

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 265
5524869

BETWEEN VANESSA JONES
Applicant

A N D MULDOON'S
INVESTMENTS LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Tanzam Hossain, Advocate for the Applicant
Clive Bennett, Advocate for the Respondent

Investigation Meeting: 27 July 2015 at Auckland

Date of Determination: 03 September 2015

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Ms Jones claims that she was offered and accepted full time employment as a Duty Manager with Muldoon's Investments Limited t/a Muldoon's Sports Bar (Muldoon's) on 17 December 2013 with an agreed start date of 23 December 2013.

[2] Ms Jones says she resigned her then job at Crow's Nest on the afternoon of 17 December 2013 after accepting employment by Muldoon's. On 19 December 2013 Ms Jones was told in a phone call that she was not going to be employed by Muldoon's because her reference check had been unsatisfactory and she had also failed to disclose that she was signed off work on ACC until mid-January 2014.

[3] Ms Jones claims she was unjustifiably dismissed.

[4] Muldoon's denies dismissing Ms Jones because it says it never employed her. It says Ms Jones was never offered employment so there was nothing for her to accept. Muldoon's says there was never an employment relationship between the

parties so the Authority does not have jurisdiction to investigate Ms Jones' dismissal grievance.

[5] Muldoon's says Ms Jones was someone who applied for a job but was assessed as unsuitable so was then informed that her application was not going to be pursued.

[6] Muldoon's says it has a normal recruitment process that it always follows. A potential candidate is required to complete an application form. The information on the application form is then discussed during an interview. Muldoon's will reference check a candidates who are of interest to them and a decision will not be made to offer someone employment unless the reference check is satisfactory.

[7] Muldoon's says it does not offer anyone employment until they have undergone a satisfactory reference check because staff are required to deal with money, stock and the public so Muldoon's has to have high level so trust in the people it employs.

[8] If the candidate is successful then Muldoon's makes a written offer which is accompanied by a draft proposed employment agreement. The employee is given 3-5 days to take advice and respond to the offer and proposed terms. Muldoon's says it did not depart from this usual process for Ms Jones.

[9] Muldoon's says Ms Jones approached it for work by dropping off a CV on 16 December in response to a Facebook advert she had seen for a Duty Manager. Ms Jones was interviewed on 17 December by Mr Adrian Martin the then General Manager, Ms Heather Rodgers (Mr Martin's then 2IC) and Mr Ian Watt one of Muldoon's Directors and Shareholders.

[10] Mr Martin and Mr Watt¹ say that during the interview on 17 December they told Ms Jones she would have to meet Muldoon's Business Consultant/Advisor Mr Philip Heath because he usually sat in on interviews (but was away that day) because he had to approve any hires. They explained that Mr Health would also do a reference check on her.

¹ Ms Rodgers is no longer employed by Muldoon's and could not be located.

[11] Ms Jones met with Mr Heath on 18 December and his initial view was that she was unsuitable for the position but he decided to do the reference check anyway because she was the preferred candidate.

[12] Mr Heath contacted Ms Heidi Martin who owned and operated the Crow's Nest where Ms Jones was at that time working. Ms Martin gave a poor reference and also queried how Ms Jones could start work for a new employer when she was on ACC until mid-January 2014 for a back injury. Mr Heath reported back to Mr Watt that Ms Jones was not suitable to be employed by Muldoon's.

[13] Mr Watt (who knew Ms Martin personally) also contacted Ms Martin to discuss the unfavourable reference she had given Ms Jones and as a result of their discussion he was also satisfied that Ms Jones should not be employed.

[14] Mr Watt phoned Ms Jones and advised that she was not going to be employed. Mr Watt also expressed considerable disappointment that she had not been honest with them. Mr Watt told Ms Jones she should have disclosed her back injury on the application form and also during the interview on 17 December when she had been asked if there was anything that may adversely impact on her ability to do the role.

[15] Mr Watt says Ms Jones apologised and asked to meet with him to explain. He declined because he said it would not make any difference. Ms Jones said she told Mr Watts she did not say anything about being on ACC because she was fine to work for Muldoon's so her back injury was irrelevant.

[16] Mr Heath also phoned Ms Jones on the evening of 18 December but it went to answerphone. Mr Heath spoke to Ms Jones on the morning of 19 December and told her that Muldoon's would not be proceeding with her Duty Manager application. Ms Jones claims this was an unjustified dismissal.

Issues

[17] The following issues are to be determined:

- (a) Were the parties in an employment relationship?
- (b) If so, was Ms Jones dismissed?
- (c) If so, was her dismissal justified?

(d) If not, what if any remedies should be awarded?

(e) What if any costs should be awarded?

Were the parties in an employment relationship?

[18] An employment relationship is defined in s.5 of the Employment Relations Act 2000 (the Act) as one of the employment relationships specified in s.4(2) of the Act. For these purposes, the relevant relationship is that specified in s.4(2)(a) of the Act between an employer and an employee employed by the employer. Section 5 defines an employer as a person employing any employee or employees and includes a person engaging or employing a home worker.

[19] An employee is defined in s.6 of the Act. An employee is any person of any age employed by an employer to do any work for hire or reward under a contract of service² and includes a person intending to work³ but excludes a volunteer⁴.

[20] Section 6(2) of the Act requires the Authority to determine the real nature of the relationship when determining whether a person is employed by another under a contract of service. This requires the Authority to consider all relevant matters including any matters that indicate the intention of the parties but is not to treat as determinative any statement by the parties describing the nature of their relationship.

[21] The usual fundamental elements of contract formation apply to employment relationships. It is therefore necessary to look at whether there was offer and acceptance, a mutual intention to create legal relations, consideration and certainty of terms. Ms Jones bears the onus of establishing on the balance of probabilities that the parties were in an employment relationship and that she was dismissed.

Offer and acceptance

[22] There is a dispute between the parties as to what was said during the interview on 17 December 2013. Ms Jones claims that Mr Watt said to her “*if you want the job, it is yours*” to which she replied “*yes please, awesome*”. Mr Watt and Mr Martin deny that. They both say Ms Jones was told that the next step was for her to meet Mr Heath who would also be doing the reference checking.

² Section 6(1)(a) of the Act.

³ Section 6(1)(b) of the Act.

⁴ Section 6(1)(c) of the Act.

[23] When assessing credibility I have preferred the evidence of Mr Watt and Mr Heath on the basis it is more likely than not to be correct.

[24] I therefore do not accept Ms Jones' evidence that she was verbally offered the job in the interview she on 17 December. I consider it more likely that Muldoon's complied with its usual recruitment process – i.e. Ms Jones was told she would have to meet Mr Heath who would do reference checks on her.

[25] I consider that Ms Jones' evidence that Muldoon's must have departed from its usual recruitment process because it was so desperate to employ a Duty Manager before New Year's Eve is undermined by the fact that no new Duty Manager was appointed until mid-January. That also lends weight to Muldoon's evidence that there was no rush as it already had six Duty Managers available to cover New Year's Eve.

Mutual intention to create legal relations

[26] I am not satisfied there was a mutual intention to create legal relations. Ms Jones' evidence was that the offer she accepted was unconditional (i.e. it was not subject to satisfactory reference checks or any other conditions such as a police check).

[27] If the parties had already entered into a legally binding employment relationship then there would have been no need for Muldoon's to have proceeded to reference check Ms Jones because such checks would have been redundant. I consider it more likely that Ms Jones was advised that she had to have a second interview with Mr Heath who would also reference check her.

[28] The whole point of Mr Heath interviewing Ms Jones and conducting reference checks on her was to establish her suitability for employment. The fact Muldoon's was taking such steps undermines Ms Jones' view that Muldoon's had already entered into a legally binding employment relationship with her.

[29] I also find that Ms Jones did not query why she had to have a further interview with Mr Heath or why she would be reference checked if she already had the job. This suggests that Ms Jones was aware that the parties had not already entered into a legally binding relationship.

Certainty of terms

[30] I am not satisfied there was certainty of terms. Ms Jones accepts there was no discussion about what days or shifts she would work other than that it would be full time employment. Ms Jones was not even aware what times the bar was open or what shift patterns it operated.

[31] I accept Muldoon's evidence that these are matters it specifically addresses when making an offer to a successful candidate who has passed the reference checking stage in the recruitment process. The absence of agreement around such core terms as days and hours of work undermines Ms Jones' submission that there was certainty of terms.

Agreed start date?

[32] I do not accept Ms Jones' evidence that during the interview on 17 December the parties agreed she would start work on 23 December.

[33] Ms Jones was contractually required to give her then employer two weeks' notice. Despite asking to leave early Ms Jones was not excused her notice period. This meant that Ms Jones' then full time employment with the Crow's Nest did not actually end until 31 December 2013 so she could not have started work for Muldoon's on 23 December.

[34] If there had been agreement that Ms Jones was to start on 23 December (I am not satisfied there was) then she would have had gone back to Muldoon's to have told them she was not available until her Crow's Nest employment ended on 31 December. The fact she did not do so suggests it had not been agreed that she would start work for Muldoon's on 23 December.

[35] Also Ms Jones was medically certified as unfit to work until mid-January 2014 and was receiving ACC payments over this period due to a back injury. Ms Jones therefore required medical clearance to return to work which she did not have as at the time of her interview with Muldoon's on 17 December.

[36] I do not accept Ms Jones' evidence that she was 100% fit to start work on 23 December for Muldoon's or that her GP had signed her off as fit to work at

Muldoon's from 23 December because this was unsupported by independent medical or ACC evidence.

[37] There was no evidence other than Ms Jones' assertion that her GP had signed her off work. It is difficult to understand how that could have happened because Ms Jones did not have a job description for the Muldoon's position so her GP would not have been aware of exactly what the new job required of her.

[38] The job at Muldoon's was also essentially the same as her job with Crow's Nest which she told her Crow's Nest employer she was unfit to do until mid-January. So it does not make sense that her GP said she was unfit to work for her current employer but not for Muldoon's.

[39] Furthermore it turns out Ms Jones was on ACC for another 8 months from 19 December so she could not have actually started work on 23 December. Ms Jones confirmed to the Authority that she was on ACC for a further 8 months for the same injury she had at the time she interviewed with Muldoon's – she had not suffered another accident.

[40] The fact Ms Jones received an additional 8 months' of ACC payments for the same injury she had as at 17 December undermines Ms Jones' evidence that she was perfectly fit to work for Muldoon's.

[41] Also I do not see how Ms Jones could have agreed to have started work with Muldoon's on a specific date on which she knew she had been certified as unfit to work without advising Muldoon's that she would need to obtain medical clearance before returning to work in the same job (bargaining) she had been assessed as unfit to do.

[42] I prefer the evidence given by Muldoon's witnesses that no start date was ever agreed.

Reference checking

[43] Mr Heath says no offer of employment would be made until he and the Watts had both interviewed potential candidates and the preferred candidate had been reference checked. Mr Heath says that when he met Ms Jones on 18 December he

made it clear that speaking to referees was part of the “vetting” procedure for the Duty Manager position.

[44] Mr Heath says when he called the first referee (Ms Jones’ then employer) Ms Jones was given a very poor reference. This referee told Mr Heath that Ms Jones had a poor work ethic, bad attitude, there were constant problems with her work in addition to other issues which the parties were aware of but which I do not set out in this determination in order to preserve Ms Jones’ privacy.

[45] Mr Heath says that the reference was so bad he did not bother to contact the other two referees and immediately advised Mr Watt and Mr Martin that Ms Jones was not suitable to be employed. Mr Heath also spoke to Ms Jones after the reference check to inform her that her application for the Duty Manager position would not be proceeding.

