

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Carmon Benson (Applicant)
AND Monaco Village Management Limited (Respondent)
REPRESENTATIVES Brent Climo, Advocate for Applicant
Graeme Downing, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 22 September 2005
FURTHER EVIDENCE 21 November 2005
DATE OF DETERMINATION 9 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Carmon Benson, says her employment relationship problem is that she was offered, and accepted, a full time receptionist position with the respondent on Tuesday 20 July 2004. Ms Benson was to start her employment on 2 August 2004.

[2] Ms Benson never commenced her employment with the respondent because she says the original offer of employment was withdrawn before 2 August 2004 and the new job offered was not acceptable to her. She says that she was unjustifiably dismissed either actually or constructively.

[3] The respondent does not accept that Ms Benson was offered and accepted a particular job and says that it did not conclude an employment agreement with Ms Benson.

[4] There was some initial dispute about the identity of the respondent although this was not referred to in the applicant's final submissions. I am satisfied that the intention was that Ms Benson be employed by a limited liability company, Monaco Village Management Limited. If a written employment agreement had been prepared by the new incoming manager at Monaco Village Management Limited as originally intended that would have been the identity of Ms Benson's employer.

[5] The respondent is Monaco Village Management Limited ("Monaco") and not Robert Michael Gepp, a director of the respondent. Monaco manages the Hotel Monaco complex at Nelson which is a serviced apartment complex.

[6] Ms Benson says that she was offered and accepted employment on 20 July 2004 when she met with Mr Gepp and the then Duty Manager, Jenny Gordon at Monaco. Ms Gordon has since

married and is now Jenny Walton. Ms Walton was not able to attend the investigation meeting but was available at a later time to give her evidence.

[7] Ms Benson said her employment at Monaco was to be as follows:

- Full time employment.
- A start date of 2 August 2004.
- Duties to be undertaken were reception work, general office work and some work in the restaurant.
- An hourly rate of \$15.00 per hour.
- The days and hours of employment being Monday to Friday 6am to 4pm with occasional weekend work.

[8] The days and hours of work at Monaco were particularly important to Ms Benson as she has a school aged child.

[9] Mr Gepp, who spoke to Ms Benson on 20 July 2004, does not agree that Ms Benson was offered a particular job. Whilst he accepted that he was happy for Ms Benson to work on reception and agreed that the hourly rate was to be \$15.00 he said that the details of the hours Ms Benson would work were left to be worked out by roster and in consultation with the Duty Manager, Ms Walton.

[10] The new General Manager Clare Davies had not commenced her employment at Monaco as at 20 July 2004.

[11] In anticipation of starting employment with Monaco Ms Benson handed her resignation to her then employer, the Rutherford Hotel Nelson on Wednesday 21 July 2004. The resignation was effective from 1 August 2004.

[12] Matters came to a head on 29 July 2004 when Ms Benson went to Monaco to meet with Ms Davies. Ms Davies talked to Ms Benson about the job available at Monaco and described it mainly as shift work and weekend work. Ms Benson told Ms Davies that was not the job that she had been offered and that her hours of work at Monaco were to be fixed from 6am to 4pm Monday to Friday with some occasional weekend work. Ms Davies told Ms Benson that fixed hours on weekdays *could not have been correct, it just would not have been feasible.*

[13] Ms Davies said to Ms Benson that employees were required to work seven days a week, and that the operation needed shifts to work in with other peoples shifts on reception. Ms Benson advised Ms Davies that she had resigned from her other position to take up the position with Monaco. Ms Davies said that she could not guarantee Ms Benson 20 hours let alone 40 hours per week at Monaco. Ms Davies also checked with another employee to confirm that such hours were not feasible and the job Ms Benson described was not available.

[14] Ms Davies told Ms Benson she would speak to the other director of Monaco, Roderick Duke, and would advise Ms Benson about an outcome. Mr Gepp was at this time in Fiji.

[15] Ms Davies went on to clarify the situation about Ms Benson's employment with Ms Walton. Ms Davies did not recall Ms Walton telling her what hours Ms Benson was employed to work but Ms Walton did advise her that Ms Benson had been offered full time work. I accept Ms Benson's evidence that Ms Davies telephoned her and told her Ms Walton was confirming what Ms Benson had said about her employment. Ms Benson felt reassured by this confirmation even though Ms Davies told her that such a position was not available at Monaco.

[16] Ms Benson had two meetings with Mr Duke and Ms Davies on 31 July and 1 August 2004. Ms Benson's partner, Stewart Lawson, attended with her to try to resolve matters.

