

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 2/10
5141569

BETWEEN BRYAN VINCENT FORREST
 Applicant

AND NELSON BAYS
 COMMUNITY LAW
 SERVICE INCORPORATED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Bryan Forrest, the Applicant in person
 Steven Zindel, Counsel for Respondent

Investigation Meeting: 6 October 2009 at Nelson

Determination: 8 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Bryan Forrest says he was unjustifiably dismissed by Nelson Bays Community Law Service Incorporated (Community Law Centre) on Monday, 29 September 2008. The Community Law Centre says that Mr Forrest was never an employee so he could not have been dismissed.

[2] The essence of the dispute is whether an employment relationship was formed as a result of a discussion between Mr Forrest and the Community Law Centre's manager (Katherine Riddell) on 1 September 2008 in the context of their earlier exchanges about potential employment. There is a conflict in the evidence between Mr Forrest and Ms Riddell that must be resolved in order to determine this issue.

Initial contact

[3] Mr Forrest approached the Community Law Centre in about May 2008 and told the person to whom he first spoke that he was interested in applying for the job of

legal educator that the Community Law Centre was advertising at the time. He also told her that he was interested in assisting as a volunteer even if not offered the vacancy just mentioned. Mr Forrest was familiar with the operation of community law centres because he had been a volunteer at the Hamilton Community Law Centre when a law student. The person spoken to by Mr Forrest is Judith McColl, the Community Law Centre's receptionist. Her evidence, which I accept, is that she told Ms Riddell about Mr Forrest's dual expression of interest.

[4] Mr Forrest was interviewed for the vacancy by Ms Riddell and the Community Law Centre's chairperson. His application was unsuccessful and Ms Riddell rang him to tell him so. During their phone discussion there was mention of a new position which might be available depending on a funding application outcome, at that stage unknown. Mr Forrest's evidence is that Ms Riddell said she would like to employ him as a law worker once that funding came through. That evidence overstates what was communicated. There is a letter dated 30 May 2008 from Ms Riddell to Mr Forrest that says:

... I ask whether I may hold on to your CV. As you will be aware, we have a funding application result due within the next few weeks. We have requested the services of an additional community law worker to join our team. If our funding is granted, I would be very keen to interview you for this position.

[5] Ms Riddell's verbal communication to Mr Forrest about his employment prospects in all probability reflected her written communication and I reject Mr Forrest's evidence to the extent that it is inconsistent with the written communication. Ms Riddell simply expressed interest in considering him for the position if funding was granted.

[6] Approximately two months later, Ms Riddell received an email from Ariana Brown. Ms Brown is a WINZ work broker who was working with Mr Forrest to try and place him in employment. By this time, Ms Riddell thought that additional funding had been approved so the possibility of an additional position remained open, although no decision had been made. Ms Brown told Ms Riddell that there could be a Taskforce Green wage subsidy available to the Community Law Centre to help support the employment of Mr Forrest. Ms Riddell was naturally interested in pursuing that avenue. Ms Brown's approach resulted in a meeting on 20 August 2008 between the two women. The preponderance of evidence is that Mr Forrest was not

present at this meeting. It is not suggested that any offer of employment was conveyed at this meeting.

[7] Afterwards, Ms Brown sent by email some further information showing the level of support that could be available for Mr Forrest depending on the hours of work he might be employed for and details of the subsidy application process. It was clear that the Community Law Centre would have to make a Taskforce Green subsidy application which would need to be approved by WINZ, although approval seemed likely. On Friday, 22 August, Ms Riddell replied saying that she would look through the material and respond to Ms Brown.

[8] The next week, Ms Riddell having not responded further, Ms Brown sent several emails attempting to arrange a meeting between Mr Forrest and Ms Riddell. By Thursday, 28 August there was agreement for a meeting on Monday, 1 September at midday between Mr Forrest and Ms Riddell.

[9] In the meantime, the Community Law Centre had held its regular monthly governance Board meeting on Wednesday, 27 August. In a written report for the Board meeting, Ms Riddell referred to the prospects of employment of Mr Forrest and the minutes of the meeting show that there was the following discussion:

Bryan Forrest may be a suitable part time law worker particularly with Margaret Thomson seeking to reduce her hours by one day. However, his involvement was depending on funding and there was some uncertainty in that regard, with Bryan Fox of the LSA talking of a freezing in the services budget over the next three years. It has to be made clear that any employment was on a fixed term contract and on the basis of subsidies that are able to be obtained from WINZ.

