on 15 January 2009 at the end of Mr Donaldson's working week and at the end of the working day on that particular date.

[6] By all accounts, the discussion which took place at the Adventure Travel depot and yard, did not go well. All of the protagonists describe the meeting as tense and uncomfortable and after an exchange which covered the employment agreement together with one or two other matters which Adventure Travel wished to raise with Mr Donaldson, the discussion broke up after a particularly heated exchange. Mr Donaldson says that he was dismissed from his employment by Adventure Travel and it says that Mr Donaldson resigned in a huff.

[7] Either way, the employment terminated at that point and despite subsequent email exchanges which Mr Donaldson says were designed by him to repair any rift that had developed, there was no restoration of the employment relationship and a personal grievance was subsequently raised.

[8] In the personal grievance, Mr Donaldson claimed to have been unjustifiably dismissed from his employment. That claim was resisted by Adventure Travel which maintains that Mr Donaldson resigned his employment and despite being given an opportunity to withdraw that resignation, he persevered with the resignation and that resignation was subsequently accepted. A counterclaim was subsequently raised by Adventure Travel and is resisted by Mr Donaldson.

### **Issues**

[9] The single issue for determination is whether Mr Donaldson was, in truth, unjustifiably dismissed. That was the focus of the Authority's investigation meeting which, not unnaturally, was particularly concerned with the events at the final meeting on 15 January 2009.

**Was Mr Donaldson unjustifiably dismissed?**

[10] I am satisfied, on the basis of the evidence I heard, that Mr Donaldson was not unjustifiably dismissed from his employment and that in truth he resigned his employment after apparently misunderstanding the employer's position in relation to the changes to the employment agreement which he had sought to discuss with them.

[11] Mr Donaldson had issues with the employment agreement which had been supplied to him by Adventure Travel. In particular, Mr Donaldson thought there was an inconsistency between a particular sentence in the employment agreement and a provision in the job description which mirrored a similar provision in the advertisement. In brief, the job description refers to the hours of work being *usually 45 hours per week in accordance with the monthly roster set in advance*. That statement was consistent with a similar statement in the job advertisement.

[12] However, the final sentence of clause 6 of the employment agreement reads as follows:

*If no non-driving work is available, then the hours will be forfeited by the employee and no remuneration will be paid.*

[13] Mr Donaldson's view was that the sentence just recited provided for something quite different from the provision in the job description. He thought that the employment agreement provision could be used by Adventure Travel to reduce the hours of work for staff below 45 hours per week. This was the issue which he raised with Adventure Travel when he submitted his proposed alterations to the employment agreement on 5 or 6 January 2009.

[14] Adventure Travel's position is that the two provisions are not mutually contradictory and that Adventure Travel does not use the employment agreement provision to enable it to escape its obligations to pay staff for hours of work properly incurred. However, Adventure Travel makes the point that it at no stage guaranteed 45 hours of work per week; it simply provides that 45 hours of work per week would *usually* be required. In particular, Adventure Travel sought to have the flexibility to be able to cancel runs which were unprofitable. Adventure Travel ran a shuttle coach service from Christchurch to Hanmer and in circumstances where that service was going to operate at a loss on a particular run, Adventure Travel reserved the right to cancel the run. As a matter of practice, Adventure Travel would always pay its staff if

a run was cancelled while the staff member was in Hanmer because there is little that the staff member could do in Hanmer when required to be there by the employer. Conversely, if a run was cancelled from the Christchurch end, Adventure Travel would not pay the staff member because it was assumed that the staff member could readily take the time off and at the staff member's home base. However, if Adventure Travel had other non-driving work for the staff member to do at Christchurch, then that would be substituted in lieu of having the staff member off pay.

[15] None of this is apparent from the documentation, but Adventure Travel is adamant that it explained this to Mr Donaldson on more than one occasion, first at the interview for the position, second in a phone conversation between Jan Nichol and Mr Donaldson and finally at the abortive discussion on 15 January 2009. What is more, the Nichols make clear that on the one occasion that Mr Donaldson was required to remain in Hanmer when a run from Hanmer to Christchurch was withdrawn because of lack of patronage, he was paid in accordance with their invariable policy. Mr Donaldson has no recollection or understanding of having received that intelligence and in his evidence told me that he did not know that he had been paid for the occasion that he was stranded in Hanmer until after the 15 January discussion because his pay slip arrived subsequent to 15 January. I accept Mr Donaldson's evidence as truthful, but equally I am satisfied that the Nichols did in fact communicate with Mr Donaldson that that was their invariable practice. It is regrettable that while I am satisfied that that message was transmitted, for whatever reason, Mr Donaldson did not receive it.

