

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 421
3138801

BETWEEN

MIKE KENNEDY
Applicant

AND

FIELD NELSON HOLDINGS LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Lawrence Anderson, advocate for the Applicant
Richard Upton, counsel for the Respondent

Investigation Meeting: 3 May 2022

Submissions Received: 17 May 2022 and 13 June 2022 from the Applicant
10 June 2022 from the Respondent

Date of Determination: 26 August 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mike Kennedy applied for a role with Field Nelson Holdings Limited (FNH) in its Mitre 10 store in Nelson. Mr Kennedy was interviewed and then offered a position, which he accepted.

[2] Before Mr Kennedy started employment FNH withdrew the offer as Mr Kennedy's references were not suitable.

[3] As a result, Mr Kennedy never started work at the Mitre 10 store and he raised a personal grievance for unjustified dismissal. Mr Kennedy says that there had been an offer of employment which he accepted and he was therefore a person intending to work. On this basis FNH's purported withdrawal of the offer of employment was a dismissal and given the circumstances that was unjustified.

[4] FNH says there was only ever a conditional offer of employment and the conditions were not fulfilled. This means there was never any employment relationship between the parties. And it follows that there cannot be an unjustified dismissal.

The Authority's investigation

[5] The parties were unable to resolve Mr Kennedy's personal grievance and he lodged a statement of problem in the Authority advancing a claim based on that grievance.

[6] I investigated Mr Kennedy's claim for unjustified dismissal by receiving written evidence and documents, holding an investigation meeting on 3 May 2022 and assessing the written submissions of the parties' representatives.

[7] I received witness statements from Mr Kennedy and his partner and from Brandon Beveridge and Alfred Christofferson of FNH. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Unjustified dismissal

What happened?

[9] Mr Kennedy applied for a role as a Trade Drive Thru Assistant at FNH's Mitre 10 store in Nelson. Mr Kennedy had two interviews and was then offered the role he had applied for.

[10] The offer of employment was sent to Mr Kennedy in the form of an employment agreement (the IEA) with the front page setting out the parties and signature blocks. On this page there was also the following:

We agree to employ you and you agree to accept employment on the terms set out in this agreement and the employee policies which apply from time to time. This offer remains valid for one week from the date of this agreement. If not accepted within that period, unless an extension is mutually agreed in writing, the offer of employment contained within this employment agreement will have been deemed to have been rejected and will automatically lapse.

This offer is subject to reference checks and pre-employment checks to [FNH's] sole satisfaction.

....

[11] Both parties signed the IEA on 14 April 2021, within the seven day time frame before any of the pre-employment checks had been undertaken by FNH. Mr Kennedy then completed authorities for FNH to complete criminal records check, drivers licence, references, ACC check and a credit check, also on 14 April 2021.

[12] The IEA recorded Mr Kennedy's start date as 26 April 2021 but FNH wrote to Mr Kennedy on 15 April 2021 and told him 26 April was a public holiday so they should "aim for the 27th as a start date". Mr Kennedy agreed to this.

[13] On 16 April 2021 FNH emailed Mr Kennedy and advised "while checks are being completed attached is the employment documentation for your preview" – this had tax forms attached and some policies.

[14] On 19 April 2021 FNH sent an email to Mr Kennedy advising him of the start time on 27 April and setting out roster options for him.

[15] On 20 April 2021 FNH emailed Mr Kennedy and advised:

I am still waiting on the checks to come back and thought I would touch base with you here.

The drug test is completed and now we are waiting on the credit, drivers license, ACC, reference and MOJ checks. This should come back by Friday this week. Hopefully this does come in this Friday and we should be good to start on Tuesday.

....

[16] On 23 April 2021 FNH had received Mr Kennedy's references and was concerned about certain aspects. After an internal discussion FNH decided not to proceed with Mr Kennedy's employment. On the same day FNH called Mr Kennedy and told him they would not proceed with his employment as someone else had been appointed to the role. In evidence they accepted this was wrong and the reason they did not proceed with Mr Kennedy's employment was because of the reference checks but they did not want cause issues for the person who gave the adverse reference so they made up the story about someone else being employed.

[17] Mr Kennedy never commenced work with FNH and subsequently raised his personal grievance for unjustified dismissal.

Analysis of Mr Kennedy's claim

[18] The first issue to resolve, for the personal grievance, is whether Mr Kennedy was an employee of FNH; the point being if he is not an employee then he cannot have a personal grievance and the Authority does not have jurisdiction to investigate and determine any claim arising out of his dealings with FNH.

