

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 380
5426378

BETWEEN STEVEN EVANS
Applicant

A N D COUNTIES POWER LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Ashley Sharp, Counsel for the Applicant
John Rooney, Counsel for the Respondent

Investigation Meeting: 18 June 2014 at Auckland

Date of Determination: 12 September 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Evans) claims to have been employed by the respondent (Counties Power) and to have then been unjustifiably dismissed by Counties Power and to have suffered loss as a consequence.

[2] Counties Power protests the jurisdiction of the Authority to deal with Mr Evans' claim on the basis that the factual matrix does not disclose an employment relationship problem or other action otherwise within the ambit of the Authority.

[3] The Authority's investigation meeting, and this determination, are concerned exclusively with the preliminary issue of whether the Authority has jurisdiction to deal with Mr Evans' claim, or not.

[4] In 2012, Counties Power entered into negotiations with a company incorporated as Automation and Access Solutions Limited (AASL) which entity was controlled by Mr Evans. The purpose of those negotiations was to enable Counties Power to acquire the bulk of AASL's assets and to have Mr Evans join Counties

Power on some basis to be agreed to assist the transition of the AASL assets to the ownership of Counties Power.

[5] The purpose of the acquisition was simply that Counties Power saw an opportunity to enter the security industry (which AASL was intimately involved in). The catalyst for the discussions between the parties seems to have been the prospect of a large tender associated with the construction of a prison complex at Wiri.

[6] Negotiations between the parties continued until 10 April 2013 when Counties Power indicated it no longer wished to contemplate the possible sale and purchase.

[7] It is the essence of the case for Counties Power that Mr Evans' employment with Counties Power was "*entirely conditional on the completion of the purchase of AASL*" by Counties Power and given that that purchase never took place, there was no employment agreement created between Mr Evans and Counties Power and in consequence the Authority has no jurisdiction to investigate the matter.

[8] Conversely, Mr Evans says that there was a settled understanding between the parties (although not in writing) of his employment by Counties Power and that the parties to the commercial arrangement (AASL and Counties Power), had taken a variety of steps to evidence a concluded bargain between those parties, again without that concluded bargain being reduced to writing and executed by the parties.

[9] Amongst other things, Mr Evans points to various items of publicity by Counties Power which he says are suggestive of a concluded bargain, the transfer of AASL's internet domain and email addresses to Counties Power and a similar transfer of AASL's telephone numbers and quotations from Counties Power being furnished on documentation bearing AASL's trading name.

[10] Mr Evans says that in announcing on 10 April 2013 that it did not wish to proceed with the agreement for sale and purchase, Counties Power was wrongfully repudiating the commercial agreement as well as the underlying employment agreement by which he (Mr Evans) would be employed by Counties Power and that the effect of that second repudiation was the unjustifiable dismissal of Mr Evans from the putative employment with Counties Power.

Issues

[11] The Authority will need to consider the following questions:

- (a) What is the jurisdiction of the Authority in this matter;
- (b) On the facts, does the employment agreement exist independent of the agreement for sale and purchase;
- (c) Was Mr Evans a person intending to work; and
- (d) Is there evidence of estoppel by representation?

What is the jurisdiction of the Authority?

[12] The Authority has exclusive jurisdiction to deal with “*employment relationship problems*” in terms of s.161 of the Employment Relations Act 2000 (the Act).

[13] The expression “*employment relationship problem*” is a term of art and as such is defined in s.5 of the Act. That definition includes the most common manifestation of an employment relationship problem being a personal grievance but also includes the catch-all phrase “*any other problems relating to or arising out of an employment relationship*”.

[14] Then in s.161 of the Act, there is a list of matters that fall within the ambit of the Authority. That list is not exclusive and it includes what might be referred to as a “*catch-all*” provision at s.161(1)(r) of the Act which is in the following terms:

- (r) *Any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):*

[15] There have been a number of judicial pronouncements about the extent of the phrase “*employment relationship problem*”. In *Pain Management Systems (NZ) Ltd v. McCallum* (High Court, Christchurch, CP72/01), Justice Panckhurst said simply that:

The core concept which is determinative of the exclusive jurisdiction of the Authority is whether the determination which is required is indeed about an employment relationship problem.

[16] In *BDM Grange Ltd v. Parker* [2005] 1 NZLR 353, the High Court determined that the phrase “*employment relationship problem*” meant:

... any cause of action, the essential character of which is to be found entirely within the employment relationship itself.

[17] As counsel for Counties Power suggests, that definition must limit the scope of s.161(1)(r) of the Act to only those matters where the essential character of the dispute was to be found entirely within the employment relationship; put another way, sub-para.(r) could not be seen as a way of extending the Authority’s jurisdiction into matters which are not entirely within the employment relationship.