[16] When the arrangements were made for the 15 January meeting, it seems apparent that both parties expected that the issue about the employment agreement would be the main focus of the discussion, but so far as Adventure Travel was concerned, there were other matters that it wanted to raise with Mr Donaldson pertaining to his performance in the role. It seems common ground that Mr Donaldson was unaware that these performance issues were to be raised at the 15 January meeting, and that certainly is a far from ideal situation. Plainly, employees ought to have proper notice of the subject matter to be discussed at meetings with their employer, and the fact that Mr Donaldson attended this meeting in the mistaken belief that only the contractual issues were to be discussed is a blemish which I will return to consider later.

[17] The Nichols' evidence (which I accept) is that they initiated the discussion on 15 January by talking first about the potential amendments to the employment agreement which Mr Donaldson had sought. Mr Donaldson's evidence is that the Nichols said that the employment agreement wording was *non negotiable* notwithstanding what Mr Donaldson says the Nichols told him when the agreement was first submitted to him for consideration. Mr Donaldson said that there was *no opportunity to discuss what was troubling me about the agreement* and that he had to sign the agreement or there would be no job for him.

[18] The Nichols put the matter slightly differently but agree that they were not negotiable about this particular point. They say they were perfectly negotiable about some aspects of the agreement, but were not going to change the document so as to commit themselves to effectively guaranteeing 45 hours per week which they perceived was what Mr Donaldson was looking for. They also say that they explained to Mr Donaldson again that if he or other staff were left in Hanmer as a consequence of a run cancellation, then they would be paid for the balance of the work period, but clearly Mr Donaldson did not hear that explanation.

[19] I have already noted that a blemish on the process adopted by the Nichols is their failure to notify Mr Donaldson that they wished to raise other matters with him. However, I hold that blemish was remedied by Mr Donaldson himself because it is clear from his own evidence that once he became clear that the Nichols had other matters they wished to discuss with them, he insisted that they raise those matters. That is in fact what started to happen, although the Nichols say they did not raise all of the matters they had, and in particular did not raise the more important of those matters because the atmosphere became too fraught and acrimonious.

[20] The Nichols' evidence is that Mr Donaldson became *completely belligerent including cursing, name calling and other abusive behaviours*. At another point, the Nichols say that Mr Donaldson was *ranting and raving*. At some point in the discussion, Mr Donaldson alleges that the Nichols accused him of dishonesty because he failed to disclose to them that he had formerly practised law. Mr Donaldson disputed there was anything dishonest about his failure to disclose that fact; he said that practising law had nothing to do with driving a bus and so he did not think it relevant.

[21] Despite Mr Donaldson's refusal to accept that he was intemperate in the way in which he expressed himself at the meeting on 13 January last, that I have reached the conclusion that the evidence of the Nichols is to be preferred over the evidence of Mr Donaldson on this point anyway. Mr Donaldson seeks to rely on various emails which he wrote to the Nichols about the time of the dispute between the parties and he portrays these emails as being conciliatory in tone. In my opinion, they are nothing of the sort; they frequently include barbs which are either rude or aggressive and certainly are intemperate. Given that is the characterisation of Mr Donaldson's written communication style, it is not hard to see how his verbal communication style might be equally intemperate. It was clear from Ms Jan Nichol's evidence that she was particularly hurt and distressed by the way that Mr Donaldson conducted himself and I do not think that her evidence was manufactured.

[22] However, even where a discussion between parties to an employment agreement is intemperate (as plainly this one was), that does not always result in a termination of the employment relationship. Certainly it did in this case and the fundamental question is whether Mr Donaldson resigned his employment or was dismissed. As always, there are competing accounts. The Nichols say that at the point at which Mr Donaldson became particularly belligerent, he said something like *why don't we forget all about it now?*. Mr Rob Nichol asked Mr Donaldson what the latter meant and Mr Donaldson repeated the statement. Mr Nichol then asked Mr Donaldson if Mr Donaldson meant he was resigning his employment and Mr Donaldson said he was. Mr Nichol encouraged Mr Donaldson to think carefully about his decision because Adventure Travel would need to recruit a replacement immediately if Mr Donaldson was not intending on continuing his employment. Mr Donaldson allegedly confirmed that Adventure Travel could do as it liked and that he would certainly not be working for it in the future.

