New Zealand Employment Relations Authority Decisions

Jurgens v Martin Engineering (PN) Ltd WA 141/07 (Wellington) [2007] NZERA 717 (19 October 2007)

Last Updated: 22 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

Determination Number:

WA 141/07

File Number: 5051084

BETWEEN Chadrick Jurgens Applicant

AND Martin Engineering (PN) Limited

Respondent

Member of Authority: Denis Asher Representatives: Vicki Eades for Mr Jurgens

Philip Drummond for the Company Investigation Meeting Palmerston North, 16 October 2007 Submissions received: From the parties by 18 October 2007 Determination: 19 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In his statement of problem filed in the Authority on 18 July 2007 Mr Jurgens said, as a person intending to work, he had been unjustifiably disadvantaged and unjustifiably dismissed. He sought a written letter of regret, lost income and compensation for humiliation, etc as well as his filing fee of $70.

[2] In its statement in reply filed in the Authority on 2 August the Company, amongst other things, denied the allegations and said there was no employment relationship between it and the applicant. It sought costs.

[3] The parties underwent mediation but were unable to settle their employment relationship problem.

[4] The parties subsequently agreed to a one day investigation in Palmerston North on 16 October 2007. They usefully provided witness statements in advance of the investigation. Efforts by the parties during the investigation to settle the matter on their own terms were unsuccessful. A timetable for filing submissions was agreed.

[5] It was also agreed that, as the matter was part heard (the applicant's representative, Ms Vicki Eades, having to excuse herself part way through the investigation) that the Authority would make a preliminary determination on the issue of liability.

[6] During the investigation, Ms Eades conceded that any unjustified disadvantage claim in respect of her client fell within his claim of unjustified dismissal and that the Authority was not able to direct the respondent to provide Mr Jurgens with a letter expressing its regret, in the event that the latter succeeded.

Background

[7] The issue in dispute between the parties is whether Mr Jurgens was unconditionally offered employment by the Company, i.e. whether he was an employee per ss 6(1) and 114(1) of the Act.

[8] The parties agree that in late June 2006 the Company advertised, and Mr Jurgens applied for, a position of machinery operator.

[9] The parties agree that, following receipt of his application letter dated 5 July 2006 (document d) the Company's manager, Mr Murray Cross, met with and interviewed Mr Jurgens on Tuesday 11 July.

[10] The parties very much dispute the result of that interview: Mr Jurgens says he was offered the job and accepted it, whereas Mr Cross says any offer was subject to the Company checking the applicant's referees and obtaining a satisfactory response.

[11] The parties do agree that as part of the interview programme Mr Jurgens was given a tour of the factory and that Mr Cross outlined to the applicant the responsibilities and tasks associated with the position as well as discussing the rate of pay, work times, a probationary period and a potential start date.

[12] Mr Cross properly accepts that the Company *"considered Mr Jurgens to be a suitable candidate and he was obviously interested in the position"* (par 10 of his witness statement).

[13] The parties agree that, as part of the interview process, Mr Jurgens was required to complete an employment seekers form (document a). They do not agree as to its significance: the applicant effectively says it is irrelevant, whereas the Company say it confirms that no unconditional offer had been extended to Mr Jurgens.

[14] The applicant was also provided at the same time with a draft employment agreement (document f). Included in the draft employment agreement are, amongst other things, the parties' names and a start date (clause 3.1, above). The draft employment agreement is not signed by either party.

[15] Mr Cross says that, consistent with Company policy, and as is made clear by the employment seekers form, any offer of employment made by him was conditional on a number of matters being completed, including his contacting referees and signing off an employment agreement.

[16] Mr Jurgens says, notwithstanding completing an employment seekers form and its disclaimers and the unsigned employment agreement, it was during this interview that Mr Cross unconditionally offered him the position and that he accepted the offer, i.e. it was irrelevant that he completed the employment seekers form or that the employment agreement remained unsigned.

[17] The parties agree that at the 11 July interview a start date was discussed: Mr Cross says it was a provisional start date, Mr Jurgens says it was an unconditionally agreed start date.

[18] Mr Cross says that, following a customer comment, he made further inquiries of Mr Jurgens' referees who said, in a second discussion, that if given the chance they would not re-employ the applicant. As a consequence of that discussion Mr Cross says he elected not to make any offer of employment to the applicant.

Discussion and Findings

[19] Mr Jurgens claims the existence of an oral employment agreement (refer to the applicant's submissions of 16 October 2007), that was arrived at by way of *"a gentleman's agreement and a handshake"* (oral evidence). I do not accept the applicant's claim for the following reasons.

[20] Mr Jurgens' evidence on Mr Cross contacting his referees was confused and contradictory. As a result I have reached the conclusion, on a balance of probabilities basis, that at least in respect of his recollection of the 11 July

interview, Mr Jurgens is a less credible witness than Mr Cross. That is because, during the investigation, I put to the applicant that Mr Cross, during the 11 July interview, made clear his intention to contact his referees. Mr Jurgens' first reply was that he was not sure (if Mr Cross had said he would check out his referees). On pressing the matter, Mr Jurgens replied, *"I'm sure now"* that Mr Cross did **not** say, during the interview, that he would check the applicant's referees.

[21] However, paragraph 6 of Mr Jurgens' witness statement reads as follows:

At the completion of (the 11 July) *interview, Murray Cross informed me that he would be contacting my referees that I had listed in my C.V. that accompanied my application for the position. I indicated to Murray Cross that I did not mind at all.*

[22] This same admission is also recorded in the third paragraph of Ms Eades' letter of 22 August 2006 to counsel for the Company (attachment to statement of problem), setting out the detail of her client's grievance.

[23] Mr Jurgens was unable to account for the conflict between his oral and written evidence.

[24] During the investigation Mr Jurgens also argued that Mr Cross expressed his intention to contact his referees after agreement was reached that he, the applicant, had the position. That claim flies in the face of commonsense and logic: as Mr Cross said in his witness statement (par 18. b), and reiterated during the investigation, why would he bother contacting the applicant's referees if he had already agreed to Mr Jurgens' appointment? Unlike Mr Jurgens, I find that his evidence of Mr Cross' advice at the end of the interview, that he would be contacting the applicant's referees, supports the Company's position that the applicant's appointment to the position was conditional on, amongst other things, Mr Cross checking Mr Jurgens' referees and finding him suitable.

[25] Mr Cross' advice of his intention to contact Mr Jurgens' referees is also consistent with section 4 of the Company's employment seekers form (document a). It asks for approval to make inquiries as to the accuracy of the information provided by an applicant, i.e. to make reference checks. Mr Jurgens ticked that request, signalling his approval to inquiries being made.

[26] The Company's employment seekers form is significant for other reasons: it clearly records, at par 1, that:

Any offer of employment made to you will be conditional upon you:

a. ...

d) Signing an individual employment contract ....

[27] Similarly, par 2 of the employment seekers form starts, *"**If** you are successful in becoming an employee of the Company ..."* (emphasis added).

[28] In the same vein, the opening paragraph of the second page of document a. provides verbatim as follows:

This form must be completed by the job seeker in own handwriting. Please note that the completion and submission of this form by you does <u>not</u> mean that the Company is under any obligation to employ you

[29] Finally, in section 8 of the form, Mr Jurgens put his signature to a declaration that the answers set out in the employment seekers form were, to the best of his knowledge, correct.

[30] I am satisfied that the employment seekers form, set out as it is in plain English, is compelling and that it clearly means what it says – that it is an application only and does not amount to an employment contract.

[31] I find that Mr Jurgens' signature to that form is evidence his status after the

11 July interview remained that of applicant and that no employment agreement had been entered into.

[32] I do not accept Mr Jurgens' claim that a gentleman's agreement had been arrived at that – somehow – made

his completion of the employment seekers form of no significance. I do not accept his implied argument that the form was at most a matter of going through the motions, that it was only some form of administrative completeness and can be ignored.

[33] I am also satisfied that the failure of either party to sign the draft employment agreement provided to Mr Jurgens, while including his name, a position description and a start date, is evidence no employment contract was entered into.

[34] The Company is entitled to rely on the provision set out in the employment seekers form, at par 1, and as signed off by the applicant, that any offer of employment was conditional of the employment agreement being signed.

[35] Distressing as this matter has clearly been for Mr Jurgens, particularly as the problem appears to have arisen out of an entirely unexpected, negative comment by a referee, the fact he was not appointed to the position in dispute means he is unable to seek compensation from the Company.

Determination

[36] For the reasons set out above I find Mr Jurgens was not an employee of the Company and it follows he has no grounds to pursue his claims against the respondent.

[37] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority
