

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 81
5401575

BETWEEN CHRISTINE MELDRUM
 Applicant

A N D PAUL O'BRIEN
 Respondent

Member of Authority: James Crichton

Representatives: Rachel Rolston, Advocate for Applicant
 Susan Martell, Counsel for Respondent

Investigation Meeting: 4 March 2013 at Tauranga

Date of Determination: 7 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Meldrum) alleges that she was unjustifiably dismissed from her employment by the respondent (Mr O'Brien). Mr O'Brien resists that claim.

[2] Ms Meldrum was employed by Mr O'Brien as his housekeeper.

[3] There was documentation of the employment relationship but it was not concluded. The terms and conditions under which the parties engaged with each other are in dispute, as are the details of the course of the employment relationship.

[4] Similarly, the termination of the relationship is also in dispute with Ms Meldrum saying she was unjustifiably dismissed and Mr O'Brien saying either that Ms Meldrum resigned her employment or abandoned it.

Issues

[5] The Authority will need to determine the answers to the following questions:

- (a) What were the terms of the engagement; and
- (b) What happened during the employment; and
- (c) How did the employment come to an end?

What were the terms of the engagement?

[6] The Authority heard that Mr O'Brien had been in hospital with pressure sores as a consequence of his paraplegia. He was told by his doctors that he was to limit his time in his wheelchair to four hours a day in two sessions each of two hours, one in the morning and one in the afternoon. He was to spend the rest of his time in bed, to reduce the incidence of these sores.

[7] While still in hospital, his medical advice was that he was to arrange his affairs so as to have support at home for four hours a day during the week.

[8] Mr O'Brien's evidence, which the Authority accepts, was that he chose the period from 10am to 2pm each working day as being the four hour period when he needed support. The reason that he identified that particular span of hours was that his mobility was compromised because he was in a wheelchair and he relied on mobility taxis which were typically engaged in moving school children with mobility issues prior to 10am and after 2pm each working day. Accordingly, to maximise the utility of the support person, the hours that he would be most likely to have access to a mobility taxi were chosen.

[9] Mr O'Brien said that there were two discussions with Ms Meldrum who both parties agree responded to newspaper advertisements placed by Mr O'Brien in the *Bay of Plenty Times*. The hourly rate offered of \$18.50 was attractive and so there were a number of applications. Mr O'Brien explained to the Authority that the position was funded from the public purse but it was difficult and challenging to get the funding in the first place and if it was not all utilised, it was likely to be revoked.

[10] Mr O'Brien and Ms Meldrum spoke first by telephone. There was disagreement between them as to when that telephone call took place but the Authority is satisfied that Ms Meldrum's recollection is to be preferred over

Mr O'Brien's and that the call took place around 9am on the morning of Saturday, 12 May 2012.

[11] Mr O'Brien was adamant that in that call with Ms Meldrum, he made absolutely clear the requirement for the work to be performed between the hours of 10am and 2pm on each working day. For reasons already outlined, those times were cast in stone and were not able to be varied.

[12] It is plain on the evidence that Ms Meldrum told Mr O'Brien that she had a number of existing part time positions and that she would need to resign from those jobs, or some of them, in order to take the job with Mr O'Brien. Mr O'Brien must have accepted that situation because he subsequently offered Ms Meldrum the job.

[13] After the telephone discussion between the two protagonists, the parties physically met and sat talking for a period in Mr O'Brien's kitchen. Mr O'Brien's evidence was that he actually wanted to sight Ms Meldrum before offering her the job and further, he wanted to give her the opportunity of seeing the house that she would effectively be looking after. In the result, the two of them met and talked and agreed to the commencement of an employment relationship.

[14] The second conversation between the parties, which took place in Mr O'Brien's kitchen, was also on Saturday, 12 May 2012 but commencing about 11am. There was some contradictory evidence heard by the Authority as to whether Ms Meldrum's partner had heard some or all of the discussion between Ms Meldrum and Mr O'Brien, but nothing turns on whether or not he was a party to the discussion; Mr O'Brien and Ms Meldrum had determined that they were going to have an employment relationship.

[15] There is an employment agreement in writing but it has been signed only by Ms Meldrum and none of the blank spaces that are relevant to discern what was agreed between the parties have been completed. While it may have been the intention of the parties to complete the written employment agreement, in fact by the time the employment relationship came to an end, the only portion of the employment agreement that was in any sense complete was Ms Meldrum's signature, and even that was not dated. Accordingly, the Authority is not persuaded that the proposed written agreement can be anything other than a general guide as to what the parties might have intended. Even as a general guide, it provides little real assistance because none

of the key provisions have been included. The hourly rate is missing, as are the hours of work, the start date and even the names of the parties are missing.