[23] For his part, Mr Donaldson acknowledges that the discussion *became a little personal* and although he was adamant that he had not said that he resigned or quit his job, he then went on to say that he could not remember what he had said. His actual words in answer to a question from me were as follows: *I can't recall what I said but I would deny I told them to stick their job and even if I did, I immediately retracted that with my email of that night.* Mr Donaldson admitted that he was *pretty wound up at the end of the meeting.*

[24] The email that Mr Donaldson refers to was indeed sent by him on that evening and it begins with observations suggesting that things may have been said *in the heat of the moment and may not have been meant*, and earlier, *that fences could still be mended in order that a congenial attitude could be re-established between us and the status quo restored*. However, the balance of the email is anything but conciliatory and is peppered with intemperate language which it is difficult to read as anything other than threatening. For instance, Mr Donaldson indicates that failure to respond by a particular time and date *will be considered by me to be grounds for approach to be made to the Employment Tribunal* [sic]. And then, later on, the following:

*Since I cannot see reinstatement being an acceptable remedy to Rob (or yourself either for that matter – you did the dirt digging I presume and simply made the bullets for that poor egotistical bugger to fire at me) ...*

and finally ... *trust me you fuck with this lawyer at your peril*.

[25] The short point is that Mr Donaldson says he cannot recall precisely what he said but denies ever saying that he quit his job, and even if he did say that, he alleges that the email I have just quoted from would clarify his position.

[26] I must say that I prefer the Nichols' evidence to Mr Donaldson's. I consider Mr Donaldson's method of expression intemperate and the very way in which he expresses himself in the email I have just referred to tends to support the evidence of the Nichols that he spoke in a similar way at the meeting between the parties.

[27] I think it more rather than less likely that Mr Donaldson did in fact relinquish his employment at the meeting in the yard and I accept the Nichols' evidence that they gave him more than one opportunity at the time to withdraw his resignation. I am satisfied Mr Donaldson at no stage used the words *I quit* or *I resign*, but I am equally satisfied that he successfully conveyed his intention that he no longer wished to be employed by this employer. Such an interpretation is consistent with the emails from Mr Donaldson which suggest their author is inclined to be intemperate.

[28] The Nichols say that there was a further and final opportunity for Mr Donaldson to withdraw his resignation at the point at which he got into his car and drove out of the yard. Mr Nichol's evidence is that Mr Nichols again asked him if he was certain about wanting to resign and there was no response from Mr Donaldson.

Before that point had been reached, I am satisfied that Mr Donaldson had stripped off the work uniform shirt that he was wearing and thrown that in Mr Nichol's direction.

[29] The Nichols considered the matter further after Mr Donaldson's departure and decided that they would accept his resignation which they subsequently did by letter. From the Nichols' perspective, Mr Donaldson had been offered a contract on certain terms and conditions, he had not accepted that proposal, there had been an argument about those matters in which Mr Donaldson behaved disrespectfully and had then resigned in the heat of the moment.

[30] From Mr Donaldson's perspective the position was that he had raised legitimate concerns about the nature of the employment agreement, had been told that that particular matter was not negotiable, and when he refused to work on that basis, he was asked to return company property and the keys to the company vehicle.

### **Determination**

[31] I am not satisfied Mr Donaldson has any claim against Adventure Travel. I prefer the Nichols' evidence that Mr Donaldson resigned his employment in the course of a heated argument, that he was given ample opportunity to withdraw that resignation and failed to do so, and that the email traffic from Mr Donaldson tends to confirm the kind of person who would react precipitately rather than in a measured way.

[32] It follows that Mr Donaldson's claim fails in its entirety.

[33] I also dismiss the counterclaim filed by Adventure Travel. I see that as simply retaliatory and without substance. The "losses" identified by Adventure Travel are, in my view, part of the normal costs of the business and not recoverable from Mr Donaldson.

### **Costs**

[34] Costs are to lie where they fall.