Any hiring of Bryan will be first approved with the Employment Committee, ensuring there is a tailor made employment contract for him, referring to the fixed term nature of his employment.

[10] So, by the end of August, it was clear to Ms Riddell that she was not empowered to simply employ Mr Forrest without further authorisation. I should note that Mr Forrest was not party to the Board discussion or these minutes at the time.

[11] Mr Forrest sent a letter to the Community Law Centre on 1 October 2008 setting out his grievance. The letter says:

June came and went without further progress. However I visited your office on occasion where you encouraged me that you had discussed me with the others involved and that I would definitely be employed

after other changes including relocation of the law service to Hardy Street.

You made similar encouraging submissions to Ariana, which she conveyed to me. These submissions became more certain as the weeks progressed.

After several aborted appointments, we met at the law service's new Hardy Street office some time in the week ending August 31st.

At that appointment, you consulted your wall calendar and we agreed upon September 15th as a commencement date for my employment. You promised to send me a contract during the week ending September 7th.

You further advised me that there would be between 20 and 30 hours per week, with the prospect of more hours as another law worker wished to cut back on her hours.

In response to a question, you advised me that the pay rate would be \$18 per hour.

The promised contract never arrived.

[12] I do not accept that Ms Riddell told Mr Forrest that he *would definitely be employed after other changes*. I do not accept that Ms Riddell made submissions to Ms Brown that *became more certain as the weeks progressed*. I do not accept that there were *several aborted appointments*. I do not accept that Mr Forrest and Ms Riddell met *some time in the week ending August 31st*. Mr Forrest's assertions in his letter are all inconsistent with the documentary evidence of Ms Riddell's communication with him and with Ms Brown. None of these communications have been fabricated and I accept that they portray an accurate picture of events at the time. I prefer that picture to Mr Forrest's assertions set out above and his evidence to the same effect.

The 1 September meeting

[13] Only Mr Forrest and Ms Riddell were present during this meeting and neither of them made any notes at the time. I am left to assess the conflicts between them based on the surrounding context and my assessment of their reliability generally as witnesses. I should make some more comment on the latter point first. Ms Riddell gave strictly accurate answers to poorly formulated questions asked of her by Mr Forrest. Mr Forrest seized on these answers to suggest that Ms Riddell's evidence was untruthful, but the problem was the way he asked these questions. Sometimes Ms Riddell was tendentious, even argumentative in response to Mr Forrest's

questions. That reflects an animosity between them as a result of their dealings over this grievance. Despite that, I found Ms Riddell to be a person who gave considered and generally accurate evidence.

[14] In his evidence, Mr Forrest generally lacked perspective and objectivity and was prone to exaggerate or over-extend. It is clear that he held out high hopes for employment at the Community Law Centre and feels bitterly disappointed as a result of the way things turned out. That is not surprising in the context of his employment history, the details of which do not need to be mentioned here. Overall, I must approach his evidence with much more caution than that of Ms Riddell.

[15] Mr Forrest's evidence that his meeting with Ms Riddell (which we now know was on 1 September) lasted about 45 minutes. His evidence of what happened during the meeting explains less than five minutes of that time. Mr Forrest was unable to tell me what else happened so as to occupy the remainder of the time. Ms Riddell thought that their meeting was a brief one. I prefer her evidence on this point.

[16] It is common ground that Ms Riddell told Mr Forrest that there would be between 20 and 30 hours per week and possibly more as another employee wanted to reduce her hours of work. It is common ground that Ms Riddell said that the rate of pay was \$18 per hour in response to Mr Forrest's question. It is also common ground that Ms Riddell told Mr Forrest that she would send him a contract. There is a note in her electronic diary for Monday, 8 September that reads *Get copy of contract to Bryan Forrest including hours*. This reflects their discussion about the Community Law Centre's standard terms of employment and the hours that might be available for Mr Forrest. I do not accept that it was or was to be an offer of employment.

[17] There is a dispute about whether Ms Riddell physically went over to a wall calendar and checked on dates resulting in agreement between them that Mr Forrest would commence employment on Monday, 15 September. While Ms Riddell accepts that she had a wall chart or calendar on the wall of her office she thinks that she would have used the diary on her computer if she was checking dates. I prefer Mr Forrest's evidence that Ms Riddell consulted the wall chart. What they were discussing was a date for Mr Forrest to commence as a volunteer in advance of progressing the Taskforce Green subsidy application and possible employment. There probably was some discussion about the timing of the forthcoming Board meeting.

[18] I do not accept Mr Forrest's evidence that they discussed and agreed a start date for his employment. It is unlikely that Ms Riddell would have offered Mr Forrest employment when she knew that she was not authorised to do so without further approval from the Board's employment committee. Mr Forrest's evidence is also inconsistent with the evidence of Tui Hammond, the Community Law Centre's Ture Kaiwhakahaere. Mr Hammond told me, and I accept, that when he met Mr Forrest on 10 September for the first time, Mr Forrest told him that he was coming to the Law Centre as a volunteer and hoped to be employed if funding was approved.

After 1 September

[19] The Community Law Centre hosted a national hui for community law centres on 10-12 September 2009. Mr Forrest attended as part of the Community Law Centre's delegation. Mr Forrest says that Ms Riddell told those at the hui that he would be *starting on Monday* but later told him that she had not completed the necessary procedures to formalise his employment although he should still report on Monday, 15 September even though she would not be present. What was said by Ms Riddell was consistent with Mr Forrest starting on Monday, 15 September as a volunteer who might, in due course, become an employee. It is therefore not necessary to canvass the disputes about exactly what happened during the hui.

[20] Mr Forrest attended at the Community Law Centre on 15-17 and 22-24 September. Not all of Mr Forrest's evidence about what happened on these days is accepted by the Centre and Mr Forrest rejects the Centre's evidence where criticism is made of his conduct on these days. It is not necessary to canvass the disputed evidence. Mr Forrest does not allege that he was offered and accepted employment as a result of his attendance at the Centre on these days. Even if I accepted Mr Forrest's account of events, it is consistent with his status at the time as a volunteer who might become an employee in due course.

[21] There was a Board meeting on Wednesday, 24 September. Ms Riddell prepared a report in advance which included a recommendation to employ Mr Forrest for a fixed term based on the Taskforce Green subsidy duration. However, on the day of the meeting it became apparent to Ms Riddell that there was less funding available for the Centre than she had previously thought. The miscalculation was discussed at the meeting. As a result, the Board did not accept Ms Riddell's recommendation to employ Mr Forrest at that time. Instead, the Board resolved that the decision would

be made about employing Mr Forrest after a further meeting to discuss the Centre's budget.

[22] On 26 September, Ms Riddell sent an email to Ms Brown advising her about this development. The email refers to 29 September as the date by which an offer of employment was to have been made to Mr Forrest.

[23] On the morning of 29 September Ms Riddell spoke to Mr Forrest about the financial development and its impact on his potential employment. She told him that they would not be able to offer him a position at that time because of the miscalculation about the Centre's financial position, but that she hoped still to be able to offer him a position in the future. Mr Forrest complained of stomach pains and then collapsed. An ambulance was called and Mr Forrest was taken to the hospital where Ms Riddell later visited him.

[24] Before Mr Forrest collapsed and left the Centre, he told Ms Riddell that he only had \$3 in his bank account and could not afford the cost of travel to and from the Centre which he had incurred over the previous several weeks. Ms Riddell offered to make a payment to him. Mr Forrest filled in a timesheet recording six hours daily on 15-17 and 22-25 September. Mr Forrest had not attended the Centre on 25 September but Ms Riddell said that a payment would be made for his attendance on 29 September. It was administratively easier to record the total payment within a single pay period. Mr Forrest recorded a total of 36 hours. He was paid for this time through the Centre's payroll system and received a payslip. There is evidence that other volunteers receive payments in this way so it does not assist with resolving Mr Forrest's claim about an offer and acceptance of employment on 1 September 2008.

[25] There is another email between Ms Riddell and Ms Brown that should be mentioned. On 4 September Ms Brown sent an email to Ms Riddell which made it clear that Mr Forrest had told Ms Brown that agreement had been reached over a start date. In doing that, Mr Forrest took too much from the exchange on 1 September with Ms Riddell. All that had been agreed was a date for Mr Forrest to commence as a volunteer pending the application for a Taskforce Green subsidy and an offer of employment conditional on that subsidy. Ms Riddell did not respond to that email to correct Ms Brown's misinformation because she was busy attending to the organisation of the hui.

Conclusion

[26] I confirm the earlier finding that Ms Riddell did not offer to employ Mr Forrest during their meeting on 1 September 2008.

[27] As there was no employment agreement concluded the Community Law Centre did not dismiss Mr Forrest.

[28] Costs are reserved. Any application should be made within 28 days by lodging a memorandum with the Authority and serving it on Mr Forrest who may lodge a memorandum in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority