

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 51/09
5144930

BETWEEN ANNA WILDING
Applicant

AND JIM and MAXINE MARRON
t/a AKAROA CINEMA (J M
GLOBAL ENTERTAINMENT
LIMITED)
Respondent

Member of Authority: James Crichton

Representatives: Anna Wilding in person
Hans van Schreven and Joshua Boyce, for Respondent

Investigation Meeting: 12 February 2008 and 19 March 2009 at Christchurch

Determination: 3 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Wilding) alleges that she was offered and accepted employment by the respondents (Mr and Mrs Marron) working in the latter's cinema at Akaroa. Ms Wilding further alleges that, in contravention of their obligations to her, Mr and Mrs Marron subsequently notified her that she would not be required, thereby unjustifiably dismissing her.

[2] Mr and Mrs Marron deny that they ever offered Ms Wilding a position and therefore deny that Ms Wilding was ever unjustifiably dismissed.

[3] Ms Wilding had lived offshore for a number of years. Towards the end of calendar 2008, she travelled back to New Zealand by ship and while on board ship, she met Vernon Shadbolt who was a resident of the Akaroa area and who told Ms Wilding about the Akaroa Cinema and the possibility of employment there.

[4] When Ms Wilding eventually got to Christchurch, she made contact with the operators of the Akaroa Cinema by telephone. There is dispute between the parties about how this contact was effected. Ms Wilding says that she spoke by telephone to Mrs Marron and was invited to attend at the cinema for an interview; Mr Marron says that he spoke with Ms Wilding on three occasions.

[5] Nothing turns on which of those versions of events is correct. The short point is that, as a consequence of the telephone contact, however arranged, there was a meeting at the Akaroa Cinema between Ms Wilding and Mrs Marron.

[6] Mr Marron was supposed to be present at the meeting as well but, at the last minute, there was a realisation that a cake had been left in the Marrons' oven at home and Mr Marron went back home to attend to the cake. By the time he returned to the cinema, Ms Wilding and Mrs Marron had effectively concluded their discussion.

[7] The essence of the dispute between the parties is what happened in the discussion between Ms Wilding and Mrs Marron. Ms Wilding says that during the discussion at the cinema, she was offered employment on settled terms and conditions for a particular span of hours and that she accepted those arrangements as offered.

[8] Mrs Marron, on the other hand, denies that any such arrangement was made and indicates that all that was discussed was the possibility of Ms Wilding working and that there was never an agreement on terms and conditions, never an offer of employment made, and therefore no acceptance of an offer either.

[9] After that initial meeting, the date of which is disputed but which Mr and Mrs Marron think was on 18 November and Ms Wilding thinks was on 16 November, Ms Wilding says that she went home to discuss possible accommodation arrangements with her family (her mother owned a bach property in Akaroa), and then Ms Wilding says that she had a telephone discussion with Mrs Marron but the latter does not recall that phone conversation at all.

[10] Ms Wilding calls in aid a statement put in from her mother, Mrs Judy Wilding, whose evidence is that she overheard her daughter speaking with Mrs Marron on two occasions. Mrs Wilding's evidence is that the purpose of those calls was to deal with *the precise dates* that her daughter was to work and that, after those conversations, *the only question remained* whether the Marrons would open the cinema *prior to December 19 or not* but that Ms Wilding *was confirmed*.

[11] Mrs Wilding then talks about her daughter and her working through the process of determining whether the whole proposal made sense or not, particularly in terms of having Ms Wilding living in the family bach while she was working at the cinema.

[12] After these telephone discussions (which Mrs Marron does not remember) but which both Ms Wilding and her mother recall, there is then an exchange of emails between the Marrons and Ms Wilding. On 20 November 2008, Mrs Marron sent to Ms Wilding an email in the following terms: *So excited that you are coming to join us at the cinema. Will draw up a roster of work hours soon. Maxine* (Mrs Marron).

[13] Not surprisingly, Ms Wilding sees that email in particular as evidence for her contention that there was an engagement of her by the Marrons for the Akaroa Cinema. Indeed, it is difficult to see what that email might mean unless it is available to postulate that the parties had reached an understanding about employment matters and that there was to be an employment relationship.

[14] On 26 November 2008, in the context of a general message wishing the Marrons well, Ms Wilding asks for clarification of which of the three December days she is required to work (19, 20 and 21 December), confirms that she could do all three days if required, and indicates that the holiday house (her mother's property) is available for her accommodation.

