

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 303/07
5054983

BETWEEN CHRIS BARTLEY
 Applicant

AND GRASSHOPPERS
 LAWNMOWING SERVICES
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: Garry Pollak, counsel for Applicant
 Peter Luxford, advocate for Respondent

Investigation Meeting: 25 June 2007 at Auckland

Additional material
received: 28 June and 10 August 2007 from Applicant
 11 and 17 July and 15 August 2007 from Respondent

Determination: 3 October 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Chris Bartley says Grasshoppers Lawnmowing Services Limited (“GLSL”) offered him a job, which he accepted. The agreed commencement date was 10 July 2006, but Mr Bartley was told on 7 July 2006 that the arrangement would not proceed. Accordingly he says he was a ‘person intending to work’, and was an employee under the definition in s 6(1)(b)(ii) of the Employment Relations Act 2000. GLSL’s failure to proceed with his engagement in turn amounts to an unjustified dismissal.

[2] GLSL denies there was an offer and acceptance of employment, and that Mr Bartley ever became its employee.

Discussions about possible employment

[3] Mr Bartley holds a Certificate in Horticulture and a Diploma in Landscaping. In May 2006 he saw an advertisement seeking an experienced gardener for a full time position based mainly on the North Shore, maintaining the grounds of a large residential complex. He applied for the position.

[4] GLSL was the advertiser. It already held a lawnmowing contract at the complex referred to, and had just negotiated an extension of the contract to cover garden maintenance. It sought to employ someone to work on that contract for three days a week, and spend the other two days on other contracts. Peter Luxford was carrying out the recruiting on behalf of the company.

[5] Mr Luxford met Mr Bartley for an interview on-site on 12 June 2006. For reasons beyond his control Mr Bartley arrived late, and there was not enough time for Mr Luxford to conduct a full interview. Mr Luxford showed Mr Bartley around the complex, described the work required, and provided some basic information about GLSL. There was no suggestion an employment agreement was entered into during that interview.

[6] Mr Bartley was concerned about the brevity of the interview and telephoned Mr Luxford on 13 June. Efforts were made to meet again, but the arrangements were relatively informal and eventually a meeting went ahead on 19 June at a client's site. It was common ground that Mr Luxford provided further information about the position and the GLSL business, and told Mr Luxford he was on a short list of four for the position. A possible start date of 1 July was mentioned, but it was common ground that there was flexibility about a start date.

[7] Mr Bartley said Mr Luxford told him a decision about who would be appointed would be made by 23 June. Mr Luxford doubted he said that, and believed he would have indicated the decision would be made 'shortly'.

[8] Also on 19 June Mr Bartley sent Mr Luxford an email message enquiring about the type of vehicle to be supplied with the job. Mr Luxford replied on 20 June, providing that information.

[9] Because Mr Luxford had not contacted him by the end of 23 June with news of an appointment, by 24 June Mr Bartley had assumed he was not the successful applicant. In an email message to Mr Luxford dated 24 June he set out that assumption, expressed his disappointment and sought the return of his CV.

[10] Coincidentally Mr Luxford telephoned Mr Bartley later that day. Mr Luxford had not read Mr Bartley's email, and his evidence was that he wanted to obtain further information and find out if Mr Bartley was still interested in the position.

[11] Mr Bartley's evidence was that Mr Luxford told him the decision had been made the previous day, but there had been no contact because Mr Luxford was busy finalising arrangements for the extended contract at the residential complex. Mr Bartley says Mr Luxford expressly offered him the position during that conversation. There followed a conversation about salary, the vehicle, and the required hours of work. Mr Bartley told Mr Luxford he wanted to think about things and would call him back. He did so not long afterwards and there was a further conversation about the level of salary being offered, and the motor vehicle. Mr Bartley then told Mr Luxford he accepted the salary and would arrange for the driving lessons he thought he would need before he drove the company vehicle. Finally, Mr Bartley said a start date of 10 July 2006 was agreed.

[12] Mr Luxford's evidence was that, by 23 June 2006, no decision had been made about who was to be appointed and some matters were still to be finalised. In particular he wanted to send to each of the people on the short list for the position a more detailed job description and list of safety requirements, and told Mr Bartley a detailed job description would be sent to him. Not only that, the formal extension of the contract at the residential complex had not been signed, and aspects of the obligations under the contract were to be incorporated in the material he wanted to send to the shortlisted applicants. Finally, he said in evidence that he would not offer the gardening position until the contract had been signed.

[13] There was no clear statement from Mr Luxford to the effect that, during the 24 June conversation, he told Mr Bartley the job description was to be sent to all of the short listed applicants. He said in evidence that he did not comment to Mr Bartley about where Mr Bartley was on the short list, but he had already told Mr Bartley there were four on the list.

[14] Mr Bartley was adamant that an express offer of employment was made. He did not believe there was a misunderstanding. Mr Luxford was just as adamant that there was no such offer. He said he could not see how Mr Bartley could misconstrue what was said. I put it to Mr Luxford that Mr Bartley was obviously a careful person who would be unlikely to misconstrue what he was told, but Mr Luxford said he is a careful person too and was very clear about what had been said.