[17] Ms Davies put an offer to Ms Benson at one of those meetings of work on two days, two nights and weekends. This was not acceptable to Ms Benson and she wrote to Monaco on 3 August and said:

Dear Sir/Madam

RE: Employment position, Carmon Benson

When I accepted the offer of employment on the 20th of July the terms of employment agreed upon was Monday to Friday, 6am to 4pm with an occasional weekend at an hourly rate of \$15. I accepted these conditions.

Subsequently when I was called in to meet the incoming manager on the 29th of July the original offer of employment was withdrawn and an alternative offer was made working 2 days, 2 nights and regular weekends was made on the 31st of July.

This new offer is unacceptable due to my family commitments so I must decline the alternative employment.

[18] The issues in this case are:

Was Ms Benson, within the meaning of sections 5 and 6 of the Employment Relations Act 2000, an employee, *a person intending to work*?

Was Ms Benson offered and did she accept employment at Monaco on 20 July 2004? This requires consideration as to whether there was sufficient basis to conclude with certainty what the job was or whether there was to be further negotiations?

Was the job offered to Ms Benson by Ms Davies in late July 2004 the same job?

Was Ms Benson entitled to not accept the job and treat the employment agreement as at an end?

If Ms Benson was unjustifiably dismissed then what remedies is she entitled to?

Was Ms Benson a person intending to work at Monaco?

[19] I heard evidence about preliminary discussions between Ms Benson and Ms Walton and another person prior to 20 July about the nature of the position at Monaco. I intend to focus on what was said by Ms Benson, Mr Gepp and Ms Walton on 20 July 2004.

[20] Mr Downing submitted that there was no formal offer and acceptance of employment because pending further negotiations, the parties had not fully agreed on the terms of employment. The issue is whether a sufficiently precise or certain agreement is discernable from the meeting on 20 July 2004. There is no dispute that the position at Monaco for Ms Benson was to be full time, based in reception with a pay rate of \$15.00 per hour.

[21] The following evidence supports that Ms Benson was offered and accepted a job at Monaco after a discussion on 20 July 2004.

- Mr Gepp did not dispute that he was able to offer a position in reception to Ms Benson but that *he passed on to Jenny [Walton] the responsibility to set the terms and conditions.*

- Mr Gepp could not recall specifically what the hours were but he did remember a ten hour day being talked about and commenting about that in front of Ms Benson to his wife Marla who was also present for some time on 20 July 2004.
- Mr Gepp recalled asking Ms Benson what her notice period was and when she replied two weeks said as a joke *work one week and take the second week sick and come to us.*
- Letter undated from Ms Walton attached to the respondent's statement in reply confirms *Carmen was offered full time employment, start date 2nd August 2004 at 9am. Mike told Carmen a pay rate, that when she spoke with me at reception. Carmen was very excited about and pleased to be coming part of our team.*
- Letter dated 28 October 2004 from Ms Davies provided *Mike did offer a position of employment to Carmen Benson and she was offered \$15.00 per hour, all other details such as work and responsibilities were to be discussed with our Duty Manager at the time Jenny Gordon.*

[22] Mr Downing submits that after 20 July 2004 there were still further negotiations to be undertaken about hours and days of work in terms of a roster. He submitted that this problem falls into the class of cases where the parties still have unsettled terms between them subject to further negotiation which unless agreed upon meant that there was no binding agreement.

[23] I am not of the view that the evidence supports the parties in this case expressly or impliedly reserved for later agreement the question of the days and hours of work that Ms Benson was to work.

[24] Mr Gepp had little recollection of the discussion on 20 July 2004. Mr Gepp simply could not recall any discussion about hours saying that he left that to Ms Walton. Ms Walton's undated letter attached to the statement in reply though suggests that he was present for at least some of the discussion in that it provides; *In conclusion after this informal interview, Mike, Carmen and I discussed the position hours, being mainly days, of full time employment.*

[25] Ms Walton said that she would have mentioned to Ms Benson on 20 July 2004 that she would *primarily be working weekdays and primarily doing early starts at 6pm.* Ms Walton also said that there would have been mention of some weekend work but confirmed *not every weekend.*

[26] Ms Walton was adamant that she had not said Ms Benson would have a finish time of 4 pm each day and it would more likely have been 2 pm. She felt that she had made it quite clear to Ms Benson that she was required to be flexible. In terms of the finish times I have placed weight on Mr Gepp's evidence that he recalled there was some discussion about ten hour days. That evidence is consistent with Ms Benson's evidence that the hours worked each day were to be between 6am and 4pm. It is consistent with how she described the position to her partner Mr Lawson and how they intended to make arrangements for childcare. I prefer Ms Benson's evidence and Mr Gepp's evidence that ten hour days were discussed.

[27] I find on the basis of the discussion on 20 July 2004 it was agreed that Ms Benson would primarily work on days from Monday to Friday between the hours of 6am and 4pm. There would be some occasional weekend work. The job was full time and was to commence on 2 August 2004. Ms Walton described full time as between 37 and 40 hours per week. That was a minimum and Ms Benson may have worked more than 40 hours per week on occasion.

