

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 91
5329154

BETWEEN APRIL CURETON-GRIFFITHS
 Applicant

A N D MARK BOUVET
 Respondent

Member of Authority: James Crichton

Representatives: Martin Round, Advocate for Applicant
 Respondent in person

Investigation Meeting: 19 May 2011 at Christchurch

Date of Determination: 22 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Cureton-Griffiths) alleges that she was unjustifiably dismissed from her employment and that contention is resisted by the respondent (Mr Bouvet).

[2] Ms Cureton-Griffiths commenced employment with Mr Bouvet around 25 August 2010 and the relationship came to an end on 27 October 2010. Mr Bouvet described the role as *front of house staff*. The employment was at the Sign of the Takehe in Christchurch's port hills, a well known hospitality venue in the city. There was no written employment agreement.

[3] It is common ground that at the commencement of the employment relationship, Ms Cureton-Griffiths sought a commitment from Mr Bouvet that he could employ her for 30 hours a week. This was important to Ms Cureton-Griffiths because the effects of the Working for Families tax credit system was to provide her and her partner with tax benefits provided she worked 30 hours a week.

[4] Mr Bouvet's evidence (which I accept) was that he would *do his absolute best to facilitate her request for hours*, but he denies absolutely the claim that he guaranteed that 30 hours work per week would be provided. In his evidence before the Authority, he particularly resisted the claim that the employment agreement was predicated on the 30 hours work being, as it were, an *essential term* of the employment.

[5] Despite Ms Cureton-Griffiths' protestations on this point, I prefer Mr Bouvet's evidence. It seems to me most unlikely that a hospitality provider, with the vicissitudes of that trade and the fluctuations in demand for services, would commit absolutely to providing a particular span of hours to a particular employee.

[6] I prefer Mr Bouvet's evidence that he undertook to do his best to provide the 30 hours a week requested, but that there was never an absolute commitment to provide those hours. It seems to me inherently unlikely that a business owner would commit to providing an absolute undertaking to furnish a particular number of hours to a single employee, particularly when the employment relationship had just started. The whole point about the hospitality industry is that the demands fluctuate almost on a daily basis and I think it unlikely that the commitment Ms Cureton-Griffiths relies upon was ever made. No doubt she heard Mr Bouvet undertake to do his best, but she understood that commitment to be more absolute than it actually was.

[7] A further reason that I conclude that Mr Bouvet did not give an absolute undertaking was that it was not him that actually compiled the rosters. No doubt he could have given instructions to staff who reported to him but, given the evidence before the Authority, Mr Bouvet appeared to have an understanding of how the roster was created but also appeared to have very limited actual contact with the rostering process which was handled by one of his subordinates. I think it unlikely that Mr Bouvet would have made a hard and fast commitment in a recruitment interview where he was not personally involved in the roster.

[8] At the initial interview, Ms Cureton-Griffiths also had made another major stipulation. She wanted her span of hours to be broken into as few days as possible because she lived remotely. In the result, Mr Bouvet agreed to endeavour to employ Ms Cureton-Griffiths for the 30 hours a week but over three days such that she would work three days each of 10 hours. Again, Mr Bouvet's evidence is that he said he would do his best to facilitate that request, but again I am satisfied that Mr Bouvet did

not commit to that arrangement by way of an absolute undertaking. What he did say in his evidence was that he understood Ms Cureton-Griffiths' reasoning for wanting to work in that way and that he would do his best to accommodate it.

[9] Ms Cureton-Griffiths was employed over the Labour weekend of 2010. She worked Friday, 22 October 2010, Saturday, 23 October 2010 and Sunday, 24 October 2010 on the roster arrangement prepared by one of Mr Bouvet's staff. During that weekend, she was asked if she could also work the Monday, 25 October 2010 and she agreed. She says that Mr Bouvet himself then asked her to work two hours on the Tuesday being 26 October 2010 and she refused. Then, on 27 October 2010, Ms Cureton-Griffiths received an email from Mr Bouvet in which he brought the relationship to an end. It is appropriate to set out the terms of that email in full:

Hi April,

I have had a look at roster requirements and available hours and due to the restrictions on the types and number of shifts you are able to work I am unable to offer you the minimum of 30 hours you say you need to obtain your benefit.

I am also unable to manipulate the financial records I keep in the way you have asked me to.

I have now taken on a part time staff member who is also able to cover the shifts you were able to work. I appreciate it is difficult to cover required shifts due to your current location however I have to consider the overall staffing requirements of the business.

...

[10] Ms Cureton-Griffiths maintains that the termination of her employment was effected by Mr Bouvet because he was disgruntled about her refusing to work the additional two hours on the Tuesday. Conversely, Mr Bouvet says that the employment relationship came to an end because his business was no longer able to provide Ms Cureton-Griffiths with the hours that she stipulated given the lack of flexibility that she had evidenced.

[11] Ms Cureton-Griffiths claims that she was unjustifiably dismissed, seeks compensation for the income that she lost being the difference between the wages that were paid to her over the period of the employment and the wages that ought to have been paid had she worked a full 30 hours a week as she had demanded, and she also seeks compensation for hurt, humiliation and injury to her feelings as a consequence of the unjustified dismissal and she seeks reimbursement of costs.