[15] Again, this suggests a settled agreement about an employment rather than a continuing negotiation. The only matter that appears uncertain is the question of which days in December Ms Wilding is required to work, and it is clear from the evidence of both parties that that aspect was never resolved.

[16] The following day, Mrs Marron responds to Ms Wilding with the intelligence that they have been approached by a person who was interested in running the cinema *for the whole year*. That email then goes on to observe: *... but this* [the approach from the other person] *does change our situation on having you work a few days a week*. Again, the intimation from this email is that there was a settled intention for Ms Wilding to work *a few days a week*, precisely as Ms Wilding claims.

[17] Within an hour of receipt of that email, Ms Wilding responded to Mrs Marron saying that she was *flabbergasted*, confirming her view that she had been *given the*

job, and that she required compensation for lost wages having now been denied that opportunity.

[18] No positive response to that request was received by Ms Wilding and she subsequently lodged a personal grievance claim and progressed it through the usual channels.

Issues

[19] The focus of the Authority's investigation can only be on the initial meeting between Mrs Marron and Ms Wilding. However, the surrounding circumstances to some extent assist in determining issues where there are differences between the parties.

[20] Accordingly, it will assist in a resolution of the employment relationship problem if the Authority considers the following issues:

- (a) The meeting between Mrs Marron and Ms Wilding; and
- (b) Relevant surrounding circumstances.

The meeting between Mrs Marron and Ms Wilding

[21] I have already broadly described the genesis of this meeting and it is appropriate now to consider the detail available about just what was discussed.

[22] It is clear that the meeting took place at the Akaroa Cinema and, for all practical purposes, the only persons present were Ms Wilding on the one hand and Mrs Marron on the other. Mr Marron, who was supposed to be present, was rescuing a cake from the oven at the relevant time. The meeting took place in November 2008. By all accounts, the date of the meeting itself is uncertain, although Ms Wilding thinks that it was on 16 November while Mr and Mrs Marron think the meeting was on 18 November. Nothing turns on which date is correct; however, it can be said that either fits in with the dates from the subsequent email traffic. In particular, there is Mrs Marron's email of 20 November in which she records that she is *so excited* about Ms Wilding coming to join the cinema. Then, on 27 November 2008, comes the email in which Mrs Marron indicates to Ms Wilding that the arrangements that Ms Wilding thought were in place for her employment, were disturbed by the

involvement of a third party. Ms Wilding's emails in response then follow on from that.

[23] If, as Ms Wilding claims, the initial meeting was on or about 16 November 2008, that date is consistent with the known dates thereafter. Four days after the likely meeting date, Mrs Marron sends an email saying, in effect, that she is looking forward to working with Ms Wilding, but then seven days after that, Mrs Marron is emailing again to say that somebody else is now involved and has disturbed the arrangement between her and Ms Wilding. Also within that timeframe, and at some point between the meeting date (potentially 16 November 2008) and 27 November 2008, there appear to be two telephone discussions between Mrs Marron and Ms Wilding about the employment.

[24] On balance then I am inclined to accept Ms Wilding's view that the critical meeting took place on or about 16 November 2008. I prefer that date to the alternative dated offered by Mr and Mrs Marron because we know for certain what happened soon after the meeting date and the earlier date gives more time for those events to play out. Ms Wilding said that she came away from this meeting with a job which had been offered to her on terms and conditions that she was happy with and which she accepted on the spot. Certainly she told her mother that that was the position, that is that she had been offered and had accepted employment. The only possible explanations for Ms Wilding reaching the conclusion that she had been offered employment which she had accepted are, in truth, that is precisely what happened or, in the alternative, that she was somehow confused about what she heard and perhaps took more out of the conversation than was ever intended. That latter view, of course, is the view advanced by Mr and Mrs Marron.

[25] The essence of Mr Marron's evidence is that it was his decision as to whether an individual was hired or not. He represented that he was the governing director of the employer and so all the decisions were his. It follows that if Mrs Marron had inadvertently committed herself to observations which were taken to be an offer of employment, then she was in effect exceeding her authority because she had no ability to bind the employer.

[26] That is not an attractive argument; Ms Wilding would have had no way of knowing whether Mrs Marron was or was not capable of offering her employment and, as Ms Wilding correctly observed, in her previous dealings with Akaroa Cinema

in relation to Ms Wilding's own film, she had had correspondence about the decision of Akaroa Cinema not to screen her film, not from Mr Marron but from Mrs Marron. It follows that I am satisfied that Ms Wilding is entitled to regard Mrs Marron as being able to bind the employer, and in particular to offer employment, assuming that is what happened.