[18] Similarly, the various provisions in the Act which confer power on the Authority to deal with, for instance, repudiation of a contract, cannot be accessed unless and until those powers are required to deal with a matter “*entirely within the employment relationship itself*”.

[19] It follows that if Counties Power is right in its submission that in order for the Authority to resolve Mr Evans’ employment relationship problem, the Authority must first determine the enforceability of the agreement for sale and purchase then such a determination is *ultra vires* the Act and outside the Authority’s remit in consequence.

[20] Conversely, Mr Evans submits that he was a person intending to work in terms of s.6(1)(b)(ii) of the Act and that on that footing, the inquiry the Authority must make falls “*four square*” within the Authority’s jurisdiction and that in order for the Authority to determine that question (whether Mr Evans is or is not a person intending to work), it is unnecessary for the Authority to deal in any way with the status of the agreement for sale and purchase.

[21] However, Counties Power says that at best, Mr Evans could only have been a person intending to work if the agreement for sale and purchase had been concluded because a completed agreement for sale and purchase was a condition precedent to the putative employment of Mr Evans by Counties Power. That question is the subject of the next section of this determination.

[22] Moreover, Counties Power also submits that the evidence discloses that, despite Mr Evans’ convictions in the matter, there was never offer and acceptance because there was never a concluded bargain between the parties.

[23] Finally, Mr Evans contends that if he is a person intending to work and Counties Power's behaviour leads him to the view that it has accepted there is a concluded bargain between the parties, then Counties Power is estopped from now denying that bargain because of its various representations as to its alleged completeness, and the Authority is entitled to decide whether or not Mr Evans' intention to work was subject to conditions or not.

[24] Again, Counties Power says in response that the Authority cannot adopt jurisdiction in a matter where its effect is to have the Authority making decisions about matters outside its remit. This is because, put simply, such an inquiry takes the Authority outside of the terms of s.161 of the Act on any interpretation of the statute.

Is the employment relationship independent of the commercial relationship?

[25] The essence of the position adopted by Counties Power is that the employment relationship in prospect between the parties and the commercial relationship between Counties Power and AASL are inextricably linked and so it cannot be said that the proposed employment relationship has any independent existence free of the commercial relationship in prospect.

[26] To put that same point another way, Counties Power says that were it not for the commercial agreement between AASL and itself, Counties Power would never have had the employment of Mr Evans in its contemplation and that the whole potential employment relationship between the parties was predicated on the conclusion of the agreement for sale and purchase.

[27] Moreover, as the agreement for sale and purchase never concluded, and was always no more than a prospective arrangement, it is said that the employment of Mr Evans by Counties Power must logically fall within the same parameters, that is to say, unless and until there was a concluded arrangement on the commercial agreement, there was no sense in which Mr Evans could contend that he was a person intending to work for Counties Power.

[28] Conversely, Mr Evans says that there is a fundamental legal distinction between the formation of an employment agreement on the one hand and the articulation by writing or other means of its terms. It follows from that contention that a person can legally be a person intending to work within the meaning that phrase has in the law, and yet not have the terms and conditions of the employment settled.

[29] The Authority is referred to the case of *Baker v. Armouguard Security Ltd* [1998] 1 ERNZ 424 where the Court drew this very distinction between a person who has been offered and accepted employment on the other hand and a party to an employment agreement with settled terms and conditions.

[30] At common law, there was a distinction between an agreement to employ and an employment agreement with the latter only coming into existence once work had begun. Following on from this distinction, cases decided under the Industrial Relations Act 1973 concluded that the termination of an employment relationship before work started could not ground a claim of unjustifiable dismissal: see for instance *Auckland Clerical etc Employees IUW v. Wilson* [1980] ACJ 357.

[31] The inclusion of the phrase “*a person intending to work*” as a component of the definition of “*worker*” was designed to deal with the distinction just discussed. It seems to follow that once there is some concluded bargain between the parties, even if work has not commenced, there can be a dismissal and of course, potentially an unjustifiable dismissal.

[32] In Mazengarb’s Employment Law at para.[ERA6.32], the authorise identify three types of case where the new definition will be relevant. For our purposes, only the third relates to the present situation. This is where work has been offered and accepted and even if there is no agreement on some important matters “*such as a starting date*”, there is still an employment relationship which provides remedies under the statute.

[33] In *Harrison v. Tucker’s Wool Processors Ltd* [1998] 3 ERNZ 418, Chief Judge Goddard determined that certain workers were legally employees because:

... they had been offered and accepted work, although the terms of their employment were not yet agreed. ... They were thus intending employees or, as the Act calls them, “persons intending to work” and so within the definition of employees.

[34] I am satisfied from a careful review of the case law that there must be offer and acceptance before there can be a concluded bargain. There is nothing remarkable about this conclusion; it is absolutely consistent with the ordinary precepts of contract law.

[35] It follows from this reasoning that an inconclusive agreement will not bring a claimant within the terms of the definition: see for instance *Rhodes v. LSS Holdings Ltd* (unreported) CC10/99 and similarly a failure to accept an offer will also take a claimant out of the scope of the definition: see for instance *Real v. Leusen Holdings Ltd* [2002] 1 ERNZ 655.

[36] Applying these various considerations to the factual matrix of the present case, I have reached the conclusion that there is nothing before me which would encourage me in the view that Counties Power was intent upon engaging Mr Evans in its service independent of the commercial relationship which Counties Power sought to develop with AASL. It seems to me that unless I can be persuaded that Counties Power had an unfettered intention to employ Mr Evans on some basis to be agreed without any condition precedent, then Mr Evans' contention that he was a person intending to work and therefore is entitled to the protection of the Act, cannot stand.

[37] All the evidence before the Authority, and there is a significant amount of it, postulates as the primary driver, a commercial relationship between Counties Power and AASL, supported by a subsidiary intention for Counties Power to employ Mr Evans to assist Counties Power in its new commercial relationship with AASL. There simply is no evidence that Counties Power intended to employ Mr Evans simpliciter. All the evidence suggests Counties Power was interested in a commercial relationship with AASL and as part of that new undertaking, Mr Evans was to join Counties Power to assist the development of that new commercial arrangement. But as soon as the commercial negotiations foundered, then it followed that the possibility of Mr Evans becoming an employee of Counties Power lost any benefit to Counties Power. The evidence is that it was simply not interested in Mr Evans for himself but for the knowledge and experience that he had in working with the assets of AASL in a particular industry which Counties Power sought to become engaged in.

[38] So I am satisfied first of all that Counties Power's submission that the commercial relationship was a precursor to the employment relationship is a submission which is founded fair and square on the evidence I heard and on that footing, unless there is another basis on which Mr Evans can be successful, I must conclude that Counties Power's protest to jurisdiction is made out.

[39] As if that is not enough, I have also concluded that the evidence supporting a concluded bargain between the parties concerning Mr Evans' employment is not made out either.

[40] The evidence on this second point is more equivocal because, effectively, one party (Mr Evans) says there was a concluded understanding and the other party (Counties Power), says there was not. I prefer Counties Power's view because I cannot explain the weight of evidence in favour of the commercial arrangement taking precedence if Counties Power can be said to have agreed to the employment of Mr Evans without concluding the bargain on the commercial arrangement. It is the case that in the early negotiations between Mr Evans and Counties Power, documents drafted for and by Counties Power included a "*condition precedent*". For instance, in the first draft employment agreement provided by Counties Power for Mr Evans to consider, clause 16 of the draft employment agreement is in the following terms:

Condition precedent

This offer is conditional on the parties reaching agreement on the sale and purchase of the Leaweld business (the assets of AASL involved in the proposed commercial transaction).

[41] It is common cause that that provision informed the early discussion between the parties. Indeed, even Mr Evans acknowledged in answer to a question from me at the investigation meeting, that he accepted:

... that the business and the employment arrangement are inextricably linked and that it was both parties' intention that that be the case.

[42] Mr Evans then went on to say that "... *there was a deal they [Counties Power] simply didn't pay for it*".

[43] Despite that context, it is also common ground that in the employment agreement which Mr Evans claims to have accepted, there was no such condition precedent. Mr Simmons, who was the Chief Executive of Counties Power at the relevant time, gave evidence about the provision to Mr Evans of a subsequent employment agreement which was provided to Mr Evans on 6 March 2013, some months after the negotiations had commenced. The condition precedent clause was not in this document and Mr Simmons accepted, in answer to a question from me, that this document was Counties Power's standard form employment agreement.

[44] Despite the absence of the condition precedent provision, Mr Simmons' evidence (which as I have indicated I prefer), was that the commercial and employment relationships were inextricably linked and remained so despite the absence of the condition precedent clause and that that absence was an error which he regretted and which would have been remedied if he had picked it up at the time.

[45] Of course, it is this last offer of employment from Counties Power that Mr Evans says he accepted. In his brief of evidence, Mr Evans addresses the matter in this way: "*and that is the agreement that I said I would take ...*". He says that he spoke to Mr Simmons on 8 March 2013 (two days after the draft employment agreement was generated) and allegedly agreed to backdate the employment to 14 January 2013, again supposedly agreed to a 25% increase in his base salary, and he says there were also discussions about vehicle allowances. It is this discussion which Mr Evans says constituted his acceptance of what he claims was Counties Power's offer of employment.

[46] I am not satisfied on the evidence I heard that the draft employment agreement generated by Counties Power on 6 March 2013 was, properly construed, an offer and I am equally satisfied that the evidence does not disclose that, even assuming it was capable of acceptance, Mr Evans actually accepted the offer.