Issues

[12] It will be convenient for the Authority to consider the following questions:

- (a) What were the relevant terms of the agreement;
- (b) Was there an unjustified dismissal;
- (c) Are there wages owing to Ms Cureton-Griffiths;
- (d) Did Ms Cureton-Griffiths ask Mr Bouvet to falsify his financial records?

What were the relevant terms of the employment agreement?

[13] I am satisfied that the relevant terms of the employment agreement were that Ms Cureton-Griffiths was employed as a front of hours staff member at the Sign of the Takehe at the rate of \$15 per hour, that her hours of work were determined in advance by participation in a roster arrangement which typically was notified to her a week in advance, as it was with all other staff.

[14] I am also satisfied on the evidence before the Authority, for reasons which I have already set out, that Ms Cureton-Griffiths was not promised 30 hours a week for each and every week, such hours being worked ideally in three 10 hour spans.

[15] As I have already made clear, I think the employer indicated that he would endeavour to meet Ms Cureton-Griffiths' requirements but no more than that. It follows that I do not accept Ms Cureton-Griffiths' submission that it was an essential term of her employment that she was guaranteed 30 hours per week or that she was guaranteed those hours over no more than three days. For reasons I have already enunciated, I am satisfied those were claims that she made when she was employed and Mr Bouvet did no more than indicate that he would do his best to accommodate them.

Was Ms Cureton-Griffiths unjustifiably dismissed?

[16] I am satisfied Ms Cureton-Griffiths was not unjustifiably dismissed. I think the employment agreement came to an end effectively as a consequence of being frustrated because the terms under which she was prepared to be engaged were unable to be met by the employer. It is plain on the evidence that she set rigid terms under

which she was prepared to be engaged and the employer found that he was unable to meet those terms on a continuing basis so the relationship had to come to an end.

[17] That analysis is supported by the first paragraph of the letter bringing the relationship to an end where Mr Bouvet simply states as a fact that he cannot comply with the basis on which Ms Cureton-Griffiths indicated she wished to be employed. I am satisfied that Ms Cureton-Griffiths made absolutely clear what her requirements were at the recruitment stage, Mr Bouvet indicated at that time that he would use his best endeavours to meet her needs, but that in the result he found that he was unable to accommodate the rigidity of her demands with the flexibility of his business.

[18] No doubt it would have been better for both parties if the employment relationship had never commenced, but I am satisfied that the employer's failure to meet the rigid requirements Ms Cureton-Griffiths required and his notification to her of that conclusion is not an unjustified dismissal but rather notification that the terms under which Ms Cureton-Griffiths was prepared to be employed were incapable of being met by the employer on a continuing basis.

Are there wages owing to Ms Cureton-Griffiths?

[19] The only basis on which wages could be owing to Ms Cureton-Griffiths is on the basis that she has been able to satisfy the Authority that the agreement between her and Mr Bouvet was that she would be employed for 30 hours per week for each and every week. As I have already indicated, I do not accept that submission and prefer the evidence of Mr Bouvet that he undertook to try to meet that requirement but not that there was an absolute commitment.

[20] As Ms Cureton-Griffiths claim for allegedly unpaid wages is on the footing that she ought to have been paid for 30 hours a week for each and every week she was employed is not made out, the claim for wage arrears must, of necessity, fail. The associated claim for additional holiday pay based on the alleged short payment of ordinary wages also fails for the same reason.

Did Ms Cureton-Griffiths ask Mr Bouvet to falsify his records?

[21] There is no doubt that Ms Cureton-Griffiths did ask Mr Bouvet to adjust his financial records so as to show that she was employed for 30 hours per week for each

and every week of the employment rather than for the hours that she actually worked. That much was conceded on her behalf.

[22] Mr Bouvet clearly was most reluctant to agree to Ms Cureton-Griffiths' request and he declined to accommodate her request on the basis that it was dishonest. I agree. While I applaud Ms Cureton-Griffiths' representative Dr Round, attempting to put a neutral gloss on the contention by saying that all that Ms Cureton-Griffiths wanted was for Mr Bouvet to *abide by their agreement*, I am satisfied that Ms Cureton-Griffiths was actually inviting Mr Bouvet to adjust his business records to assist her to obtain money from the tax system which, by reason of the hours she was working, she was simply not entitled to.

[23] Mr Bouvet was quite right to reject the request that he adjust his records and entitled to be a little miffed at the request that he do so.

Determination

[24] For reasons which I have already enunciated, Ms Cureton-Griffiths' claim for unjustified dismissal and the associated claims for allegedly unpaid wages all fail.

Costs

[25] Ms Cureton-Griffiths seeks costs but of course costs, in accordance with the usual principle, follow the event. As Ms Cureton-Griffiths has been completely unsuccessful with her claim, she is not entitled to look to Mr Bouvet for costs. Mr Bouvet attended to the matter before the Authority on his own behalf and was completely successful. Although there is reference in the evidence of Mr Bouvet taking legal advice, he saw no necessity to involve his lawyer in representing him and he was able to do a perfectly workmanlike job by himself.

[26] In all the circumstances, costs should lie where they fall.

James Crichton
Member of the Employment Relations Authority