[19] It is clear that Mr Kennedy did not commence work with FNH, so he was not an employee in that sense but he did accept an offer of employment from FNH. A person who has been offered and has accepted work as an employee is a person intending to work pursuant to the definition in s 4 of the Act. And a person intending to work is an employee for the purposes of the Act, pursuant to s 6 of the Act.

[20] So, the question of whether Mr Kennedy was an employee of FNH turns on whether he was a person intending to work pursuant to s 4 of the Act because he had accepted the offer from FNH.

[21] I am satisfied on the evidence and my findings of what occurred that:

- (a) FNH made a conditional offer of employment. That was clear from the offer and the communications about the offer and the fulfilment of the conditions.
- (b) Mr Kennedy accepted the conditional offer by signing and returning the IEA.
- (c) FNH maintained its position in respect of the conditions needing to be fulfilled before employment could commence. So, it did not waive any of the conditions.
- (d) Not all of the conditions were fulfilled to FNH's satisfaction and it withdrew the conditional offer as a result – noting that this was before Mr Kennedy started work at the Mitre 10 store.

[22] The advocate for Mr Kennedy says the sequence of events, particularly the exchanges over the offer of employment and the commencement of employment amount to offer and acceptance. Therefore Mr Kennedy was a person intending to work and all of the obligations that an employer owes to an employee including acting in good faith and justifiably when taking steps that might be adverse to an employee's ongoing employment apply.

[23] Counsel for FNH has expressed a position for FNH that is somewhat contradictory; there was never an employment relationship as the parties only ever entered into a conditional contract – expressed in the statement in reply - yet Mr Kennedy was a person intending to work – expressed in the submissions advanced. The key point being there was never a permanent unconditional employment relationship formed.

[24] My view is different to the positions advanced by advocate and counsel; the *offer* was conditional not the contract and as the conditions attached to the offer were not fulfilled or waived by FNH there was never a completed offer and acceptance. And it follows therefore that Mr Kennedy was not a person intending to work – he had not accepted an offer of employment as it was incapable of being accepted before the conditions attached to it were fulfilled.

[25] In reaching this conclusion I have relied on five factors:

- (a) I acknowledge that there was a draft contract – the IEA – which Mr Kennedy was invited to accept by signing and that set out the terms and conditions of Mr Kennedy’s employment, which on acceptance would be the agreed terms and conditions of employment. However, this was expressly referred to as an offer of employment and the offer was referred to as being conditional. And it was clear that FNH did not want or expect either party to perform obligations under the IEA until the conditions were met – evidenced by the correspondence about the proposed start date and the reference checks needing to be completed.
- (b) Expressing the offer as being conditional is in contrast to the approach taken when a contract is expressed as conditional – see for example the ADLS/REINZ standard form agreement for sale and purchase of real estate, which refers to the agreement being subject to conditions. In such cases the Courts have deemed these agreements to be binding contracts with performance suspended until the condition is fulfilled.

- (c) My conclusion is supported by the approach taken by the Courts which has modified and replaced the old contractual law principles of condition precedent and subsequent. See for example, *Hunt v Wilson* and *Buhrer v Tweedie*.¹
- (d) My conclusion is consistent with two Authority determinations; *Barnes v Telecom New Zealand Ltd* and *Gwilliam v KPMG*.²
- (e) My conclusion is not inconsistent with the approach taken by the Employment Court to conditional contracts where the question of conditional offers was not relevant, even when offers were expressed as conditional, because the employee had commenced work and the arrangement between the parties had become a conditional contract.³

Conclusion

[26] Mr Kennedy was not a person intending to work, so he was not an employee and cannot bring a personal grievance against FNH, nor do I have jurisdiction to investigate and determine any claim arising out of the events concerning the application, interview and offer of employment with FNH.

[27] Mr Kennedy's claim is dismissed.

Costs

[28] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, FNH may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum FNH will then have

¹ *Hunt v Wilson* [1978] 2 NZLR 286; and *Buhrer v Tweedie* [1973] 1 NZLR 517.

² *Barnes v Telecom New Zealand Ltd* ERA Christchurch CA20/06; and *Gwilliam v KPMG* [ERA Auckland AA354/03].

³ *Philson v Airways Corporation of New Zealand Ltd* EmpC Auckland AE35/96; *Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152; and *Scullin v Airways Corporation of New Zealand Ltd* [2021] NZEmpC 180.

14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[29] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁴

Peter van Keulen
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.