[47] Dealing with the status of the document first, I am satisfied in law that the only basis on which the employment agreement of 6 March 2013 could be construed as an offer is on the basis that it was tendered by Counties Power with the intention of creating legal relations on its acceptance and given my conclusion about the pre-eminence of the commercial relationship, I am satisfied that a proper construction of the 6 March 2013 document is that it cannot be a complete offer of employment.

[48] Moreover, I am not satisfied on the evidence I heard that Mr Evans ever accepted the offer, even assuming he was able to. The only evidence that Mr Evans accepted the offer is his oral testimony; there is nothing on the papers before the Authority or indeed in any other form of evidence which confirms Mr Evans' view. Mr Simmons is adamant that no acceptance was ever conveyed to him and equally adamant that there could be no acceptance of an employment relationship as between the parties unless and until there was a settled commercial understanding in place.

[49] I conclude then that the employment relationship was not independent of the commercial relationship and indeed the commercial relationship took priority over the employment relationship. Second, I conclude that, recognising that a person intending to work can only fall within that term of art where, in the context of an intention to create legal relations, there is both offer and acceptance.

[50] In that latter regard, my conclusions are that in forwarding the draft employment agreement on 6 March 2013, Counties Power was not intending to create legal relations for reasons already described, that therefore the draft employment agreement was not an offer of employment at all but simply a building block in a negotiation, and that therefore the 6 March 2013 document was not capable of being accepted but that in any event the evidence does not disclose that it was accepted.

What about the estoppel by representation argument?

[51] It will be remembered that Mr Evans told me in his oral evidence that the commercial deal had been completed, it was just that Counties Power had failed to pay for the sale and purchase that had been agreed to.

[52] But it is common cause that there was no signed agreement, either in relation to the commercial deal or in respect of the employment relationship. So how does Mr Evans say that he can demonstrate the deal has been completed? He says that because of the statements made by Counties Power and the actions it took, he was led to believe that Counties Power had completed the purchase of AASL and so in reliance on those purported representations, he acted as if there was a concluded arrangement. This is the estoppel by representation argument.

[53] I am satisfied that I cannot take this argument any further for want of jurisdiction. Put simply, an inquiry into whether Counties Power behaved as if there was a deal, given my conclusion that the commercial deal took primacy over the employment arrangement, would require the Authority to consider the behaviour of the parties in respect of the commercial transaction before making any determinations about the employment relationship. That takes the Authority outside its remit.

[54] Even if it were possible to contemplate a situation where the Authority's only inquiry was into the behaviour of the parties relative to the employment situation, I

am satisfied that it would be absolutely impossible on the facts to distil out the material that related only to the employment and exclude the material related to the commercial transaction.

[55] Even if it were possible to make that distinction (and as I have just indicated, I do not consider it possible), it still would not overcome the fundamental difficulty that if the commercial arrangement takes primacy over the employment relationship, as I have already decided, then an inquiry into estoppel by representation exclusively relating to the employment transaction does not meet the case because I am satisfied that the driver for the employment relationship was the commercial relationship, and if there is any defect in Counties Power's behaviour (and I do not mean to imply that there is or indeed that there is not), then that can only be disclosed by an inquiry into the totality of the behaviour of the parties, beginning with an inquiry into the question whether, in its commercial dealings, Counties Power erroneously represented there was a deal when there was not.

[56] Even on Mr Evans' evidence on this point, it seems clear that he is reliant on Counties Power's behaviour relative to the commercial arrangement rather than the employment one. For instance at para.41 of his evidence, he has this to say:

... even if there had been a condition precedent that there had to be a purchase and sale of Leaweld (AASL) to Counties (Power) ... Counties (Power) had by its actions and representations to me, my suppliers and the wider public and customers held itself out as having acquired Leaweld as part of Counties' (Power's) new security operation. ... As a result of the representations that Counties (Power) made and its actions taken, I was led to believe and did believe that they had bought my business ... and that I was therefore contractually bound to deliver it to them.

[57] In my judgment, that passage seems to clearly emphasise the commercial nature of the representations which Mr Evans seeks to rely upon and whether those representations are made out or not cannot be a matter for the Employment Relations Authority because they are outside its remit.

[58] Looked at another way, the matters that Mr Evans relies upon to demonstrate his claim of estoppel by representation, is on any construction of it a list of matters pertaining to a commercial agreement and having nothing whatever to do with the employment relationship between himself and Counties Power.

[59] Accordingly, my conclusion is that if there is an argument of estoppel by representation, for reasons that I have already traversed, that is not an argument that can be entertained in this jurisdiction.

Determination

[60] For the reasons already canvassed, Mr Evans' claim fails in its entirety.

Costs

[61] Costs are reserved.

James Crichton
Member of the Employment Relations Authority