[28] In conclusion therefore I find that Ms Benson was offered a position at Monaco which she accepted. The terms of agreement between the parties were sufficiently certain with respect to days and hours of work. They were not subject to further negotiation and agreement. Even if there were rosters Ms Benson would primarily be rostered on for weekdays between the hours of 6am and

4pm. Ms Benson could also be required to work occasional weekend duties. Ms Benson was a person intending to work at Monaco within the definition in the Employment Relations Act 2000.

Was the job offered to Ms Benson by Ms Davies in late July 2004 the same job?

[29] The answer to this question in my view is quite clear. The job offered to Ms Benson by Ms Davies in late July 2004 was not primarily days with occasional weekends. It was a mixture of two days, two evenings and weekends. The job offered was not the same job Ms Benson was offered and accepted on 20 July 2004.

Was Ms Benson entitled to not accept the job?

[30] The job offered by Ms Davies to Ms Benson was a significant variation from the original agreement. Ms Benson was entitled to treat the employment agreement at an end on the basis that Monaco no longer intended to be bound by the essential terms of the original agreement with respect to her employment and the days and hours of work. In light of the knowledge Ms Davies and Mr Duke had about the importance to Ms Benson of the hours and days that had been agreed to it would have been reasonably foreseeable that she would have treated the employment agreement as repudiated. Monaco did not attempt to justify the variation because they took the position that there was no concluded employment agreement and Ms Benson should have been more flexible.

[31] I find that Ms Benson was unjustifiably constructively dismissed from her employment by Monaco. Ms Benson has a personal grievance and is entitled to remedies.

Remedies

Contribution

[32] I do not agree with Mr Downing's submissions that I should reduce any remedies by 80%. I do not find that Ms Benson's actions contributed toward the situation that gave rise to the grievance I have found in any way whatsoever. Ms Benson was offered and accepted a position at Monaco with agreement as to days and hours to be worked. I have not found, as submitted by Mr Downing, a misunderstanding as to hours of work but rather that Monaco did not intend to be bound by that original agreement.

Lost Wages

[33] It took Ms Benson from 2 August 2004 until January 2005 until she found full time employment in Nelson. The positions Ms Benson applied for over this period were office based and were not in the hospitality industry. I take into account that Ms Benson wanted child friendly hours but balance that with Ms Benson's experience in hospitality. She has worked in a number of lodges and restaurants and has a diploma in Tourism Management. Ms Benson had a duty to mitigate her loss. I am satisfied that Ms Benson applied for a number of office based jobs but I am not of the view that the consequences of her decision not to apply for any positions in hospitality should be visited on the respondent by an award for reimbursement of lost remuneration beyond three months ordinary time remuneration.

[34] Ms Benson is entitled to reimbursement of three months loss of wages calculated on the basis of a 40 hour week. That is \$15.00 per hour x 40 hours = \$600.00 x 13 weeks = \$7800.00. Ms Benson received income between 2 August 2004 and 2 November 2004 in the sum of \$552.00 which must be deducted from \$7800.00 leaving a balance of \$7248.00.

[35] I order Monaco Village Management Limited to pay to Carmon Benson the sum of \$7248.00 gross being 3 months reimbursement of lost wages under section 123 (1) (b) of the Employment Relations Act 2000.

Compensation

[36] Ms Benson gave considerable evidence of the emotional stress she felt when she was told by Ms Davies that the position she had agreed on with Monaco did not exist. Ms Benson had on the basis of the agreement reached with Mr Gepp and Ms Walton on 20 July 2004 resigned from her current position. She was very excited about the new job with Monaco. Although Ms Davies, who was in an unenviable position having recently commenced employment at Monaco herself, and Mr Duke did make some attempt to try to resolve the matter Ms Benson said that she felt like a fool and an idiot and was humiliated because no-one knew what was going on. Ms Benson was unemployed for a considerable time and she started to doubt her ability. In all the circumstances I am satisfied that the claim for compensation of \$5000.00 is a fair and reasonable claim.

[37] I order Monaco Village Management Limited to pay to Carmon Benson the sum of \$5000.00 without deduction being compensation for humiliation, loss of dignity and injury to feelings under section 123 (c) (i) of the Employment Relations Act 2000.

Costs

[38] I reserve the issue of costs. I encourage the parties to attempt to reach agreement failing which Mr Climo on behalf of the applicant is to provide a written memorandum to the Authority by 20 January 2006. Mr Downing on behalf of the respondent is to have a further 14 days from that date to provide a written memorandum to the Authority.

Helen Doyle
Member of Employment Relations Authority