

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Andrea Barnes (Applicant)  
**AND** Telecom New Zealand Limited (Respondent)  
**REPRESENTATIVES** Scott Fairclough, Counsel for Applicant  
Samantha Turner, Counsel for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 23 November 2005  
**DATE OF DETERMINATION** 14 February 2006

**DETERMINATION OF THE AUTHORITY**

***Employment relationship problem***

[1] The applicant, Ms Barnes, says that she was unjustifiably dismissed on 3 February 2005 when what she understood to be an unconditional offer of employment was withdrawn by the respondent, Telecom New Zealand Limited (Telecom).

[2] Telecom, for its part, says that there was never a concluded employment relationship offered by Telecom in order for Ms Barnes to accept and that they withdrew a conditional offer only. It follows that there was, they say, no employment relationship and thus no prospect of an unjustified dismissal.

[3] The parties attended mediation but were unable to resolve their differences there.

[4] Ms Barnes applied for two positions with Telecom in January 2005. The position that is the subject of this dispute is one as a collections representative.

[5] As is Telecom's invariable practice, part of the recruitment exercise was attended to, on its behalf, by Drake Personnel.

[6] Ms Barnes was interviewed by Ms Lisa Baker of Drake Personnel who, together with others, explained Telecom's recruitment process.

[7] Ms Barnes says that she was given an unconditional offer of employment by Ms Baker acting on behalf of Telecom on 27 January 2005 and that, acting on that advice, she promptly resigned her position.

[8] Telecom says that no such unconditional offer of employment was made and in the communication on 27 January 2005 there was a **conditional** offer of employment made subject to satisfactory reference checks.

[9] On 3 February 2005, Ms Baker rang Ms Barnes again and indicated to her that a reference check had not *checked out* and accordingly the employment relationship would not proceed. Telecom says that this telephone call merely withdrew an earlier conditional offer of employment while Ms Barnes' view is that this telephone call was effectively an unjustifiable dismissal.

### *Issues*

[10] The fundamental task for the Authority is to decide what actually happened between the parties and in particular what can be deduced from the evidence about the telephone discussions and other relevant contact between Ms Barnes and Ms Baker. From this factual matrix can be deduced:

- (a) whether there was an employment relationship created; and if there was,
- (b) what were its terms

### *The early contact*

[11] Ms Barnes' evidence was that after answering an advertisement by Telecom, she was contacted by telephone by Ms Lisa Baker of Drake Personnel.

[12] Ms Barnes said that Ms Baker told her that Drake Personnel (Drake) was recruiting on behalf of Telecom for a number of positions as collections representatives.

[13] This initial call is important because it sets the scene for the subsequent employment relationship problem. Ms Barnes and Ms Baker have quite different recollections of what was conveyed in this early exchange in relation to the central issue of the structure of the recruitment process.

[14] Ms Barnes says that there were three steps to the Telecom recruitment process viz:

- A pre-screening check (in effect an introductory interview);
- Assuming success in that stage, candidates would then be subjected to a criminal, reference and credit check.
- Assuming the candidate passes the reference check, the next stage is called the assessment centre process;

[15] As described by Ms Barnes, this is effectively a three-stage process with candidates being required to pass each stage before they are allowed to go onto the next stage.

[16] For its part, Drake identifies a four-stage process. Drake agrees that the first stage is a pre-screening application process and then it says the next stage is an initial reference check undertaken by Drake itself, and then the third stage is the assessment centre stage and finally, assuming the candidate passed those three stages, there is a second reference check, a credit check and a criminal check, undertaken by the client, Telecom before an offer is actually made.

[17] The importance of this exchange (and the difference between the protagonists), is that the understanding that Ms Barnes got from this conversation (whether right or wrong) set her up for the subsequent employment relationship problem.

[18] Because Ms Barnes believed that there were three stages to the process, when she had a call subsequently from Ms Baker on 27 January 2005 to indicate (she believed) that she had been appointed to a particular role, nothing triggered any anxiety in her mind that the process was not then complete.

[19] Conversely, had Ms Barnes understood that this was a four-stage process, the conversation on 27 January might well have been treated more critically in that Ms Barnes might well have been on notice about the fourth stage of the process.

[20] In order to determine what is most likely to have happened in this early exchange between the principal protagonists, I need to look at the evidence that is available about the state of mind of the parties and other contextual evidence.

[21] Ms Barnes might well have been either excited or anxious in that initial telephone exchange. She referred in her evidence to *advancing my career* by applying for the positions that she applied for. It is conceivable that Ms Barnes misunderstood what she was told.

[22] Ms Baker, on the other hand, gave clear and unequivocal evidence that she did not misrepresent the position in her conversations with Ms Barnes and that she had a wealth of experience in recruiting for Drake on behalf of clients, including in particular Telecom. Amongst other things, she told me that she had run the Telecom assessment centre process on a total of 31 occasions, so she was hardly inexperienced.

[23] Given all that experience, I asked Ms Baker how Ms Barnes could have misunderstood the position so convincingly if she had indeed been provided with all the information that she should have been. Ms Baker told me that *it's not possible for Andrea (Ms Barnes) to have the wrong end of the stick. It's not something I would have forgotten to say* (she means the final reference check).

