

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 139/09
5148434

BETWEEN JACQUI LATHAM
 Applicant

AND THE ADVENTURE CENTRE
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: David Beck, Counsel for Applicant
 Tim McGinn, Counsel for Respondent

Investigation Meeting: 21 July 2009 at Christchurch

Determination: 31 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Adventure Centre Limited (TAC) operates a tourism business in Christchurch and employs staff such as sales consultants. TAC advertised for a sales consultant in November 2008 leading up to its busy period. Jacqui Latham applied for the position, was interviewed and was offered the job. She attended the business premises as arranged on Tuesday 25 November. Ms Latham was next expected to attend on Friday 28 November but she did not turn up. Later, there were telephone discussions and a meeting between Ms Latham and TAC. It is from these exchanges that Ms Latham's claim of unjustified dismissal emerges.

[2] In its statement in reply TAC says that Ms Latham did not accept within the stipulated time an offer of employment; accordingly it lapsed and Ms Latham was not an employee; and that even if Ms Latham was an employee, she was never dismissed.

[3] During the investigation meeting it became clear that TAC was not pressing the former defence but was relying on the latter defence. Regarding that, TAC says

that Ms Latham became unavailable as a result of a medical condition, it was arranged that she would contact TAC once her medical issues became clearer but she failed to do so. Instead her solicitor sent a letter alleging a dismissal and seeking remedies of compensation and legal costs.

[4] To resolve this problem I will review events between the parties from Friday 28 November and resolve the factual disputes. I will then assess whether TAC dismissed Ms Latham as alleged. First, I will briefly express findings about the establishment of an employment relationship.

[5] I should note that Ms Latham did not have access to TAC's phone records before lodging her statement of evidence despite directions intended to ensure that relevant documents were exchanged in a timely manner. That left Ms Latham somewhat disadvantaged since her recall was inconsistent with the phone records. I have taken account of this in assessing the evidential conflicts.

The employment relationship

[6] Rachel Powell is TAC's manager. John Phillips is TAC's sole director and shareholder and in effect its managing director. They both interviewed Ms Latham on 21 November and Ms Powell rang her the next day to offer the position. Ms Powell subsequently sent a letter of offer to Ms Latham and asked her to sign a duplicate of the letter and return it by 28 November to confirm her acceptance, failing which the offer would be withdrawn on that date. The letter nominates 1 December 2008 as the starting date of the employment.

[7] Arrangements were made for Ms Latham to attend the business premises on Tuesday 25 and Friday 28 November. In her evidence Ms Powell characterises this arrangement as *pre-work training*. Ms Latham says that they agreed she would start work on the Tuesday (25 November), next work Friday 28 November and then commence her first full week Tuesday to Saturday starting the next week. It is common ground that Ms Latham said that she was unavailable on Wednesday 27 and Thursday 28 November. Ms Latham also says that the 1 December 2008 date was put in the letter of offer after discussion with Ms Powell to reflect the starting point of her full time availability.

[8] On 25 November Ms Latham attended the business premises. She completed an IRD tax code declaration, a Kiwisaver form, and other documentation for TAC

such as is common for a new employee. She was given a copy of the proposed individual employment agreement referred to in the letter of offer. During the day at work, Ms Latham spent time familiarising herself with some of TAC's facilities, services and processes. She completed a timesheet as requested recording her work from 10am until 5pm. These undisputed facts cause me to conclude that in substance Ms Latham accepted the offer of employment even though she did not sign and return a copy of the letter of offer. Accordingly, at the material time, Ms Latham was an employee.

[9] As mentioned, Ms Latham was next expected at work on Friday 28 November but she did not arrive. Ms Latham had been unexpectedly admitted to hospital on the Thursday evening and discharged on the Friday morning. Ms Latham's evidence is that she noticed missed calls on her cellphone after she was discharged. She says that she was discharged at about 10.30am and she distinctly recalls speaking to Mr Phillips' at about 11am shortly after the discharge. She is uncertain who initiated the call but she is certain that she spoke only once to Mr Phillips on this day. Mr Phillips' evidence is that he rang Ms Latham's cell phone at 1.39pm and 2.59pm and left messages for her. This evidence is supported by phone records. After that he rang Ms Latham on her home telephone number which is when he spoke to her. Despite her attention being drawn to the telephone records, Ms Latham persisted with her evidence about timing.

