IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE

[2025] NZERA 504
3314100

	BETWEEN	MARLIES HIEMER Applicant
	AND	STYLE CLUB NZ LIMITED Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Kara Orviss, advocate for the Applicant Michael Smyth, counsel for the Respondent
Investigation meeting:	On the papers
Submissions received:	Up to 19 May 2025
Date of determination:	19 August 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Hiemer applied for a position at Style Club NZ Limited (SCNZL). Before she started in the role, Holly Andrews, the sole director and shareholder of SCNZL, withdrew an offer of employment because a senior stylist had resigned. SCNZL wished to recruit another senior stylist rather than an emerging stylist. Ms Hiemer lodged an employment relationship problem in the Authority claiming she was a person intending to work and having been dismissed with no process, raised an unjustified dismissal personal grievance claim.

[2] SCNZL agrees it made an offer of employment to Ms Hiemer but says it withdrew the offer before Ms Hiemer accepted it. SCNZL says no employment relationship was entered into because no contract was formed. Ms Hiemer was not a

person intending to work and therefore the Authority would have no jurisdiction to carry on and investigate and determine a claim of unjustified dismissal.

The Authority's investigation

[3] This determination resolves the issue of whether Ms Hiemer was an employee by virtue of being a person intending to work under s 5 of the Employment Relations Act 2000 (the Act). The parties agreed to have this issue determined as a preliminary matter on the papers. Submissions on behalf of Ms Hiemer and SCNZL and an agreed statement of facts were lodged. The agreed facts are as follows:

(a) The respondent operates a hair salon under trading name "Headstart".
(b) The applicant was interviewed for employment by the respondent's Salon Manager and Operations Manager on 9 April 2024.
(c) Between 10 April and 21 April 2024 there were email exchanges between the respondent's sole Director and the application initially concerning a Stylist role for the respondent and then for the role of Emerging Stylist.
(d) On 3 May 2024, the respondent's sole Director emailed the applicant attached documents for the role of Emerging Stylist, including a letter of offer and a draft Individual Employment Agreement.
(e) Further emails were exchanged between 3 May to 7 May 2024, and at 1.32pm that day, the respondent formally withdrew the offer of employment.
(f) On 14 May 2024, the applicant raised a personal grievance for unjustified dismissal.
(g) On 14 May 2024, the respondent replied to the personal grievance.

The preliminary issue

[4] The preliminary issue for investigation and determination is whether the email communications between the parties demonstrate a binding agreement to enter into an employment relationship was reached. It is accepted SCNZL made an offer so the focus is on whether Ms Hiemer had accepted SCNZL's offer before Ms Andrews email on 7 May withdrawing the offer.

A person intending to work

[5] If Ms Hiemer accepted the offer then she is considered to be a person intending to work and an employee. Section 5 of the Act sets out the definition of a person intending to work as being a person who has been offered and accepted work as an employee. Section 6(1)(b)(ii) of the Act provides that a person intending to work is an employee.

[6] Whether Ms Hiemer was a person intending to work depends on what happened between the parties and if there was both an offer from the employer and acceptance from the prospective employee. The words "offer" and "acceptance" have frequently been considered in contract law and it is settled law that the court or decision maker examines all the circumstances to see if one party has made an offer that the other party subsequently accepted. As stated above the focus in this case is on whether Ms Hiemer can be said to have accepted SCNZL's offer.

[7] Acceptance is defined as follows:[1]

> An acceptance is a final and unqualified expression of assent to the terms of the offer. It indicates an unconditional willingness to be contractually bound that mirrors that of the offer. Whether acceptance has occurred depends upon the consideration of the words and documents that have passed between the parties and the totality of the offeree's conduct. If all the requirements for contract formation are met then the contract comes into force at the place and the time the acceptance has effect.

The Employment Court recently referred to the test in the employment context in the following way:[2]

> [49] In a general sense, the Act departs from a strictly contractual approach to employment, with its emphasis being on the relationship between the parties. Nevertheless, the requirement that, for there to be an offer and acceptance, the offeror must intend to be legally bound is consistent with the concept of an employment relationship. Where parties have not yet begun to act on that relationship, the only thing tying them together is any understanding or agreement between them. If one or both of the parties do not intend to be bound by that understanding or agreement, it seems implausible to describe the situation as an "employment relationship", giving rise to the rights included in the Act, including the right to bring a personal grievance.