[16] The Authority's conclusion about what the parties actually agreed is based more on their oral evidence and the other documentation that has been filed with the Authority, than it is on the incomplete employment agreement. The Authority is satisfied on the evidence it heard that Mr O'Brien wanted a housekeeper to work for four hours a day Monday to Friday between the hours of 10am and 2pm each day, that Ms Meldrum accepted the position on that basis but that she indicated that she needed to resign from other part time positions and that she would have to give two weeks' notice to quit those other roles.

[17] It is apparent that while Ms Meldrum was working out her notice period for her other positions, the parties agreed that she would try to fit around her other positions appropriate hours to assist Mr O'Brien as well.

[18] The Authority is satisfied that Mr O'Brien, in a perfect world, would not have accepted this interim arrangement but he accepted it because Ms Meldrum was, in his words, the only suitable applicant, and he was "*desperate for assistance*".

[19] The Authority is satisfied that Ms Meldrum was given the various documents associated with the employment on Sunday, 13 May 2012 and that, at her request, she took the documents home with the intention of reviewing them and completing them and returning them. The Authority is satisfied that Ms Meldrum returned those documents on 22 May 2012. Mr O'Brien noted that the documents, when they were returned, were incomplete although, on the Authority's understanding of the situation, Ms Meldrum had completed the parts of the documents which only she could attend to. In any event, the Authority has already made clear its view that the employment agreement, because it was incomplete in a number of material particulars, cannot be relied upon as a basis for the terms of the employment agreement.

[20] Finally, the Authority mentions the job description about which there was dispute. Ms Meldrum maintained that the job description that was produced as part of the proceedings, had never been sighted by her before. This is relevant because she says that during the employment she would frequently run out of things to do and then Mr O'Brien would send her home early. Conversely, Mr O'Brien's evidence was that Ms Meldrum should not need to be told what to do but should be able to find cleaning

and other associated tasks when there was nothing specific that he personally required.

[21] In the Authority's opinion, this dispute about duties is symptomatic of the general confusion between these two parties about just what each expected of the other. For Mr O'Brien, he was expecting a housekeeper who would give priority first of all to his personal needs but then occupy the balance of her hours with cleaning the house by vacuuming and dusting, cleaning the bathroom after use, washing and cleaning the kitchen and so on. While those might have been Mr O'Brien's expectations, on the evidence the Authority heard, they were seldom fulfilled by Ms Meldrum who clearly sought a list of tasks that she needed to perform and, in the absence of which, she felt unable to act.

What happened during the employment?

[22] It seems to be common ground that Ms Meldrum worked three hours on the day after the parties had agreed on the employment relationship. That was Sunday, 13 May 2012. While the employment relationship did not contemplate weekend hours as a rule, the parties agreed that, to commence the relationship, and given Ms Meldrum's difficulty about fitting in all of the hours required during the notice period, she would make a start on the Sunday.

[23] Ms Meldrum did not work at all the following day, Monday, 14 May 2012. Her evidence is that she had a hospital appointment which she had told Mr O'Brien about. Mr O'Brien has no recollection of being told that that was the position and he told the Authority that he had expected Ms Meldrum to work some hours on that day.

[24] On Tuesday, 15 May 2012, Ms Meldrum appeared to commence work at 11am, an hour later than the stipulated start time. Mr O'Brien told the Authority that during that work period, she sought to vary the hours from the hours he had stipulated to an alternative of 1pm to 5pm and he refused. Ms Meldrum agrees she made that request but says it was later on 19 May 2012. In any event, concerning the hours of work, Mr O'Brien's position was that he had carefully selected the hours that suited him, and those hours had been selected for good and sufficient reason and he was not minded to vary them. Ms Meldrum worked just two hours on 15 May 2012.

[25] Ms Meldrum did not work at all on Wednesday or Thursday of that week, but appeared again on Friday, 18 May 2012 when she again worked for just two hours.

[26] Ms Meldrum worked next on Sunday, 20 May 2012 for 2½ hours and then on Monday, 21 May 2012 for two hours and finally on Tuesday, 22 May 2012 for three hours.

[27] Of all the things that are in dispute in this matter, the one thing the parties seem to agree about is the hours that Ms Meldrum actually worked and the hours the Authority has set out above are those hours. It will be apparent that on no day did Ms Meldrum work the span of hours which the Authority is satisfied Mr O'Brien had sought from her and it is also true that on none of the days that Ms Meldrum worked did she work the particular span of hours which the Authority is satisfied Mr O'Brien had contracted for.

[28] Of particular concern to the Authority is the number of missed days. Mr O'Brien's evidence, which the Authority accepts, was that he was never given any information that she was not going to come to work on any of these missed days. Ms Meldrum's evidence is that she told Mr O'Brien that she would not be working on Monday, 14 May 2012 (the day that she had an appointment at Tauranga Hospital), but even she does not maintain that she made any arrangements with Mr O'Brien in respect of the other days that she missed. Given Mr O'Brien's vulnerability by reason of his health status, and his limited ability to respond quickly to Ms Meldrum's sudden absences, those gaps in the service that she provided do not reflect well on her.

[29] Mr O'Brien was vulnerable and relied on her to provide him with the most basic of assistance during a particular window of time and yet it appears that on no occasion during the employment did Ms Meldrum complete the number of hours required nor even make appropriate arrangements with Mr O'Brien in respect of her regular absences.

[30] The Authority does accept that Ms Meldrum told Mr O'Brien that she would have to resign some of her existing part time work in order to accommodate the hours that he wanted, but having committed herself to Mr O'Brien, she still had an absolute obligation to communicate effectively with him in relation to her absences and the need for them. There is no evidence that she did. In that regard, she is clearly in breach of her obligations under s.4 of the Employment Relations Act 2000 (the Act) which requires parties to an employment relationship:

... to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.

[31] In the Authority's opinion, the duty just expressed is all the more a requirement of an employee assisting a vulnerable member of the community to live as normal a life as his health will allow.

[32] A further influence on the Authority's thinking in respect of this matter is the clear evidence that, after the employment relationship commenced, Ms Meldrum tried to get Mr O'Brien to agree to change the hours from 10am to 2pm to 1pm to 5pm. According to Ms Meldrum's evidence, this proposal was made by her in a discussion that she had with Mr O'Brien on 19 May 2012, by common consent not a day that she actually worked for him. The Authority has already noted that according to Mr O'Brien the discussion happened earlier on 15 May 2012, but nothing turns on when the discussion took place.

[33] The fact that Ms Meldrum would suggest a change in the hours which the employer wanted to employ her for suggests to the Authority a fundamentally misconceived notion concerning the purpose of the employment. The purpose of the employment was to assist Mr O'Brien to live as normal a life as his health would allow and was not to meet the convenience of Ms Meldrum. If, as this alternative proposal suggests, Ms Meldrum was not confident that she could work the hours required of her, then she should never have taken the job in the first place.

[34] Ms Meldrum protests that she did not earn the amount she expected during the employment and she attributes that loss to the fact that she claims Mr O'Brien would send her home early rather than allow her to work the full span of hours. She says that is the explanation for her never working a complete four hour stretch.

[35] Mr O'Brien denies ever having sent Ms Meldrum away early. His evidence is that he understood that he simply had to put up with her coming and going on an irregular basis while her notice was being worked out at the other positions that she had said she was resigning from. The Authority prefers Mr O'Brien's evidence on this point to Ms Meldrum's. given his self evident need for assistance and the limited ability he had to vary arrangements once made.

[36] Part of the difficulty for Mr O'Brien must have been the uncertainty around when or if Ms Meldrum was going to show up at all. It is difficult to establish a routine in collaboration with another person if that other person's behaviour is unpredictable. Mr O'Brien had determined the hours of work based on his long experience with his disability. His life had to be driven by routine, particularly

because of the more recent medical requirements that he avoid sitting down for longer than his medical advisers would contemplate.

[37] When Ms Meldrum simply failed to appear on either Wednesday, Thursday or Friday of the second week of the employment (that is, 23-25 May 2012), Mr O'Brien says he panicked and started trying to both contact Ms Meldrum and contact other people who could assist him in her absence. It is evident from the phone records put before the Authority that Mr O'Brien made a large number of calls over that period, many of which appear to have been of very short duration. He told the Authority that he thought he had Ms Meldrum's telephone number but that it had been mislaid.

How did the employment relationship come to an end?

[38] Like most of the aspects of this matter, there is dispute about the way in which the employment ended. Mr O'Brien says that he finally got a telephone call from Ms Meldrum on Saturday, 26 May 2012 in which she indicated that she had received a better offer and that his job was simply not worth it. Ms Meldrum absolutely denies that that is what happened. She says that Mr O'Brien rang her on Friday, 25 May 2012, asked her if she had quit a particular one of her other jobs and then told her, when she said she had not left that job, that she need not return.

