

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Huia Wikaere (Applicant)
AND Barnardos New Zealand Charitable Trust (Respondent)
REPRESENTATIVES No Appearance by the Applicant
Bridget Fleming for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 26 April 2005
DATE OF DETERMINATION 26 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Huia Wikaere claims that Barnardos agreed to pay her \$27 per hour, in addition to her hourly rate of pay of \$16 per hour, for sleep over nights.

[2] Barnardos accepts that an offer was made to Ms. Wikaere in writing dated 12 July 002 that referred to the sleepover rate being \$27 per hour. However it says this was a mistake.

[3] It says that the applicant and others were offered employment with the respondent and at first the terms were explained verbally to the applicant and others by Donna Kelly the then manager, including that they would be paid an allowance of \$27 per night for a sleepover allowance. Secondly it was put in writing and the applicant signed her confirmation of the terms, but subsequently it was discovered, and pointed out to all the workers, by their supervisor Natasha Etienne and Donna Kelly, on their first day before any overnight work was undertaken, that there had been a mistake. Barnardos say the applicant and others accepted that an error had been made.

[4] No other action was taken by either party to address their positions before overnight stays commenced from 13 October 2002. The parties then got into a dispute about the payment.

Was there a mistake?

- [5] For completeness, I accept that there was a mistake for the following reasons:
- The applicant has not appeared at the Authority's investigation. No good cause has been given for her not appearing.
 - The applicant has not arranged for any of the other workers employed at the same time to corroborate her version or contradict the respondent that a verbal offer of \$27 over night allowance was made and explained prior to the written agreement being provided and that when they were told there was a mistake that they accepted it.
 - The existence of a \$27 per hour overnight allowance is inconsistent with the respondent's evidence that the intention was to pay \$27 a night for sleepovers. The respondent is supported by such payments not having been made.
 - Barnardos did not correct the situation in writing at the earliest opportunity. The first time it was corrected by Barnardos in writing was on 22 October 2002. Nothing turns on this since the applicant also waited until later to raise it as an issue.
 - The mistake was found out and announced before any sleepovers commenced.
 - Donna Kelly provided an affidavit stating that she had offered and explained the terms of the positions including \$27 for the overnight stay. The Applicant did not appear at the investigation meeting to contradict that evidence.
 - The written employment agreement, including the reference to \$27 per hour, was written by the Group Manager Specialist Services who does not appear to have been directly involved in the interviews and explanations on the terms and verbal acceptance of the employment terms.
 - The mistake was taken up with the appointees by Treena Haylock, Barnardos Human Resources Advisor, and the person in the position of Group Manager Special Services.
 - Natatasha Etienne, Senior Social Worker deposed that she and Donna Kelly discussed the mistake with all staff where they all agreed on what was meant.
 - It is probable that if the applicant brought the written terms of the overnight allowance to the attention of the respondent it was because it was substantially different to what she had been told in her interview and when the terms were verbally explained.

I conclude that there was a mistake

[6] I am satisfied that the mistake was genuine, and that the respondent's position on it, was put in reasonable time to the applicant for her to understand the situation. On balance it is more than likely that an offer was originally made before the terms were written and subsequently the mistake was accepted.

Conclusion

[7] The applicant's claim is dismissed.

Costs

[8] The applicant had the benefit of her representative's involvement in filing her problem and being involved in the Authority's organisation of its investigation meeting. I obtained an undertaking from the applicant's representative at a telephone conference that he would ensure that the respondent's statement in reply, including the affidavits, would be discussed with the applicant who had not seen it.

[9] At the time of another telephone conference on the information before me I offered a risk assessment to the representatives that involved the above considerations and the risk to the applicant in proceeding. Subsequently the Authority was advised by the applicant's representative of his withdrawal from the problem and that the applicant was seeking further advice. I indicated that it was my intention to proceed with the investigation meeting that was on notice. There has been no notice of a change in representation.

[10] The situation was conveyed to Ms. Wikaere on 12 April (fax: copy provided to the Authority) by her representative and she was informed that her not attending could involve her incurring substantial costs. Mr. Nutsford also advised the applicant he was withdrawing and a copy of his fax was forwarded to the Authority and the respondent, with contact details for her.

[11] On 13 April the respondent informed the applicant's representative that the applicant had until 5.00pm on 14 April but that after that it would have no option but to proceed in preparing and

making arrangements for the Authority's investigation. The applicant may not have been provided with this information and I have no details of any attempt by the respondent to contact her.

[12] The respondent has reasonably taken action to be prepared in the event of today's investigation meeting taking place. It arranged for the attendance of witnesses for the Authority to interview, including a written statement from Treena Haylock, now residing in Australia, to avoid the cost of her having to attend today's investigation meeting.

[13] The matter has been relatively straightforward and the investigation proceeded on the statement of problem and statement of reply and documents provided therein. Costs usually follow the event and I do not intend to depart from this. I am not inclined to award full solicitor client costs because the applicant may not have known about the offer she could consider to avoid the costs of today's investigation meeting. It would also be tantamount to punishing the applicant. A failure not to turn up is unusual but not necessarily exceptional. I am satisfied that the applicant has been informed of the risk of the Authority proceeding by her representative before he withdrew from the proceedings. I am also satisfied the applicant knew of today's investigation meeting since she was contacted by the Authority's support staff when she did not appear and she has had notice of the investigation meeting. Therefore the respondent is entitled to a contribution of reasonable costs incurred. It has been put to the expense of today's investigation. There has been some saving to the length of the investigation meeting because the applicant did not turn up. The Respondent has tried to minimise its costs by the full statement in reply provided, including the affidavits and relevant documents and providing a written statement from Treena Haylock in the event that the proceedings took place and avoiding the expense of her travelling.

[14] The respondent has submitted that its costs have been \$4,900 (including travel and the preparation of Ms. Haylock's written statement). Reasonable costs for preparation and the investigation meeting would be \$3,234 being 66% of the total costs. Donna Kelly travelled from Auckland, and if the applicant had turned up, she would have been an important witness and needed to be present. Therefore it was reasonable for arrangements to be made for her to be present. Especially since the applicant gave no notice that she would not be attending the investigation meeting.

[15] Huia Wikaere is ordered to pay Barnardos New Zealand Charitable Trust the sum of \$3,234 contribution to reasonable costs and \$480 travel costs in disbursements.

P R Stapp
Member of the Authority