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1 Burrows, Finn and Todd on the *Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [41-42].

2 *Edwards v Laybuy Holdings Ltd* [2023] NZEmpC 188.

Relevant background

[8] A summary of the emails is necessary to put the parties' communications about the employment opportunity in context. From 16 April 2024, when the first offer was made, until 7 May when SCNZL withdrew its offer, there were numerous emails between the parties.

The first offer of employment

[9] On 16 April, after a phone conversation with Ms Hiemer, Ms Andrews recorded the key terms of an offer of employment in the body of an email. The first line of the email recorded:

> Further to our phone conversation today, please find below details of your offer. If you are happy with the below details, let me know, and I will draw up your contract.

The last sentence of the email recorded:

> If you have any questions regarding the offer please do not hesitate to let me know.

[10] On 17 April, after confirming Ms Hiemer did not have her full NZ Hairdressing Certificate, they exchanged another six emails. Once Ms Andrews established what Ms Hiemer's qualifications were she sent the following email:

> That's ok. So you would be employed as an emerging stylist. We would want you to get your qualifications as soon as possible, so we will support you to do that :) If you are happy with that let me know so as I can get a contract over to you.

Ms Hiemer replied:

> Thanks for getting back to me. I am happy with that, and I am grateful that you and your team at Headstart are allowing me this opportunity to gain my third-year qualification.

[11] On 21 April, Ms Andrews asked for Ms Hiemer's full legal name for the contract which was supplied. On 3 May, Ms Andrews sent the individual employment agreement to Ms Hiemer with a covering email:

> Please find attached your contract documents. Please read carefully and do not hesitate to ask if you have any queries. Because you are an emerging stylist without certification, there are some slight changes to your offer which can be

> viewed within the attached documentation. I have also listed below your offer so its easy for you to see.
>
> …
>
> I look forward to hearing back from you soon (signed contract is due back by 8th May).

The second offer of employment

[12] The individual employment agreement and letter of offer were attached to the 3 May email:

> **Offer of Employment**
>
> I am pleased to offer you the position of Emerging Stylist at Style Club NZ Limited (trading as Headstart), based at [address] starting on 28 May 2024.
>
> Attached is an employment agreement setting out the proposed terms and conditions.
>
> You can discuss this offer and seek advice on the agreement with your family, a union, a lawyer, or someone else you trust.
>
> If there is anything you are unclear about, disagree with, or wish to discuss about the agreement or about the position, please contact Holly [contact details]
>
> If you are happy with the proposed terms and wish to accept this offer, please sign all the necessary forms, agreements, and letters, and return them to me by 08/05/2024.
>
> [documents attached]
>
> If I have not heard from you by 08/05/2024, this offer will be automatically withdrawn.

Ms Hiemer's response

[13] Ms Hiemer emailed back the same day with a number of queries about the job description. The next day Ms Andrews replied:

> Part of being an emerging stylist is committed to training in all areas of hairdressing. We do not expect you to be able to confidently perform all tasks immediately, but we do expect that you are willing to upskill towards confidence in all of these areas. This will be necessary in order to gain your Level 3 certification. Are you happy to upskill, with the help of [name of other employee] in our team, in order to gain your Level 3 certification?

[14] On 4 May, Ms Hiemer replied by email that she was happy and appreciative to be receiving the training to gain her Level 3 certificate and asked further questions about commission:

> I am wondering if there is a possibility of being able to get commissions for retail and for extra product per chemical service eg additional 20 grams +. I also have my own clippers, trimmers, combs and brushes so if I'm able to bring those to work that would be great.

[15] Ms Andrews did not reply to that email straight away. On 7 May, three days later, Ms Hiemer followed up:

> I sent you this email 3 days ago and am wondering if you have read it as I have not yet received a reply from you. I realise that I am to sign my work contract by 08/05/24 (tomorrow).

Ms Andrews replied at 10.05am on 7 May:

> I'm sorry I did not receive any return email from you. Unfortunately commission is only offered to senior stylists. This is because it costs the salon a significant amount of time and resources to train you to become s senior stylist.

Ms Hiemer replied at 10.47am:

> That's fine. In terms of the contract, I'll get it printed out and signed then will come by the salon either today or tomorrow. I would need to have management sign it too so what would be an appropriate time?

The email withdrawing the offer

[16] At 1.32pm Ms Andrews sent an email withdrawing the offer:

> Unfortunately I will have to withdraw your offer for employment at Headstart. We have just today had notice that our senior stylist is leaving Headstart. Due to this, we are no longer able to offer you employment as an emerging stylist, as we need someone at a senior stylist level to replace her. My apologies to you as I know this new may be upsetting.

[17] A personal grievance claim was raised on Ms Hiemer's behalf with SCNZL on 10 May 2024.

Was Ms Hiemer a person intending to work?

[18] SCNZL pointed out new evidence, not recorded in the agreed statement of facts, was referred to in Ms Hiemer's submissions. That evidence was said to be Ms Hiemer's emailed resignation from her previous employment and the taking down of the

advertisement for the role. The relevance of both pieces of information is that they support Ms Hiemer's submissions, that an employment relationship was formed. SCNZL asks the Authority to put those submissions aside because no evidence was given about the reasons for Ms Hiemer's resignation from her previous role or about why SCNZL removed the advertisement for the vacancy.

[19] It is appropriate to put those submissions aside when SCNZL has not had an opportunity to ask questions or provide its own evidence about the relevance of those two matters to the issue the Authority is to determine.

Ms Hiemer's submissions

[20] Submissions were made on Ms Hiemer's behalf that she was a person intending to work because she accepted the first offer of employment on 18 April, or in the alternative, acceptance occurred on the 7 May, after an amended offer was sent by email. Her email replies were said to be exchanges that reflected a meeting of the minds and represented acceptance of what were clear offers and therefore what transpired resulted in the forming a binding agreement.

[21] With reference to the specific communications Ms Hiemer relies on, she says she accepted the first offer by return email on 16 April when she stated "I am happy with it". She says if the Authority finds the first offer was not accepted then the second offer for the position of emerging stylist was accepted on 7 May by return email when she indicated "that's fine" and conveyed she would print, sign and return the individual employment agreement.

SCNZL's submissions

[22] SCNZL say the first offer could not have been accepted when Ms Hiemer disclosed she was not qualified for the role of stylist because Ms Hiemer qualified to work at the level of emerging stylist. The role of emerging stylist required SCNZL to provide support and training to Ms Hiemer so she could complete her Level 3 certificate to be able to work at the level of stylist. SCNZL appeared happy to provide that training but that meant another offer was formulated and provided to Ms Hiemer.

[23] In terms of the second offer, SCNZL says for two reasons Ms Hiemer did not accept the offer. When reading the covering email dated 3 May setting out the offer and attaching the individual employment agreement, the words "I look forward to hearing from you soon (signed contract is due back by 8th May)" meant acceptance could only be by way of signing the documentation, and not by way of a written response to the email.

[24] Secondly SCNZL says on 3 May Ms Hiemer did not accept the offer. Instead she entered into further negotiations about concerns she had regarding the emerging stylist job description and commissions. After several more emails between them Ms Andrews replied answering Ms Hiemer's final question about whether a different commission structure was possible in the negative. Ms Hiemer's email reply to that was to state "that's fine" and she indicated she would print the contract out, sign it and come by the salon either that day or the next for the employer's signature on the document.

[25] SCNZL say this was not sufficient to convey acceptance of the offer because the prescribed mode of acceptance was not used and therefore Ms Hiemer did not accept the offer by the due date or prior to SCNZL withdrawing the offer.

Analysis

First offer was not accepted

[26] In support of Ms Hiemer's contention that the first offer was accepted, it was submitted there were only minor changes to the key terms and conditions when comparing the first and second offers. However, the communications make it clear the first offer was not capable of acceptance because the role was not one Ms Hiemer could accept. This was because there was at least one significant difference in the terms namely the role description. An emerging stylist was still engaged in training to reach the required level of certification whereas the other was able to work independently and was fully certified to work at the level of stylist.

[27] For those reasons the first offer was not accepted by Ms Hiemer because she entered into further discussions to test out SCNZL's comfort with employing her at the

level she was at. Those communications included an indication of what she could offer and the timeframes she predicted were required for her to achieve her Level 3 certificate.

[28] While Ms Hiemer submitted there were only minor changes when comparing the offers and indeed Ms Andrews described the changes as minor, they appear to be more than minor because not only had the role changed, but the rate of pay was less and the commission structure was different. These are fundamental terms and conditions of an employment agreement and add strength to the position reached that a different second offer was made after it was established Ms Hiemer could not accept the first offer.

The second offer

[29] After Ms Hiemer communicated she was at an emerging stylist level, Ms Andrews revised the position emerging stylist and put together a second offer that was sent on 3 May. What occurred next was another series of emails between the parties up until 7 May. In these emails Ms Hiemer was still negotiating commission, the nature of the work she would be required to undertake as an emerging stylist and the training and support envisaged which means her initial response five days earlier cannot be taken as acceptance.

[30] SCNZL say the mode of acceptance was expressly provided for in the covering email on 3 May, namely:

> If you are happy with the proposed terms and wish to accept this offer, please sign all necessary forms, agreements, and letters, and return them to me by 08/05/2024.

[31] What Ms Hiemer relies on as acceptance is recorded in her email on 7 May at 10.47pm which records:

> Thats fine. In terms of the contract I will get that printed out and signed then will come by the salon either or today or tomorrow. I would need to have management sign it too so what would be an appropriate time?

Ms Hiemer says after the negotiations that was an expression of her clear intention to accept the offer meaning there had been a meeting of the minds at that point and a contract or agreement to form an employment relationship had been reached.

[32] In the context of the emails between the parties, the words used in the email at 10.47am do not convey sufficiently a clear and unequivocal agreement by Ms Hiemer to the offer made. Ms Hiemer had entered into a series of emails negotiating key terms of the second offer and this email was in response to Ms Andrews pushing back on Ms Hiemer's proposal for a different commission structure. The words "that's fine" are open to being interpreted as referring to the discussion on commission and in that way were not clear enough to indicate she accepted the offer in its entirety.

[33] The fact the offer stipulated the mode of acceptance to be the signing and return of the contract and the attached documentation is not determinative on its own. It would still have been possible for the parties to have reached the point where it could be said there was a meeting of the minds short of the paperwork being completed, if those communications were sufficiently clear to indicate that was the position reached. Ms Hiemer's response was not clear enough for that conclusion to be reached.

[34] The second part of Ms Hiemer's email makes reference to the signing and return of the documents as the final step. On review of the individual employment agreement attached to the second offer it is evident Ms Hiemer would have been agreeing to a trial period. This adds weight to SCNZL's submissions that the mode of acceptance was prescribed and involved the printing and signing of the actual documents.

[35] A trial period provision extinguishes the employee's ability to bring a personal grievance claim in the event of a dismissal. It is prudent for employers to bring such a provision to the attention of employees before signing agreements. The date a trial period commences is important for the successful operation of such a clause and is usually taken to be the date the individual employment agreement was signed. Verbal agreement to a trial provision is unlikely to be acceptable to an employer who is complying with their obligations under the Act.

[36] Given the amount of communications between the parties, and the nature of the discussions, together with the expectation that if Ms Hiemer wished to accept the offer,

the documents needed to be signed and returned by 8 May 2025, Ms Hiemer's 10.47am did not amount to an acceptance by Ms Hiemer of the offer made to her by SCNZL on 3 May.

[37] That means that SCNZL was able to withdraw the offer because it did so before Ms Hiemer accepted the offer and before the deadline it had imposed for Ms Hiemer to accept by 8 May.

[38] Ms Hiemer has not been successful because she was not an employee and will not be entitled to pursue a personal grievance claim.

Costs

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[40] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Style Club NZ Limited may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Hiemer will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[41] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[3]

Sarah Kennedy - Martin
Member of the Employment Relations Authority

[3] www.era.govt.nz/determinations/awarding-costs-remedies