[39] Certainly, the evidence is as clear as can be that Mr O'Brien did not ring Ms Meldrum on Friday, 25 May 2012 or, more accurately, that he did not ring her in order to have any sort of conversation with her. The telephone records provided by Mr O'Brien to the Authority disclose that on 25 May 2012, he rang Ms Meldrum three times and the telco identifies the duration of each call as 1 minute which is presumably the minimum duration for charging purposes. The first call is timed at 11.15am, the second at 11.17am and the third at 11.45am. These calls, of this very limited duration, and so close together in time, seem to confirm Mr O'Brien's evidence that, having been without his housekeeper for three days without notice, he was becoming extremely anxious about the position and was trying to contact her to find out where she was. But equally, the Authority is entitled to conclude from the proximity of the three calls and their respective duration that each call simply went to voicemail and there was no actual conversation on any occasion.

[40] That being the Authority's conclusion, the contention that Mr O'Brien rang Ms Meldrum and terminated the employment cannot be right. Equally, Mr O'Brien's contention that Ms Meldrum rang him and indicated that she had received a better

offer seems implausible as well, not because the Authority does not believe Mr O'Brien but because the evidence provided by Ms Meldrum is that she had not received a better offer at all and indeed the tax position for Ms Meldrum provided to the Authority suggests that her income went down rather than up.

[41] Whatever the truth about Ms Meldrum's income position, it is apparent on the evidence before the Authority that her claim that Mr O'Brien rang her simply cannot be right. Conversely, Mr O'Brien's evidence that Ms Meldrum rang him on either the Friday 25 May 2012 or the Saturday, 26 May 2012 is possible because of course his telephone records (which are available to the Authority) only disclose outgoing calls. Mr O'Brien told the Authority that Ms Meldrum had rung him and said something to the effect that the job that she had previously been doing had been subject to an increase and that as a consequence it was not worth her while continuing to work for Mr O'Brien.

[42] Ms Meldrum's evidence was that Mr O'Brien had rung her and in the course of that conversation dismissed her. The Authority is satisfied that Mr O'Brien did not ring Ms Meldrum on that day. He certainly tried to but the evidence suggests that he was not successful in connecting with her. She must have rung him. It is still possible that although she initiated the call, he took advantage of the call and dismissed her in that telephone call.

[43] But the Authority is not disposed to reach that conclusion. The Authority's view is that it was Ms Meldrum who brought the employment relationship to an end. The Authority was frankly puzzled by the number of errors that had to be corrected in Ms Meldrum's evidence. She provided a number of variations of the dates that she had worked, the date on which she was dismissed, and created an air of uncertainty about her evidence as a consequence. Amongst other examples that the Authority noted was a claim originally made that she had taken some food around to Mr O'Brien, a claim now withdrawn. Similarly, the cellphone number that Ms Meldrum gave to the Authority is a different cellphone number from the one inscribed, presumably by her, in the documents she provided in order to get paid for the work she did for Mr O'Brien.

[44] Conversely, the Authority has no reason to doubt the veracity of Mr O'Brien's evidence. In particular, on the termination of the employment, Mr O'Brien in his oral evidence, told the Authority:

I was not trying to get rid of anyone. I was trying to get help. She [Ms Meldrum] was juggling several jobs. I got the impression I was the ball that was going to get dropped.

[45] It may be as simple as that. It may be simply that the stress of trying to fit in a number of different calls on her time made things too difficult for Ms Meldrum to contemplate continuing with the work for Mr O'Brien, work which, on the Authority's assessment of the position, had never worked out particularly well for either party.

[46] In any event, whatever the explanation, the Authority is not satisfied that Ms Meldrum was dismissed at all by Mr O'Brien and thinks that Ms Meldrum resigned her employment in the telephone call that it is plain she initiated with Mr O'Brien. The Authority's conclusion is based on a general preference for the evidence given by Mr O'Brien who, unlike Ms Meldrum, maintained the same evidence throughout. Moreover, the Authority accepted Mr O'Brien's point that he had no reason to dismiss Ms Meldrum because the effect of so doing was to leave him completely exposed and without assistance. The effect of dismissing her would have been to require him to go through the recruitment and bedding in phase all over again and so soon after he had commenced an employment relationship with Ms Meldrum.

Determination

[47] The Authority has not been persuaded that Ms Meldrum has any personal grievance as a consequence of her employment with Mr O'Brien.

Costs

[48] Costs are reserved.

James Crichton
Member of the Employment Relations Authority