

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Craig Adsett (applicant)
AND	Wellesley Limited (respondent)
REPRESENTATIVES	Graham Gowland for the applicant Wayne Coffey for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 27 February 2007
SUBMISSIONS	Received by 8 March 2007
DATE OF DETERMINATION	13 March 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In his statement of problem filed on 13 December 2006 Mr Adsett says he was unjustifiably disadvantaged and unjustifiably dismissed and is owed arrears of pay. He sought compensation of \$7,000 for humiliation, unspecified reimbursement of all lost pay, statutory penalties for breach of good faith, breach of contract and failure to provide the applicant with an employment agreement and comply with ss. 64 & 65 of the Act.
2. In its statement in reply received on 22 December the Company denied the applicant's allegations.

3. Mediation did not resolve this employment relationship problem.
4. The parties agreed to a one-day investigation in Wellington on Tuesday, 27 February 2007. They usefully provided witness statements in advance. Efforts during the investigation to settle this matter on the parties own terms were unsuccessful.

Background

5. Wellesley Limited is a small privately owned family company with 20 years industry experience specialising in accommodation, catering and recreational services.
6. In October 2006 it placed the following advertisement:

Country Club/Camp Manager

Role with career development opportunities & flexible hours

Stunning rural scenery

Exciting, rapidly expanding, hospitality group

The Wellesley Group operates the Wellesley Boutique Hotel, Wellesley Harbour Cruise Ship, Wellesley Hovercraft and the Wellesley Country Club in Wellington. Also operated by the group (are) the Wellesley Resort Fiji and the Wellesley Apartments at London Tower Bridge, UK.

Our new product, the Wellesley Country Club in Akatarawa seeks an experienced individual to manage daily operations at this property. Duties include hosting of clients (from community groups through to senior corporate clients), responsibility for the presentation and security of the property as well as overseeing catering and recreational activities. As the company intends to substantially (develop) this property, maintenance and hands on development work will also be a significant component of this role. Experience in this area would be highly desired.

Salary, hours and an accommodation component can be negotiated with the successful applicant.

7. Mr Adsett applied for the position. He was interviewed on Friday, 20 October by Mr Philip Temple, the Company's General Manager, Operations and Ms Lisa Noedl, its General Manager of Sales. The parties agreed their discussion focused on the advertised position and that there was no mention of casual employment.

8. On 25 October Mr Temple spoke by telephone to the applicant. It is in respect of what was discussed during this telephone call that the parties' accounts of relevant events start to markedly diverge: Mr Temple said he offered Mr Adsett casual work at the camp, at \$16.83 per hour (I refer to Mr Temple's witness statement and oral evidence during the investigation). Mr Adsett denies that claim and says instead that Mr Temple told him he had the camp manager's job if he wanted it. He also said Mr Temple offered him a starting salary of \$35,000 p.a. and that there would be a three month trial period with a salary review.
9. The Company accepts that, in respect of the job offer it agrees it put to Mr Adsett, it failed to "*provide to the employee a copy of the intended (individual employment) agreement, under discussion*" (s. 63A (2) of the Act) and thereby breached the Act.
10. From the evidence before the Authority it is clear that the Company also failed to advise Mr Adsett of his entitlement to seek independent advice about the intended agreement or give him a reasonable opportunity to seek that advice.
11. By way of explanation, the Company said it acted in haste, because – while finding that Mr Adsett was not suitable for the camp manager's position – it was short staffed and it also wanted to help the applicant by responding positively to what it says was his keen wish to find work, as both he and his partner were then unemployed.
12. Mr Adsett started his employment on Monday 30 October. He was shown around the camp by another employee, Mr Wayne Snowden. The applicant formed an impression Mr Snowden was in charge and was unsure as to his role. Mr Adsett said he asked Mr Temple the following day, 31 October, to explain his position and where Mr Snowden fitted in: the applicant said Mr Temple repeated he was camp manager. Mr Temple confirmed he visited the camp several times when the applicant was working, but that he always introduced him as a new casual employee, and never as the new camp manager.
13. Mr Snowden gave evidence. Amongst other things, he said he asked the respondent's director, Mr Wayne Coffey, several times for a change to his job description to that of camp manager, so as to reflect his actual responsibilities: Mr Coffey refused his request.
14. Mr Snowden also said he was upset to see the advertisement for the camp manager as it looked to him very much like the role he was performing; he was concerned the respondent might be trying to get rid of him. He said he was telephoned by Mr Temple on 27 October who advised him the applicant was starting on the following Monday (30

October) and that Mr Adsett was to be “a full-time acting Camp Manager” (par 12 of his witness statement), but only when he, Mr Snowden, was not there. When he was present Mr Snowden was the camp manager. Understandably, Mr Snowden says he “was very unsure about this arrangement” (above).

15. Mr Snowden said that, when the applicant started, Mr Adsett clearly believed he was the camp manager. As a result Mr Snowden says he sought, and received from Mr Temple, reiteration as to the arrangements described in par 14 above.
16. Mr Snowden said he was “a bit peeved” to discover that Mr Adsett was on a salary while he was not, and that his rate of pay was higher (par 14 of his statement and oral evidence).
17. Mr Snowden described as “complete rubbish” (oral evidence) the claim set out in the Company’s letter of 20 November that the camp manager position was “filled by an internal management transfer” (attachment to statement in reply).
18. In his evidence to the Authority Mr Snowden said his employment with the respondent finished on 8 December and that he had not brought, and was not bringing, any employment claims against the Company.
19. Mr Adsett filed a personal grievance by letter dated 15 November 2006. His last working day was 18 November, i.e. he worked for the Company for a little over two weeks. The parties undertook mediation on 8 December, shortly after which the Company produced an undated casual employment agreement (attachment to statement in reply) that it claims was intended for the applicant.

Discussion and Findings

20. This employment relationship problem came into existence because of a dispute between the parties as to whether Mr Adsett was employed as a permanent camp manager, either – as he says – on a 3-month trial or, the Company’s position, as a casual employee. I am satisfied for the following reasons that Mr Adsett’s account of relevant events is to be preferred and that he was employed as a permanent camp manager.
21. The Company is in breach of its now 7-year old obligation to provide Mr Adsett, in advance of his employment, with a copy of the intended employment agreement. Had the Company complied with that requirement, and s. 65 (2) (a) (ii) of the Act in particular, a written record would exist of the work to be performed by the applicant. The respondent’s

failure to meet its well-known obligation is a major cause of this employment relationship problem. Its failure is all the more pronounced given the Company's 20 year industry and regulatory regime experience both inside of New Zealand, and overseas. It is ironic that, in 'helping' the applicant by speedily employing him, the Company created a significant problem for both itself and Mr Adsett.

22. The position first advertised by the Company was for a permanent camp manager. The respondent accepts its job advertisement makes no reference to casual employment and that no mention of the same was made when Mr Temple and Ms Noedl interviewed the applicant on 20 October.
23. The key credibility issue is the contest between Mr Adsett's recollection of the telephone offer made to him by Mr Temple on 25 October, and their subsequent exchanges, and Mr Temple's recall of the same. There were no witnesses to their discussion. While both men are equally credible, Mr Adsett's recollection is to be preferred because of the supporting evidence provided by Mr Snowden. That is because, consistent with the respondent's director, Mr Wayne Coffey's, description articulated during the investigation, I am satisfied that Mr Snowden should properly be seen as a genuinely "*independent witness*". I therefore do not accept the submission filed by the Company on 8 March, at par 2.3 e., that Mr Snowden left its employment on bad terms which later coloured his evidence against the respondent: this claim should have been put to the witness during the investigation, but in fact was never raised. Instead, as explained above, Mr Coffey accepted Mr Snowden as an independent witness.
24. Consistent with Mr Coffey's description of the witness during the investigation, I am satisfied Mr Snowden had – and has – no axe to grind against his former employer. His memory and accounts of relevant events are therefore more likely to be free of unintended pressures or influence, or self-serving, impaired or partial recollection.
25. Mr Snowden's evidence can also be relied on because he was keenly interested in the events surrounding the applicant's grievance, because of his own aspiration to be recognised in that role: as a result he queried the situation several times with Mr Temple. Mr Snowden's preferred account is that he was consistently informed the applicant was a camp manager. That understanding largely corroborates the applicant's position.
26. Consistent with Mr Adsett's understanding is the fact that his hourly rate equates to the salary he claims he was offered (\$16.83/\$35,000) and time sheets were not required of him (par 14 of Mr Snowden's witness statement).