[27] Mrs Marron, for her part, acknowledges there was a general discussion about the prospects of employment but denies that there was ever any confirmed offer made which was capable of being accepted by Ms Wilding. In particular, Mrs Marron points out that all she ever talked about was the possibility of Ms Wilding *filling in* on 19, 20 and 21 December and that *even for those three days it was still uncertain*. Mrs Marron says that the conversation which developed disclosed that Ms Wilding would never work weekends but she seems to accept that if those three days worked out (or some of them), *then further work might develop*.

[28] Mrs Marron is adamant that she did not show Ms Wilding the cinema's kitchen nor the computerised till arrangement and how to work it. However, Mrs Marron says that Ms Wilding would have seen the cinema rooms themselves and agrees that she told Ms Wilding about the food products which the cinema sold as part of its service.

[29] Finally, Mrs Marron acknowledged that she would have referred to an hourly rate of \$15 because that was the rate that all of the cinema staff were paid.

[30] For her part, Ms Wilding claimed that Mrs Marron was keen for her to do the job. Indeed, Ms Wilding attributes the following remark to Mrs Marron: *I really want you to do this job*. Mrs Marron allegedly said that Ms Wilding could work the days and hours that she wanted and that she would be paid \$15 an hour because she was *special*.

[31] Ms Wilding says that she was shown around the cinema, told about the making of basic food dishes and perhaps a cake from time to time, told about the sale of liquor at the cinema and how to operate the till.

[32] Ms Wilding said that Mrs Marron told her they were not going to interview anyone else and that the cinema would open on either 17 or 19 December 2008.

[33] Ms Wilding's clear evidence is that she left that meeting with Mrs Marron believing that she had a position working at the Akaroa Cinema for \$15 per hour on days of the week yet to be agreed.

The surrounding circumstances

[34] On the face of it, it is quite difficult to reconcile the views of the two protagonists at the meeting on or about 16 November 2008. However, the surrounding circumstances do, to some extent, assist in identifying what might have happened.

[35] First, in terms of time anyway, once Ms Wilding concluded that meeting, she immediately told her mother that she had a job. That, of course, does not prove conclusively that she had a job; only that she believed she had one. Her mother was not present at the meeting in question and therefore cannot offer any independent testimony of what happened at the meeting.

[36] However, her mother can offer independent testimony about what she overheard her daughter discussing with Mrs Marron on the telephone on two occasions after the meeting. This evidence comes in the form of a signed dated statement from Mrs Wilding. Before concluding this matter, I gave Mr and Mrs Marron the chance to insist I interview Mrs Wilding with their counsel present; Mrs Wilding had indicated her willingness to be interviewed. My provisional view was that such an interview was unnecessary, a view I formed because of Mrs Wilding's age and the implausibility of her deliberately fabricating evidence. In the result Mr and Mrs Marron did not require Mrs Wilding to be interviewed.

[37] Mrs Wilding's evidence is that her daughter discussed with Mrs Marron *the precise dates* for Ms Wilding to work and Mrs Wilding makes clear that these conversations took place before her daughter received Mrs Marron's email of 20 November 2008 in which the latter expressed enthusiasm that Ms Wilding was coming to join the cinema.

[38] Mrs Wilding's evidence then is consistent with her daughter's position that she was offered employment on terms and conditions which she accepted but that there was still discussion about the actual days to be worked and that that discussion took place subsequently in the two telephone calls about which Mrs Wilding gave evidence.

[39] It is clear from Mr and Mrs Marron that their phone records show they did not initiate either of those calls, nor do they recall ever receiving a call or calls from Ms Wilding during that period. It follows that the only possible explanations are that Ms Wilding was literally talking to herself and her mother heard that or that Mr and Mrs Marron are mistaken. Given the subsequent email traffic between Mrs Marron and Ms Wilding, I prefer the latter explanation.

[40] Next, it is useful to look at the arrangements that were made by Ms Wilding in respect of accommodation. This was done specifically to meet her obligations (as she understood them) to Akaroa Cinema on the one hand and her family's needs to maximise the income from the bach at Akaroa on the other. Again, Mrs Wilding's statement is highly relevant. She says that she spoke to her letting agent and instructed it to keep Monday to Thursday nights free starting on 5 January until the end of February together with the period around 18, 19 and 20 December which was the potential start time for the cinema's new season. A cleaner was arranged to clean the property on each Friday morning after Ms Wilding had vacated. These arrangements are extraordinarily thorough if there was no certain employment relationship. Indeed, it seems inconceivable that anybody would go to the trouble of making such detailed arrangements about accommodation if there was no settled understanding about the employment. The evidence of those particular accommodation arrangements is confirmed by the letting agent.

[41] Finally I consider the email of 20 November 2008 from Mrs Marron to Ms Wilding. It will be recalled that the email is in the following terms: *So excited that you are coming to join us at the cinema. We will draw up a roster of work hours soon. Maxine.* I confess to find it difficult to understand what that email means if it is not talking about a settled arrangement in respect of employment, albeit with, at this stage, uncertain hours.

[42] That view gains further support from the email sent by Mrs Marron to Ms Wilding on 27 November 2008 when she reveals that the Marrons had had an approach from a third party to run the cinema for the whole year. In that email, Mrs Marron says *but this does change our situation on having you work a few days a week.* Again, this suggests a settled arrangement, not just a commitment to engage as and when required, but a settled arrangement on precisely the terms which Ms Wilding was claiming were the terms agreed.

Conclusions

[43] I have reached the conclusion, after earnest consideration, that at the meeting between Mrs Marron and Ms Wilding on 16 November 2008 or thereabouts, there was a commitment by Mrs Marron to employ Ms Wilding on settled terms and conditions but without commitment as to an actual schedule of dates but that that schedule of dates was subsequently agreed between the women in two telephone conversations between the date of the meeting and 20 November 2008, when Mrs Marron sent the first of the two emails that I referred to in the preceding section of this determination.

[44] By the time Mrs Marron sends the second of the emails to which I have referred, there is, I hold, a settled view about the days to be worked as well because Mrs Marron's email simply makes no sense unless that is the position. It follows that I am satisfied there was a concluded employment agreement between the parties on and from 27 November 2008 or such earlier date as the parties had agreed the actual days to be worked.

[45] Ms Wilding's behaviour following on from the initial meeting and the behaviour of her mother and the letting agent for her mother's rental property make no sense unless there is a concluded bargain. Nor do Mrs Marron's email messages to Ms Wilding make any sense unless they too are illustrative of a concluded bargain. The first of those emails sent on 20 November 2008 talks about Ms Wilding joining the cinema team and Mrs Marron being happy about that. Why would Mrs Marron send such an email if there was not a concluded arrangement?

[46] Next, the very email in which Mrs Marron purports to resile from the arrangement, contains the words that I referred to above which seem to make it absolutely plain that Mrs Marron was contemplating Ms Wilding working a particular span of hours over a particular period.

[47] I am satisfied then that this was no casual discussion which resulted in a confused person believing that they had been employed when all that had happened was that there had been a discussion about possible employment. I am satisfied that, whatever Mrs Marron intended, her behaviour at the meeting at the cinema, her subsequent email traffic to Ms Wilding and her telephone discussions with Ms Wilding all proceeded on the footing that a commitment to have an employment

relationship developed to a point at which all of the uncertainties were satisfactorily resolved and there was a settled understanding about an employment relationship.

[48] It follows that I am satisfied there was an employment relationship and that that employment relationship was severed unjustifiably by the very email in which Mrs Marron confirmed to my satisfaction that the terms and conditions of the employment were agreed, that is the email of 27 November 2008.

[49] While no doubt Ms Wilding's response might be criticised as being over-zealous, presumably she was shocked and dismayed by the sudden change in the position and her conviction that she had been unjustifiably dismissed is, I hold, made out.

Determination

[50] I am satisfied that Ms Wilding has been unjustifiably dismissed from her position and therefore that she has a viable personal grievance. She is entitled to remedies.

[51] Before considering those remedies, I need to turn my attention to the question of whether Ms Wilding has contributed in any way to the circumstances leading to her personal grievance. I am satisfied that Ms Wilding has made no contribution whatever to those circumstances.

[52] To remedy Ms Wilding's personal grievance, I direct that Mr and Mrs Marron are to pay to Ms Wilding the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$1,000;
- (b) A contribution to lost wages in the sum of \$4,185;
- (c) The Employment Relations Authority filing fee of \$70.

Costs

[53] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority