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## Jack v Duratech Wholesale Ltd CA 96/07 (Christchurch) [2007] NZERA 619 (9 August 2007)

Last Updated: 17 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 96/07 5051332

BETWEEN MEGAN JACK

Applicant

AND DURATECH WHOLESALE LIMITED

Respondent

Member of Authority: James Crichton

Representatives: Peter Macdonald, Advocate for Applicant

John Bolton, Counsel for Respondent

Interview Meeting Investigation Meeting:

23 May 2007 at Hamilton

30 May 2007 at Christchurch

Determination: 9 August 2007

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] The applicant (Ms Jack) alleges that she was unjustifiably dismissed by the respondent Duratech Wholesale Limited (Duratech) in that Ms Jack contends she was offered and accepted a position with Duratech which subsequently withdrew the offer of employment after she had accepted it.

[2] Duratech resist that claim and say Ms Jack was never employed by them, although they accept that there were discussions between Ms Jack and Duratech about employment which were terminated by Duratech before any acceptance of an offer by Ms Jack.

[3] Ms Jack was employed by a Christchurch employer which, during the winter of 2006 was subject to a sale and purchase by Duratech. Officers of Duratech visited Christchurch from their base in Hamilton and amongst other things met with Ms Jack

on 13 June 2006. There was a discussion about the nature of the role that Ms Jack had with her then employer and some information was provided by Duratech about the nature of the role they had in mind for Ms Jack after the transfer of

ownership of the employer. There is disagreement between the parties as to whether any finality was reached in these discussions on 13 June 2006.

[4] On 7 July 2006 there was to be a meeting at Duratech's head office in Hamilton which was designed to introduce Ms Jack and one other employee or potential employee, to the existing workforce at Duratech. Duratech indicated the purpose of the 7 July meeting was a *getting to know you meeting*.

[5] However, Ms Jack gave evidence that in late June she had a telephone discussion with Mr McLachlan of Duratech in relation to the 7 July meeting. She told Mr McLachlan that she had a fear of flying and that she would only attend the meeting, according to her evidence, if it was certain that she had a position on the basis of the stipulations she said she made at the earlier meeting on 13 June. She says that Mr McLachlan told her to *book her ticket*.

[6] Mr McLachlan was very clear in his evidence before the Authority that no impression was given by him during this telephone discussion that Ms Jack had either certainty in respect to an offer or indeed certainty in respect to conditions. In addition, Mr McLachlan was quite explicit that at the earlier meeting on 13 June, there had been no agreement on remuneration and, although hours of work had been discussed, there was no specificity or agreement.

[7] Notwithstanding the dispute about the nature of any agreement between the parties prior to the 2 July meeting, Ms Jack attended the meeting and participated in it, as did others. She refers to a document that was produced for the purposes of that meeting by Duratech, namely an organisation chart which referred to her by name in the position of *Merchandiser*. Duratech says that this organisational chart was referred to throughout the meeting as a *proposed* organisational chart. Ms Jack denies that the word *proposed* was ever used in relation to it.

[8] A follow-up letter dated 10 July 2006 from Duratech to Ms Jack refers to the usefulness of the get together *now that we have new team members on board*. Ms Jack took this as further confirmation that she was indeed employed.

[9] Duratech say the letter does not have the significance which Ms Jack confers on it and it was a generic letter to everybody who attended the 7 July seminar, including people who were not being employed.

[10] There were various exchanges between Ms Jack and Duratech during July 2006 culminating in a letter of offer erroneously dated 3 July 2006 (it should have been 13 July 2006) and received by Ms Jack on 20 July 2006. The letter set out a formal offer which was to be accepted within five days of receipt.

[11] Ms Jack was unable to consult her legal adviser within that timeframe and she rang Mr McLachlan at Duratech and sought additional time. He says that on the basis that she told him that the delay was only for a day or so, he agreed because she would still be within *the original time line*. Duratech was concerned to have signed employment agreements in place before new employees commenced their duties on 2 August 2006.

[12] On 31 July 2006 with the deadline fast approaching, Duratech had not received any response from Ms Jack and accordingly Mr McLachlan telephoned Ms Jack to establish the position. Duratech say that during this conversation, Ms Jack indicated that some of the changes she had made to the agreement, based on her legal advice, were *non negotiable*. Mr McLachlan said in his evidence that having heard that, he felt he *had no choice but to withdraw the offer of employment contained in the letter of 3 (sic) July 2006*.

[13] When the letter from Ms Jack to Duratech finally did arrive on 8 August 2006, the changes, according to Duratech, were extensive and effectively amounted to a counter offer, and a counter offer which would have been completely unacceptable to Duratech, even if it had been received in time.

[14] For her part, Ms Jack told the Authority in her evidence that the reason she had made such extensive changes to the terms of the proposed offer were that they did not accord with her understanding of the discussions that she had had with Duratech's Mr McLachlan on the scope and extent of her role.

[15] Ms Jack contends that Mr McLachlan's withdrawing of the offer in the telephone discussion of 31 July 2006 constituted an unjustifiable dismissal and Duratech maintained that their action on that day was simply to withdraw an offer of employment which had yet to be accepted.

## Issues

[16] The first issue for the Authority to determine is whether in fact there was offer and acceptance and if so, when did each occur.

[17] If the Authority were to find that there was an intention to create legal relations between the parties, then the next question to consider is whether there was, in truth, an unjustified dismissal.

### **Was there offer and acceptance?**

[18] Ms Jack contends that she was offered employment in broad terms at the meeting on 13 June 2006, that that offer was subsequently developed over following discussions between the parties and was finally crystallised by an offer and acceptance during the telephone discussion that she had with Mr McLachlan in late June 2006 immediately before making arrangements to attend the 7 July meeting wherein she recalls Mr McLachlan telling her to *book her tickets*.

[19] Duratech say that those discussions were no more than that and that the first and only offer made (and an offer that was not accepted at any stage) was the offer conveyed in their letter of 3 July 2006 (sic). Duratech say the earlier exchanges between the parties were no more than negotiations or discussions designed to lead to a possible offer which the letter of 3 July 2006 (sic) was.

[20] I am satisfied on the balance of probabilities that the evidence I heard discloses that the only offer made by Duratech was that contained in their letter of 3 July 2006 (sic) and that that offer was not accepted by Ms Jack.

[21] I consider that the evidence discloses that there were extensive discussions and/or negotiations between Duratech and Ms Jack during the period from the parties' meeting on 13 June 2006 down to the formulation of the offer contained in the 3 July letter. I do not think there is sufficient evidence of any certainty about the terms of any offer made by Duratech which was capable of any acceptance by Ms Jack. Amongst other things, her own behaviour tends to support this view. When she received the 3 July letter the evidence shows that she immediately set about making significant alterations to it, according to her evidence because it did not accord with her understanding of the proposal that she says Duratech had already made her.

[22] More fundamentally, I prefer the evidence of Mr McLachlan about the exchanges between Duratech and Ms Jack, particularly in respect to the telephone discussion in late June which Ms Jack relies upon. Mr McLachlan was very clear that Ms Jack was still raising matters on which she sought concessions and he was equally clear that *she never gave me to understand that she was accepting the position*.

[23] Indeed, the evidence from both parties suggests that there were ongoing discussions well after the end of June so it seems to me inconceivable that there could have been an agreement on the basis of an understanding reached within a matter of around 14 days of the parties' first meeting.

[24] Furthermore, Mr McLachlan is absolutely explicit that there was no agreement about significant aspects of what the scope of the job might be including salary and while hours of work were discussed, there continued to be discussion around how many hours of work needed to be in the package with each party having a fundamentally different view on what the ideal situation was.

[25] Furthermore, there was even debate about the content of the role with Ms Jack wanting to emphasise the merchandising aspect of the role (which she enjoyed and was good at) and with Duratech wanting to emphasise the sales side of the role.

[26] It follows that I am not persuaded that there was an offer capable of acceptance before the offer made in the 3 July letter. It is very clear on general principles that that offer was never accepted. What Ms Jack did with that offer was counter offer which Duratech never considered because they withdrew their offer in the telephone discussion on 31 July principally because Ms Jack made it clear that some of the terms in her counter offer were *non negotiable*.

### **Determination**

[27] For reasons that I have advanced in this determination, I am not satisfied that Ms Jack was employed by Duratech at any stage and it follows that she does not therefore have status to bring a personal grievance against Duratech.

[28] Those being the Authority's conclusions, I am unable to take this matter any further.

## Costs

[29] Costs are reserved.

**James Crichton**

**Member of the Employment Relations Authority**

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