[15] Aside from the conflict in the evidence about whether a decision on an appointment was to be made by 23 June and the nature of the discussion about that point, as well as whether there was a direct statement to the effect that the job was Mr Bartley's, there was relatively little dispute about what else was said on 24 June. Mr Luxford even acknowledged that Mr Bartley said he wanted to think about things, and Mr Luxford wondered why Mr Bartley would say that.

[16] Mr Luxford effectively agreed, too, with most of Mr Bartley's account of the further conversation, except that he denied Mr Bartley's response to the discussions was to say he accepted the position. Mr Luxford saw the exchanges as a further discussion of the terms and conditions on offer in a general sense, including the salary and whether it was negotiable, rather than a discussion of the terms and conditions of the agreement actually being offered to Mr Bartley. Mr Bartley saw the exchanges as his response to, and acceptance of, the terms and conditions he believed he had been offered.

[17] As for the need for Mr Bartley to take driving lessons, much of the evidence about that was also common ground except that Mr Bartley denied Mr Luxford indicated driving lessons could be provided in-house if necessary. Much of the content of the discussion about a possible start date of 10 July was also common ground, although there were differences over the context in which that discussion should be construed. Finally it was common ground that Mr Luxford said he would send out a written job description and other written material although, again, the context is disputed.

[18] There was disagreement about whether Mr Luxford said he would send the material by email. Mr Bartley said he did, which Mr Luxford denied. When he had not heard from Mr Luxford by 27 June Mr Bartley left a telephone message advising he had not received the email. Mr Luxford responded by further telephone message which appears to acknowledge the material was to be sent by email, although Mr Luxford believed he had used the word 'email' in error. In the message, Mr Luxford said the material would be sent when it was 'drawn up properly'. He also said he was going to speak to Mr Bartley about 'tools and things that are required so I can get these all underway'. Mr Luxford said he meant that in a general sense because it concerned a task he had to address anyway, while Mr Bartley took it as a reference to 'tools and things' that would be provided to him for use in his new position.

[19] There were no further exchanges until, on 6 July, Mr Bartley sent Mr Luxford an email saying in part:

“3. I assume the job is still ‘all go’ and that I will meet you at ... at 8 am Mon 10 July?”

4. Re what u said (on Sat 24 June) that u would send me an email confirming the job offer: to date I have not received anything.”

[20] Point 4 refers to what Mr Luxford said was the job description.

[21] Mr Luxford replied to the email as follows:

“Your email took me by surprise. I regret to inform you that your application for the position was unsuccessful. I will return your CV

Thank you for your application”

[22] Mr Luxford’s evidence was that he had sent the job description by post, and when he did not hear from Mr Bartley he assumed Mr Bartley was no longer interested. He took steps to appoint someone else. Mr Bartley said he did not receive the material.

[23] Mr Bartley also disputed Mr Luxford’s evidence that he had first sought to contact Mr Bartley to obtain a response to the material. Mr Bartley said no telephone messages were left for him, and nor were there any email messages in respect of the matter. Telephone accounts for Mr Luxford’s business line and cell phone do not record any calls to Mr Bartley during the relevant period, but Mr Luxford said he works from home and could have used his residential line to make the calls.

[24] On the evening of 7 July the two had a telephone conversation about the matter. During the conversation Mr Luxford explained that he had posted the material, had tried unsuccessfully to contact Mr Bartley for his response, and in the absence of a response had appointed someone else. Mr Bartley did not accept, either then or during the investigation meeting, that Mr Luxford had posted the material or sought to contact him. He believes Mr Luxford simply changed his mind about the appointment and failed to advise Mr Bartley of that promptly.

[25] On 9 July Mr Luxford left Mr Bartley a telephone message saying he had been: “feeling pretty bad about everything that happened and just trying to work something out.”

[26] On 11 July Messrs Bartley and Luxford met to discuss the matter. Mr Luxford raised the prospect of a contracting arrangement with GLSL. However such a position was contingent on the satisfactory outcome of pending negotiations with a new client. In an email exchange of 19 July Mr Luxford advised that the meeting with the client in question had not gone as well as hoped, and further response from the client was awaited.

[27] By email message dated 20 July Mr Bartley raised his concerns about the employment issue in some detail, asking how the company would address the matter. Mr Luxford replied by wanting to know whether Mr Bartley was interested in a contractual arrangement. However there was no firm offer of work and the prospect was not pursued.

Was there an employment relationship

[28] A 'person intending to work' is defined in s 5 of the Act as:

“.. a person who has been offered, and accepted, work as an employee”

[29] My task here is to determine whether, on the facts, Mr Bartley was offered, and accepted, work as an employee on 24 June 2006. There were several disputed areas of evidence. Nevertheless, although they have very different views of what transpired between them, both Mr Bartley and Mr Luxford were honest and genuine witnesses.

[30] The first disputed area of evidence concerned whether Mr Luxford told Mr Bartley a decision on the appointment to the gardener's position would be made by 23 June, and whether he subsequently confirmed on 24 June that the decision had been made.

[31] I accept Mr Luxford was working with a short list of four applicants, and by 24 June had not made a decision on which of them to appoint. He was attempting to complete the negotiation and signing of the extended contract at the residential complex. Those arrangements had not been finalised by 23 June. He saw the detail of the employment agreement as flowing at least in part from the to-be-finalised detail of the extended contract. In turn his approach to the appointment of someone to the gardener's position was one of ensuring the detail of the employment agreement was acceptable to a potential appointee before making an offer.

[32] Thus while I am prepared to accept that Mr Luxford mentioned the date of 23 June in some context, I can go no further than that. I consider it unlikely that he told Mr Bartley on 24 June that the decision on the appointment had been made.

[33] I therefore accept, too, that Mr Luxford's purpose in calling Mr Bartley on 24 June was to find out whether Mr Bartley was still interested in the position.

[34] The next area of evidence, which was hotly disputed, concerned whether Mr Luxford went further and expressly offered the position to Mr Bartley. Again, since I accept Mr Luxford's evidence about the short list, as well as about progress with the extended contract, I consider it unlikely that Mr Luxford would make an express offer at that time. For his part Mr Bartley did not recall precisely the form of words in which the offer was made. He told me Mr Luxford said 'I offer you the gardener's position' or may have used other words to that effect, to which Mr Bartley replied 'I accept'. However for Mr Luxford to have acted in that way would be contrary to the elements of his evidence which I have accepted. Accordingly I consider it unlikely that he used the words Mr Bartley attributed to him.

[35] An associated area of disagreement concerned the forwarding of the job description and associated material. Again the context in which the material was to be provided was disputed, to the extent that Mr Bartley viewed the material as the written 'job offer'. The material did amount to detailed terms and conditions of employment, but it was to be sent to all four short listed applicants for their response. Apparently Mr Luxford did not communicate that to Mr Bartley in an effective way, if at all.

[36] Against that background I consider it likely that the miscommunication here was exacerbated by the parties' differing use of the word 'would'. To illustrate, in one exchange during the investigation meeting the witnesses were discussing their recollection of the conversation about salary and other matters. Mr Bartley said he told Mr Luxford he 'would accept' the salary in particular. Mr Luxford's evidence was, if Mr Bartley had said that, he 'would have' taken it that Mr Bartley was still interested and said he 'would send' the job description. Mr Luxford went on to deny Mr Bartley said he 'will accept' the position but acknowledged Mr Bartley indicated he was keen on the position and 'would accept' it.

[37] In that exchange Mr Bartley was using the word 'would' as a polite form of 'will', while Mr Luxford was using it in the conditional tense. Thus to Mr Bartley there was a firm offer and acceptance, while to Mr Luxford there had been nothing more than each party indicating their likely position to the other.

[38] Unfortunately there was no record that the job description was posted to Mr Bartley, and Mr Bartley does not believe it was sent at all. However I have no reason to conclude Mr Luxford was

lying or mistaken about the point, and nor is there any reason to reject Mr Bartley's evidence that he did not receive the material.

[39] Ultimately the relevance of the mailing (or not) of the material lies in the role it played in creating the problem that has resulted. Had the material - together with a covering letter accurately setting out Mr Luxford's intentions - been sent and received, the problem may not have arisen. Otherwise, in the factual matrix as I have found it, the matter is not of great assistance in determining whether an offer was made and accepted on 24 June.

[40] The same is true of another of the areas of disputed evidence, namely whether Mr Luxford sought to follow up with Mr Bartley for a response to the material. The relevance of that evidence lies more in the fact that no direct contact was made and no message was left, so that there was no opportunity to clarify the fate of the job description or the response to it. Further, the apparent lack of follow up fed Mr Bartley's belief that Mr Luxford had simply changed his mind about the offer.

[41] I consider it unlikely the present problem has been caused by a change of mind on Mr Luxford's part. I was unable to identify anything in the evidence to indicate there had been such a change of mind, or what could cause such a change. The lack of any such evidence reinforces my view that a misunderstanding or miscommunication has led to the problem.

[42] Finally I regard Mr Luxford's message of 9 July, and his attempts to find another role for Mr Bartley, as a genuine attempt to address the above difficulty. I do not regard the message as his acknowledgement that he had offered Mr Bartley the position, then changed his mind.

[43] In conclusion I am not persuaded an express offer of employment was made and accepted on 24 June. Mr Bartley thought there was such an offer, while Mr Luxford was not intending to make an offer and as far as he was concerned he did not do so. There was no meeting of the minds regarding an entry into contractual relations at that point.

[44] Accordingly I am not persuaded the parties had entered into an employment agreement. Mr Bartley was not a 'person intending to work' in terms of s 5 of the Act, or an 'employee' in terms of s 6(1)(b)(ii).

Costs

[45] Costs are reserved.

[46] If either party seeks an order for costs the party shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. If the other party wishes to respond, there shall be a further 7 days from the date of receipt of the memorandum in which to file and serve such response.

R A Monaghan

Member of the Employment Relations Authority