[10] I prefer Mr Phillips' evidence as to the timing of their discussion. The telephone records confirm the two calls to Ms Latham's cell phone number. The records indicate that messages were left rather than conversations had. It is common ground that there was only one discussion between Mr Phillips and Ms Latham that day and it makes sense that it occurred after Mr Phillips' two telephone messages.

[11] To the extent that there is a material dispute about what was said between Ms Latham and Mr Phillips, I prefer his evidence. Ms Latham told Mr Phillips that she had been admitted to hospital, that she was unwell, not sure with what, that she could be very unwell, and it was a woman's problem. Ms Latham told Mr Phillips that she would not be able to start work as planned, that she would be undergoing tests over the new few days, and that it could be up to two weeks before she would know if she was in the clear or if she needed an operation. Mr Phillips sympathised with Ms Latham and suggested she could speak to Ms Powell. That reflected his thinking

that Ms Latham might prefer to discuss her medical situation and its impact on her availability with a woman rather than a man.

[12] It is not suggested that anything was said or done by Mr Phillips during this telephone discussion to give rise to any grievance.

[13] Mr Phillips told Ms Powell about the gist of his conversation with Ms Latham including his suggestion that the two women talk about the situation. Ms Powell then had a brief telephone discussion with Ms Latham and they arranged to meet the next day on Saturday 29 November. It is not suggested that Ms Powell said anything during this brief telephone discussion to give rise to any grievance.

The Saturday meeting

[14] Late morning on Saturday 29 November Ms Latham came into the business premises and the two women went to a café nearby. Ms Latham now complains about the venue for their discussion criticising its lack of privacy. I note that this was also the venue for Ms Latham's job interview. If there was a problem using this venue for the discussion about Ms Latham's medical situation and its impact on her availability for work, Ms Latham should have raised that concern at the time.

[15] There are some evidential disputes between Ms Latham and Ms Powell about this discussion. They were the only ones present and neither of them made any contemporaneous notes. However, they each made a note about this discussion after Ms Latham raised her grievance with TAC. Ms Powell made a note on 13 December for the purpose of TAC instructing counsel and Ms Latham made a note on 13 January 2009 for a similar purpose. These notes were provided by the parties just before and during the investigation meeting. They provide a useful starting point for assessing the evidence about the Saturday discussion.

[16] To add some context, Ms Powell's note was made after receipt of Ms Latham's solicitor's letter that alleged that Ms Latham ... *was summarily dismissed from employment by Rachel Powell on 29 November for having been off on sick leave for one day and for indicating she may have further short term sick leave following an unexpected hospital admission.* Ms Powell's note reads as follows:

Jacqui told me that she had ended up in hospital on the Friday and did not think of getting someone to let us know. She then told me she had woman's problems with growths but it was unknown what the

real problem was until further monitoring and tests were done. This meant that she would have to make regular visits to the hospital, but did not know what days each week this would be and how long the appointments would take, with the possibility she would be all day at each appointment.

I said I did not know how we could make this work with our roster, if we could not establish appointment days and times, but I would discuss it with John and we would go from there.

Jacqui told me she had an appointment on Monday and might know more after that, however later that day she told me the appointment was not until Friday, therefore we would not know any more until the following week.

Before parting Jacqui said thank you for seeing me today and I appreciate you even considering any options for her.

[17] Ms Latham's note reads:

I deny the comment that I had told Rachel I would be away from work for days at a time ... I had specifically asked for one day a week and told her I was able to give a weeks notice of which day of the week it would be ... normally being a Thursday or Friday. She had asked if I would be available in the afternoon, as she had done the roster for me through til the end of January and was unable to change this. she stated that if I was able to swap an early shift for a late shift maybe it would work. I told her I could not promise to be into work by midday, as it was the acute department where I had my appointments and if there was an emergency I would have to wait, that it would be better to have the day of my appointment off work.

It was at this time that Rachel told me she needed someone able to work any days out of seven, and that only being available for six days out of seven would not work. (this was even though I was only to work for five days a week). She said she had spoken to the owner and they didn't have any other options, they needed a full time person available all days of the week. This was when I asked her if they were going to replace me. I disagree with Rachel Powell's statement that she said 'no' and she had told me yes they would have to replace me this is the busiest time of the year and they needed a full time person.

[18] Ms Latham's note was made in response to a letter dated 16 December 2008 from TAC's solicitor. The relevant part of the letter reads:

On Saturday 29 November, after the offer of employment had lapsed, your client met with my client and explained that she had a medical condition that meant that she was subject to monitoring and tests and that she was likely to be unable for days at a time to attend work as she could be at hospital all day and she could not predict when this might occur. My client's manager, Rachel Powell, observed that your clients unknown intermittent availability would not be workable with the roster, but that she would discuss it with owner, Mr Phillips to see

what could be done in terms of a revised offer addressing your clients random availability. Your client thanked Rachel for her consideration.

[19] In her written evidence Ms Latham says that she told Ms Powell that she would be monitored weekly, that she would need a day off per week and that her appointments would be made ahead weekly at the time of the current week's appointment.

[20] I prefer the account recorded in Ms Powell's note of 13 December as to what Ms Latham told Ms Powell about her condition and the requirement for time off. Specifically I do not accept that Ms Latham said that she would need only one day off per week, that it would most likely be a Thursday or a Friday and that she would know a week ahead. I accept Ms Powell's evidence that she was left with the impression that there could be more than one appointment per week.

[21] There is a dispute about whether Ms Latham told Ms Powell that she had an appointment for the Monday. In her evidence Ms Latham accepts that she gave Ms Powell the wrong date but she is not prepared to concede that she nominated the Monday. I prefer Ms Powell's evidence as reflected in her note.

[22] Ms Latham's evidence is that Ms Powell said that they could look at some part time work for her in a few months once everything medically had been sorted out. Ms Latham says that she asked if that meant she would be replaced and Ms Powell said they would need to. Ms Powell's evidence is to the effect that the discussion was about the difficulty from a rostering perspective created by Ms Latham's uncertain availability and that she did not say anything about part time work in two months or anything about replacing Ms Latham. I prefer Ms Powell's evidence on these points.

[23] There is a dispute also about what happened at the conclusion of the meeting. Ms Latham's evidence is that Ms Powell said she would talk to Mr Phillips about the possibility of part time work and for Ms Latham to call her. Ms Powell's evidence is that she asked Ms Latham to contact her once she had found out any more from her appointment on Monday and she (Ms Powell) meantime would talk with Mr Phillips about the rostering difficulties. Ms Latham denies thanking Ms Powell for considering options for her. I prefer Ms Powell's evidence on these points.

[24] Ms Powell's evidence is that she received a text message from Ms Latham later on the Saturday to the effect that the appointment next week was actually for the Friday, not the Monday. Ms Latham did not mention this initially in her evidence but does not dispute Ms Powell's evidence on the point, which I accept is accurate.

[25] I should note that Ms Latham's position about where things rested after the Saturday meeting is equivocal. On the one hand her solicitor's letter and the statement of problem assert that she was summarily dismissed on the Saturday. Her statement of evidence is expressed on that basis. On the other hand, Ms Latham's evidence in response to questions from the Authority and from opposing counsel is that it was unclear to her that she had been dismissed until after a phone discussion on the Tuesday afternoon.

[26] On balance I am not satisfied that Ms Powell said or did anything on the Saturday amounting to a dismissal. There was discussion about Ms Latham's medical situation which at that time could have been very serious; there was discussion about the hospital monitoring and testing which was to start on the Monday (or so Ms Latham thought); there was discussion to the effect that the medical situation might be clearer in two weeks time; there was discussion about the rostering difficulties for the employer in light of Ms Latham's uncertain availability; there was discussion that Ms Powell would talk about the rostering problem with Mr Phillips; and there was discussion to the effect that Ms Latham would contact Ms Powell on the Tuesday after the first specialist appointment. The message conveyed at least implicitly if not explicitly by Ms Latham was that she was not available to start work in the meantime.

The Tuesday phone call

[27] Mr Phillips and Ms Powell have several discussions about the difficulties presented for the business as a result of Ms Latham's condition and her uncertainty about her availability. Their evidence, which I accept, is that they understood there would be some greater clarity about Ms Latham's availability within two weeks as a result of the hospital monitoring. Mr Phillips evidence which I accept is that they decided to wait for Ms Latham to report back and to reassess the situation then. It was arranged that Ms Powell should telephone Ms Latham to discuss that.

[28] Ms Latham statement of evidence says that she telephoned Ms Powell on Tuesday 2 December to tell her about the wrong date for her appointment and to see

what had been said by Mr Phillips about part time work. Ms Latham's acknowledgement about the text message resulted in a change to that part of her evidence but not the bit about her calling Ms Powell. TAC's telephone records show a call of just over three minutes duration at about 3.30pm on 2 December to Ms Latham's cell phone number. That accords with Ms Powell's note and her evidence that she telephoned Ms Latham. I prefer Ms Powell's evidence on the point

[29] There are several disputes between Ms Latham and Ms Powell as to what was said during their brief telephone discussion. The best evidence of what was said is to be found in Ms Powell's note on 13 December. It reads:

I contacted Jacqui via telephone and said currently we could not offer her hours around hospital visits, but once she knew more about her situation to come back to me and we could look at further options once she knew more about what she could do.

Jacqui also asked me if we were going to employ another person, and I replied as my discussion with John that we had made no decision as to what we were going to do with staffing numbers at that time.

[30] In particular I do not accept that Ms Latham asked if it meant she did not have a job. Nor do I accept that Ms Powell responded saying *no you don't I am sorry*.

Subsequent events

[31] Ms Latham's evidence is that she telephoned TAC about six times to chase up her pay for 25 November. Ms Powell's evidence is that she received one message and Ms Latham telephoned again before she had a chance to return the call. They then had a brief discussion on the telephone about the whereabouts of Ms Latham's pay. Ms Powell undertook to follow up about the payment. There was no discussion between them about ongoing employment. Ms Powell says that she was with a client at the time so it would not have been appropriate: there is no reason to doubt this evidence.

[32] Ms Latham's evidence is to the effect that Ms Powell was avoiding speaking to her, presumably out of embarrassment at having dismissed Ms Latham. Even on the assumption that Ms Latham's evidence about Ms Powell avoiding her phone calls is correct, it would not cause me to doubt any of the findings about the Saturday and Tuesday exchanges between the two women.

[33] The next thing to happen was that Mr Phillips received a letter wrongly dated 14 September 2007 from Ms Latham's solicitor. Mentioned above is part of the opening paragraph. The letter goes on to say that the solicitor is instructed to commence urgent proceedings in the Employment Relations Authority seeking monetary compensation. Grounds for the grievance are set out and then the letter says:

*As a remedy on a **without prejudice** basis to avoid mutual legal costs and the stress of litigation we seek:*

- *negotiation of an appropriate compensation package pursuant to s.123(c)(i) of the Employment Relations Act 2000 and;*
- *full payment of our client's legal costs.*

If you are willing to constructively discuss the remedies sought and we reach a full, final and strictly confidential settlement (which we suggest is registered at the Mediation Service) this matter is resolved. However, if we proceed to the ERA we will claim additional lost wages up to the hearing and considerable legal costs. We note our client is employment on a fixed term employment agreement and that she thus has the option of alleging a breach of contract and suing for damages in an amount of the remainder owed under the agreement (ie wages up until 30 April 2009).

We suggest an early meeting but that indicate that if we received no response by Friday 19 December 2008 we will refer the matter to the Employment Relations Authority.

We look forward to your response and remind you not to approach our client and to direct all correspondence through our office.

[34] Mr Phillips instructed counsel who responded on 16 December 2008. That response says that Ms Latham was never an employee; or if she was, she was never dismissed. An account of events is given largely based on Ms Powell's notes mentioned above.

[35] Shortly after this response was sent, Mr Phillips became aware of a letter to the Editor published in the Christchurch Press on 16 December 2008. The relevant part reads:

As an experienced employment law specialist representing both employees and employers, I have come across several cases involved where blameless employees are dispensed with for spurious reasons.

Once recent instance was at employee dismissed after her first day at work when she was unexpectedly taken to hospital and two days off

sick, only to be told by the employer that her job was no longer available and had been filled by someone else.

Luckily, this person has personal grievance rights under current legislation.

Let's have some perspective in the debate. The 90-day legislation is ill thought through, ideologically driven and an avowedly punitive law that will not protect those employees most vulnerable force.

*DAVID G BECK
PAPANUI*

Was Ms Latham dismissed?

[36] I have already found that Ms Latham accepted TAC's offer of employment and as noted above, TAC did not press the argument to the contrary during the investigation meeting. So given that Ms Latham was employed, how did the relationship end?

[37] I have rejected Ms Latham's evidence about being told by Ms Powell that TAC was replacing her, that they could look at some part time work her in a few months and that she did not have a job. Nor do I accept that Ms Latham was told that her job was no longer available and was filled by someone else, as claimed in the letter to the Editor.

[38] In short, nothing was said by Ms Powell on either 29 November or 2 December which could reasonably have been understood as a dismissal.

[39] The argument for Ms Latham is that she was available to work except for one day each week when she needed to be at the hospital for tests. However, I do not accept that the situation was conveyed that way to either Mr Phillips or Ms Powell at the time. Ms Latham explained that she was unwell and potentially very unwell, that she needed tests and monitoring to establish how unwell she was, that she unsure when she would need to present herself for these tests and that she would be unavailable for work for the whole day on each occasion. Ms Latham also explained that her situation would be clearer after several weeks. As a result she was not available to start work as planned. In response to that information Ms Powell spoke about the rostering problems that would be caused by Ms Latham's uncertain availability. None of that amounted to a *sending away* by the employer. To the

contrary, TAC indicated its interest in discussing the situation further once Ms Latham's circumstances became clearer.

[40] The respondent is criticised for not agreeing to an early meeting to discuss the employment relationship problem and for not responding by saying that the job was being kept open for Ms Latham pending clarification of her medical situation. There is no merit in these criticisms. Counsel's letter dated 14 September 2007 summarises the situation by saying *our client appears to have been treated very harshly and with gross insensitivity*. There is then a claim for compensation and full legal costs and a suggestion of an early meeting for that purpose. Unsurprisingly, that approach drew a steely rebuttal that there was a valid legal claim for the reasons indicated earlier. If Ms Latham wanted to restore the employment relationship a different opening gambit was required. No doubt the description of events set out in the letter to the editor helped to cement TAC's oppositional response.

[41] The solicitor's wrongly dated letter and the statement of problem are constructed on the basis of the Saturday meeting being a disciplinary meeting convened by an employer to investigate an allegation against the employee. That is not what happened. Quite understandably, the employer wanted to ascertain the potential effects on its business of Ms Latham's uncertain availability. TAC never got to the point of dismissing Ms Latham.

Conclusion

[42] Ms Latham was not dismissed and has no sustainable personal grievance against The Adventure Centre Limited.

[43] Costs are reserved. If costs cannot be agreed, a memorandum may be lodged and served within 21 days and any reply may be lodged and served within a further 14 days.

Post scrip

[44] During the investigation meeting it emerged that Ms Latham was on a sickness benefit from the time of her hospitalisation. She was asked to provide copies of relevant medical certificates as I wanted to clarify what was being certified at the time as to her capacity for work. I had the support officer follow up that request and eventually a medical certificate dated 24 August 2009 was supplied. There followed

an email exchange between counsel about all this and counsel for Ms Latham referred to *James & Co v Hughes [1995]*.

[45] With respect, the principle expressed in *James & Co v Hughes [1995]* 2 ERNZ 432 is irrelevant. That case makes it clear that receipt of unemployment benefit does not reduce lost remuneration when assessing remedies for a proven grievance. What I sought in the present case was contemporaneous documentary evidence that might have said something about Ms Latham's fitness for work following her hospitalisation; and at least inferentially what she might have conveyed at that time to TAC about her state of health. However, on the evidence available, I have concluded that Ms Latham was not dismissed. It is not necessary to pursue the point any further.

Philip Cheyne
Member of the Employment Relations Authority