27. I am satisfied the respondent repudiated its agreement with the applicant by not requiring his full time attendance at the camp and by the corresponding reduction of his pay: Mr Adsett was significantly disadvantaged by this unilateral initiative and it was therefore fairly and reasonably open to him to regard these changes as amounting to the termination of his employment.
28. In the alternative, had I found against Mr Adsett's claim of unjustified dismissal, I am satisfied this would have been an appropriate instance in which to award significant penalties against the Company for its material breaches of the Act. Because of the resulting employment relationship problem, and the obvious disadvantage afforded Mr Adsett, I would also have directed that most if not all of the resulting monies be paid to him: that is because the Company's failures to adhere to the requirements of the Act, in particular to put before Mr Adsett a copy of the intended employment agreement, were entirely responsible for the applicant bringing this matter to the Authority for determination. The outcomes to the Company, in particular its financial liability, would have been thereby very similar.

Remedies

29. Mr Adsett seeks \$7,000 compensation for humiliation, etc and lost wages totalling \$8,682 gross (i.e. 3-months and 10-days unemployment from the termination of his position to starting a new job this month, February 2007).
30. Evidence in support of these claims was not originally set out in Mr Adsett's statement of problem or witness statement but was provided orally at the investigation itself. Mr Adsett said the termination of his employment caused him to experience depression for which medication prescribed by his doctor was required. No medical information was produced: the applicant agreed he had suffered depression previously. He described himself as experiencing pronounced low self-worth and by being "*very hurt by all of this*" (par 23 of his witness statement).
31. Mr Adsett also provided a detailed list of agencies and employers with whom he had applied for positions following the end of his employment with the Company.
32. Mr Adsett's belated evidence in support of his claim for compensation for humiliation, etc does not support his original claim for \$7,000. I am also satisfied that, in assessing an appropriate compensation figure, it should be balanced by the fact that Mr Adsett worked only a little more than two weeks of what was a 3-month trial period. Because of the short

period of employment and its uncertain outcome, and consistent with the applicant's evidence of humiliation, etc, I am satisfied compensation of \$6,000 is appropriate in all the circumstances: s. 123 (1) (c) of the Act applied.

33. I am also satisfied that the applicant made proper effort to mitigate the effect of the loss of his employment by promptly and actively seeking other employment. It follows he is entitled to the sum claimed for compensation of lost salary: ss. 123 (1) (b) and 128 (3) of the Act applied.
34. I do not accept Mr Adsett's claim he is owed \$75 overnight allowance by the Company: the applicant was unable to satisfy me that entitlement to the same was ever an agreed term and condition of his employment agreement: s. 123 (1) (b) of the Act applied.

Contributory Fault

35. The Company's decision to vary the terms and conditions of employment agreed with Mr Adsett are entirely its responsibility. The Company is properly not suggesting otherwise as there is no evidence of the applicant's actions in any way contributing towards the situation that gave rise to his grievance: s. 124 of the Act applied.

Penalties

36. The Company accepts it breached s. 63A of the Act by failing to provide Mr Adsett with a copy of the intended employment agreement. I am also satisfied that the Company breached the same section by failing to advise the applicant of his entitlement to seek independent advice, and by failing to give him a reasonable opportunity to seek that advice.
37. As is made clear above, that first failure is a significant contributor to my finding in favour of Mr Adsett's claim.
38. Because the applicant has been successful with his claim, and because he has been awarded significant remedies, the harm occasioned by the breach has been largely remedied. I am therefore satisfied that only a nominal penalty is required, and only in respect of the Company's admitted breach of s. 63A (2) of the Act, and that – in all the circumstances – it is appropriate it be paid to the Crown, via the Authority. I direct the respondent to pay a penalty of \$100: ss. 63A (3), 135 (1) (b) and 136 of the Act applied.

Employer's Financial Position

39. In the absence of any claim or evidence in respect of the employer's financial position, I decline to order payment of the sums set out above by way of instalments: s. 123 (2) of the Act applied.

Determination

40. The Company is to pay to Mr Adsett the following sums:

- a. \$6,000 (six thousand dollars) compensation for humiliation, etc; and
- b. \$8,682 (eight thousand and six hundred and eighty-two dollars) gross for lost salary.

41. The Company is also to pay to the Crown, via the Authority, the penalty of \$100 (one hundred dollars).

42. Costs are reserved.

Denis Asher

Member of Employment Relations Authority