Employment agreement?

[46] Muldoon’s was legally required to provide Ms Jones with a written employment agreement recording the proposed terms of employment. Muldoon’s has a standard employment agreement it uses so it would have been easy to have provided Ms Jones with copy had it offered her employment.

[47] Muldoon’s says it gives prospective employees between three and five days to discuss and return the signed employment agreement and that staff cannot start work until an employment agreement has been signed.

[48] Ms Jones was not provided with a written offer or written employment agreement and no arrangements had been made to do so. This omission undermines Ms Jones’ claim that she had been offered and had accepted employment.

Recruitment process

[49] I accept Muldoon’s evidence about its usual recruitment processes. The fact that Mr Heath had to meet Ms Jones before the matter went further suggested that an employment relationship had not been created and that the parties were still in the preliminary stages of interviewing and assessing Ms Jones’ suitability for the role.

[50] Ms Jones says Muldoon’s must have departed from its usual recruitment process because it was desperate to employ her because it needed a Duty Manager to

work on 31 December. I do not accept that. Muldoon's had 6 Duty Managers already who could work on 31 December so there was no urgency for it to appoint another Duty Manager. Muldoon's did not in fact appoint a new Duty Manager until mid-January 2014. I do not consider urgency was a reason for Muldoon's to have departed from its usual recruitment process.

Ms Jones' bank details, IRD number and uniform size

[51] Ms Jones gave Muldoon's her bank account and IRD number and was asked what size uniform she took. Ms Jones claims this shows she was an employee. I do not accept that these factors by themselves establish an employment relationship.

[52] I prefer Muldoon's evidence that its usual practice was for it to ask for bank and IRD details from the preferred candidate(s) and to discuss uniform sizes because uniforms had to be ordered in advance. Muldoon's says that having these details on file already streamlined its actual appointment process once an offer of employment had been accepted. Muldoon's did not actually order Ms Jones a uniform.

Ms Jones' resignation

[53] Although Ms Jones did resign from her then job with Crow's Nest the same day she was interviewed with Muldoon's I consider she acted prematurely. The fact that she appears to have 'jumped the gun' by resigning cannot in itself create an employment relationship in the absence of offer and acceptance.

Staff meeting?

[54] Ms Jones claims she attended a "*staff meeting*" at the bar on the evening of 17 December. I find this was not a staff meeting. The event referred to was a discussion involved interested parties about the new liquor legislation that was due to come into effect the following day. Ms Jones was invited because the changes were relevant to anyone who worked in licensed premises.

[55] I find that other people who were not employed by Muldoon's were also invited to attend. This included another preferred candidate for the Duty Manager position.

Person intending to work?

[56] Section 5 of the Act defines a “*person intending to work*” as “*a person who has been offered, and accepted, work as an employee.*” I find that Ms Jones does not fall within this definition because I am not satisfied on the balance of probabilities that she was ever offered work so there was nothing for Ms Jones to have accepted.

[57] The failure by Ms Jones to establish she was a person intending to work means she cannot bring herself within the definition of “*employee*” in the Act. It follows that the parties were not in an “*employment relationship*” as defined in s4(2) of the Act.

Outcome

[58] I find that Ms Jones could not have been unjustifiably dismissed by Muldoon’s on 19 December because the parties were never in an employment relationship. Ms Jones’ claim is dismissed.

Costs

[59] Muldoon’s as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to resolve costs by agreement. However if agreement is not reached then Muldoon’s has 7 days within which to file costs submissions and Ms Jones has 7 days within which to file its costs submissions. Muldoon’s then has a further 3 working days within which to reply.

[60] The Authority is likely to adopt its usual notional daily tariff based approach to costs so the parties are invited to identify any factors they say should result in the notional daily tariff of \$3,500 being adjusted.

Rachel Larmer
Member of the Employment Relations Authority