[24] Ms Baker said that she accepted that people were nervous in those initial exchanges and that there was a lot of information for people to absorb. She said that Ms Barnes may have been rushed for time or excited.

[25] Ms Baker also told me that she had never had a difficulty of this sort before. She accepted, with the benefit of hindsight, that it may have been better to impart the necessary information (particularly around the process) by way of a letter.

[26] She told Mr Fairclough in answer to a question from him that she was *a lot more careful now* in what she said to candidates, but the process still is essentially a process of verbal communication rather than written communication. Ms Sally Short, who is the responsible manager for Telecom, confirmed that there was no document setting out the recruitment process until the letter attaching the employment agreement by which time of course the recruitment process was complete.

[27] Ms Short also gave evidence that Telecom had had a longstanding and very successful relationship with Drake. She said it was a rare event indeed for a conditional offer to be withdrawn and she estimated that this had happened three or four times in the last five years during which period approximately 250 staff would have been recruited.

### ***The pre-screening interview***

[28] Ms Barnes' evidence was that this was effectively a standard introductory interview and the evidence from Drake and Telecom does not contradict that. Ms Barnes said in her evidence that she was not given any further information about the process at this interview except to be told what the next stage was.

[29] Ms Barnes thought that the interview was unhurried and professional and her evidence was that she was told that a reference check would be done and then, if she passed that, she would go on to the assessment centre stage. Ms Barnes said that she actually filled out forms to enable Drake to do the Police check during the interview with Ms Baker on 20 January 2005.

[30] Ms Baker's evidence, contrary to what Ms Barnes told me, was that she again went through the process at the 20 January interview and indicated the various steps that were involved. Ms Barnes, as I mentioned above, has no recollection of this.

[31] On 21 January, having spoken to the first of Ms Barnes' referees, Ms Baker rang Ms Barnes to tell her she was proceeding to the next stage.

[32] Again, in this part of the process, we have a clear difference on the evidence. Ms Barnes says that there was no further discussion about the process during the 20 January interview while Ms Baker says that as part of the process, she again explained the process and its four stages.

### ***The assessment centre***

[33] On 26 January 2005, Ms Barnes attended at the assessment centre at Drake and her evidence was that for the morning of that day she worked with a group of five others demonstrating problem solving techniques. This process was observed by Drake and Telecom personnel.

[34] In addition, Ms Barnes would have answered questions about her behaviour in certain situations and she participated in a phone role-play, as the position applied for involved working in a call centre situation.

[35] The afternoon of the same day was taken up with a visit to the Telecom call centre where the successful applicants might be expected to work. Included in the visit to Telecom, according to Ms Barnes, was an overhead projector show which gave details of the position applied for including a description of the job, the shifts that would be worked, the salary for the position and other benefits, together with a start date.

### ***The alleged job offer***

[36] Ms Barnes says that she was telephoned on 27 January by Ms Baker in the following terms: *Good news. They want to offer you a position. Congratulations.*

[37] Ms Barnes says that she was then told by Ms Baker that an employment agreement would be provided in the mail in the next few days and she was adamant that there was no condition put on the offer.

[38] Ms Barnes told me that she got off that telephone call and thought that she had the job. That is why she gave written notice of her resignation from her current employment on that same day.

[39] Ms Barnes said that anything that she needed to know about her new employment position was either conveyed to her in her telephone discussion with Ms Baker on 27 January 2005 or alternatively had been covered in the overhead projector show the previous day at Telecom's offices.

[40] Ms Baker, on the other hand, again has a different recollection. She says that all that she advised Ms Barnes about was a conditional offer of employment ... *subject to receipt of favourable second reference check criminal and credit history.*

[41] Ms Baker also says that Ms Barnes confirmed to her during that telephone conversation that she was aware that the offer was conditional and that Ms Baker actually double-checked that aspect with Ms Barnes and she again confirmed that she understood this was only a conditional offer.

*Telephone call on 31 January 2005*

[42] Ms Short rang Ms Barnes on 31 January. Ms Barnes says she never spoke to Ms Short and that what she got was a voicemail message to the effect that there had been a hold up in sending out the employment agreement and that Ms Barnes should get hers on 4 February.

[43] Nothing turns on whether these parties actually spoke to each other or not.

*Telephone call on 3 February 2005*

[44] On 3 February, Ms Baker rang Ms Barnes and told her that the second reference had not checked out and accordingly that the job offer was being withdrawn.

[45] Both Ms Barnes and Ms Baker seem to agree that Ms Baker had told Ms Barnes that the second reference check was not favourable and that that was the cause of the offer being withdrawn.

[46] Ms Baker's recollection is that Ms Barnes was tearful and that Ms Barnes told Ms Baker that Ms Barnes had resigned her position on the strength of the telephone call on 27 January.

[47] Ms Barnes says that Ms Baker offered to get Ms Short to ring to discuss the position further; Ms Baker on the other hand says that Ms Barnes asked her to organise a call from Ms Short.

*Telephone call on 3 February 2005 from Ms Short*

[48] Ms Short called Ms Barnes on 3 February.

[49] There seems to be reasonable agreement between Ms Barnes and Ms Short about what happened in this conversation. Broadly, Ms Short explained to Ms Barnes why she had been unsuccessful and Ms Barnes' evidence is that she felt better as a consequence of that and Ms Short's evidence is that she thought Ms Barnes accepted her observations in that regard.

[50] On the critical issue of whether the offer of employment was conditional or not, Ms Short asked Ms Barnes whether she understood that the offer was subject to reference checks and the like and she records Ms Barnes as having answered in the affirmative.

[51] Ms Barnes' evidence is that she did in fact say that she understood that the job offer was conditional on satisfactory reference checks, but the issue for her was **when** those reference checks were done.

[52] In Ms Barnes' view, the reference checks were, as she understood it, not done at the end of the process but more or less in the middle of it and because she did not have an understanding that the process was a four step process, when she got the offer of employment on 27 January, she understood that offer to be a final confirmed offer and she acted accordingly.

### *Determination*

[53] In effect, the only question the Authority has to decide is whether it is more or less likely, on the evidence available, that Ms Barnes was not told that the offer of employment conveyed to her by telephone on 27 January was conditional on further reference checks.

[54] In order to decide the issue, I am really left with making judgments about the credibility of Ms Barnes on the one hand and Ms Baker on the other. While Ms Short gave evidence for Telecom, and her evidence was clear and concise, her testimony was not central to the fundamental issues between the parties except to the extent that she confirmed that Telecom had a long and satisfactory relationship with Drake and was satisfied with the process used by Drake in recruiting its staff.

[55] In respect of Ms Short's telephone conference with Ms Barnes on 3 February 2005, there is surprisingly a substantial measure of agreement between Ms Short and Ms Barnes and so Ms Short's evidence as to that conversation is, in the main, unchallenged.

[56] I turn then to consider Ms Barnes as a witness. I certainly found her evidence clear and I have no reason to believe that she deliberately misled the Authority. She struck me as an honest and straightforward young woman who genuinely believed what she advanced by way of evidence.

[57] Her own evidence suggested to me that Ms Barnes was comparatively inexperienced in business matters and had only been in the workforce for a comparatively short period of time and in only one significant employment relationship.

[58] Those factors being in play, it is certainly possible that, in her excitement at the prospect of being successful at the new position that she aspired to with Telecom, Ms Barnes misunderstood or failed to hear the various warnings from Telecom's contractor that there was another step involved in the recruitment process.

[59] I advanced the proposition in the investigation meeting, and do so again now, that it seems to me a risky strategy for complicated recruitment patterns of the sort in contention here, to be managed exclusively with verbal communication. This will be particularly the case where the recruiter is dealing with younger and/or less experienced employees or potential employees.

[60] Had Ms Barnes been provided at the commencement of the recruitment process with a document which set out clearly and unequivocally the steps in the process, she would have had no difficulty in understanding what was involved and being prepared for a process with the different steps that this one actually has.

[61] In my opinion, the initial communication between Ms Baker and Ms Barnes on 20 January when Ms Baker rang Ms Barnes in response to Ms Barnes' application set the tone for the subsequent communications between the parties. I imagine that Ms Barnes would have been excited by the contact and she may simply have misheard what she was told.

[62] Having misheard the process the first time, it is of course easier to then confuse the process when there are further discussions about it. This is particularly the case when, as in this particular situation, the process actually involves two separate points at which reference checking or some process similar to that is undertaken.

[63] If it was not crystal clear that there were actually two points at which references were checked then it would be very easy for an inexperienced young person to not have a comprehensive understanding of a process such as this.

[64] Ms Baker, on the other hand, is an experienced professional person whose evidence very clearly established that she had undertaken a role like this recruiting exercise on numerous occasions, not only for the respondent Telecom but also for other employer clients of Drake.

[65] It is difficult frankly to see how Ms Baker could have got the process so wrong as to make a mistake in the conveying of the information to Ms Barnes.

[66] I understand the point made by Mr Fairclough in his submissions, that Ms Baker changed her language on a number of occasions when describing the conditional nature of the offer. However, I do not think this signifies any uncertainty on her part about the conditional nature of the offer; only some doubt about the way she expressed it.

[67] Ms Baker's evidence was that she had done this particular kind of recruitment on over 30 occasions, that she knew the process intimately, that she always explained the four step process and that she explained that at various points throughout the steps so it was explained not just once but more than once.

[68] In my opinion, it is more rather than less likely that Ms Baker did precisely that on this occasion and that Ms Barnes simply did not hear that there were two points at which reference checking came into question.

[69] That being my conclusion on the evidence presented to me, Ms Barnes' case fails in its entirety she having been unable to satisfy the Authority that there was ever an employment relationship created, which is of course a necessary precursor to an unjustified dismissal. Having not found an employment relationship created, there can be no question of there being an unjustified dismissal. It also follows that it is not necessary for me to consider the terms of the relationship between the parties.

### ***Costs***

[70] Costs are reserved.

James Crichton  
Member of Employment Relations Authority