

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 50
5554073

BETWEEN JASON KANE MCDONALD
Applicant

AND DISCOVER TEKAPO
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Craig O'Connor, Counsel for the Applicant
Hugh Matthews, Counsel for the Respondent

Investigation meeting: 4 March 2016, Timaru

Submissions: At the meeting

Determination: 19 April 2016

DETERMINATION OF THE AUTHORITY

- A. Jason McDonald never became an employee of Discover Tekapo Limited. The claim is dismissed.**

- B. Jason McDonald must pay Discover Tekapo Limited \$1,750.00 towards its legal costs.**

Employment relationship problem

[1] Jason McDonald was employed as head chef at the Tin Plate Kitchen and Bar by Coldwater Hospitality Limited. He had helped to establish the business in June 2014 by assisting to design the kitchen and the menu. Discover Tekapo Limited (DTL) bought the business on 1 February 2015.

[2] Mr McDonald says Daniel and Olivia Ball of Coldwater advised him and the other staff that DTL would employ all staff on terms no less favourable than those in their existing individual employment agreements (IEAs).

[3] On Friday, 30 January 2015 Prudence Blake, director of DTL, gave Mr McDonald a new IEA for the position of head chef to begin on 3 February 2015. The covering letter provided that if he wished to accept the offer he should:

...sign the agreement and attached documentation and return to me by close of day on 2 Feb 2015.¹ A copy of the agreement signed by both parties will then be made available to you. If you have any questions about the agreement or about the position, please contact me as soon as possible.

[4] Mr McDonald says he was inclined to accept the offer of employment. However, he did not sign and return the agreement by the end of the day on 2 February 2015. He went in to see Ms Blake on 3 February 2015 intending to accept the offer. Ms Blake told him it was too late to accept the offer and DTL would not employ him.

[5] Mr McDonald claims that DTL unjustifiably dismissed him on 3 February 2015. He claims payment of one month's wages in lieu of notice and compensation of \$3,500 for humiliation, loss of dignity and injury to his feelings.

[6] DTL says that it never employed Mr McDonald. It agrees it offered to employ him but says the offer could only be accepted by signing and returning the documentation by the end of the day on 2 February 2015. When Mr McDonald failed to do that, the offer expired.

Determination

Mr McDonald's evidence and submissions

[7] Mr McDonald says that Ms Blake asked him if he wanted to stay on as head chef while he was at work on Wednesday, 28 January 2015. He said he wanted to stay on. On the Friday, 30 January Ms Blake handed him the letter of offer and proposed contract while he was at work and just before he started the dinner service.

¹ Which was the following Monday.

[8] He says he told Ms Blake that he was interested in staying on but that he needed more than one working day and that he wanted to seek legal advice. However, he worked until late in the evening on Friday and worked on Saturday until 2.30 am doing a stocktake so that DTL could take over on Sunday, 1 February.

[9] Mr McDonald says that he did not have a copy of his existing IEA and so on Sunday, 1 February he spoke to Michael Burtscher of Coldwater and asked for a copy of it. Mr Burtscher had telephoned him and asked him to order stock for DTL's opening. Mr Burtscher told Mr McDonald he needed to have the agreement signed before 3 February.

[10] Mr McDonald says that before Monday, 2 February 2015 he had worked 14 days, of 12-14 hours, in a row. He did not have any petrol in his car or enough money to fill up his car and his lawyer was in Timaru so he could not go and see his lawyer that day.

[11] Mr McDonald did not telephone his lawyer or send him through the proposed IEA.

[12] Mr McDonald says he was inclined to accept the offer and with that in mind, he went into work at the Tin Plate on Tuesday, 3 February and started the kitchen. He then went to see Ms Blake in her office. He told her he intended to get legal advice but did not have a copy of his Coldwater IEA and had not been able to compare the two IEAs.

[13] Ms Blake told him that he was not working for DTL because he had not signed the agreement the previous day. He says he was disheartened, confused and at a loss.

[14] He says that the Coldwater and DTL IEAs were similar but that the DTL IEA was not the same or better.

[15] Mr McDonald submits that DTL breached s 63A of the Employment Relations Act 2000 (the Act). He says that DTL was required to give him a reasonable opportunity to seek independent advice about the intended agreement, under s 63A(2)(c). However, it failed to do so. For the purposes of that section, an *employee* includes a prospective employee.

[16] Mr McDonald also submits, in reliance on the Employment Court case of *Olsen v Carter Holt Harvey IT Limited*² that the absence of a written agreement does not affect the validity of an agreement reached by other means. He submits that he had already verbally accepted the job offer from DTL before Monday, 2 February and therefore, on 3 February, Ms Blake unjustifiably terminated his employment.

[17] Under clause 14.9 of his IEA with Coldwater, he was entitled to a two-week notice period in cases of technical redundancy, if he decided not to accept any transfer to the acquiring employer. Mr McDonald agrees that he was paid \$1,458.38 being a fortnight's notice payment by Coldwater. Coldwater paid that because Mr McDonald had not accepted DTL's offer.

DTL's evidence and submissions

[18] Ms Blake says that the restaurant was closed on Sunday, 1 and Monday, 2 February 2015 in order to get ready for opening on Tuesday, 3 February. She says that the time of the end of the day on Monday, 2 February was chosen as the last date for Mr McDonald to communicate his acceptance of the offer because she needed to know which staff she would have working the following day. She says she was at work until at least 9 or 10 pm on Monday, 2 February.

[19] Since she had not heard back from Mr McDonald she assumed he did not want the role of head chef and arranged for two other staff, who are qualified chefs, to be rostered on the following day.

[20] When Mr McDonald came to see her on 3 February it was late morning and she asked him if he had signed the agreement. He told her he had not and said he had wanted to compare it to his Coldwater IEA and to take legal advice but that he did not have a copy of his Coldwater IEA.

[21] Ms Blake had been Coldwater's general manager since December 2014 and told him she would have been able to supply a copy of his Coldwater IEA if he had asked. She told him it was too late to accept the offered IEA as she had enough staff.

[22] DTL submits that Mr McDonald never accepted the offer of employment with it and so was never an employee. Therefore, DTL could not have dismissed him.

² [2008] ERNZ 557

Decision

[23] Section 63A of the Act applies to this situation. DTL was required to give Mr McDonald a reasonable opportunity to consider its offer of employment. It is certainly arguable that in giving a prospective employee only one working day, in a town that I understand has no lawyers, DTL did not provide a reasonable opportunity to consider the offer.

[24] Section 63A(3) makes an employer who fails to comply with the requirements of s 63A liable to a penalty imposed by the Authority. However, Mr McDonald has not claimed a penalty. Therefore, I do not need to consider whether DTL breached its obligations under s 63A.

[25] Before I can consider whether DTL unjustifiably dismissed Mr McDonald, he has to prove that he was an employee of DTL. Only an employee can bring a personal grievance claim. The Act defines an employee as including *a person intending to work*. However, a *prospective employee* is not the same as *a person intending to work* for the purposes of being able to bring a personal grievance claim. Section 5 of the Act defines a person intending to work as *a person who has been offered, and accepted, work as an employee*. It is clear Mr Blake had been offered work as an employee but the issue for determination is whether he had accepted that work.

[26] An employment relationship between an employer and an employee only exists when the parties have concluded a contract. The usual fundamental principles of contract formation apply to IEAs, which are contracts. Therefore, Mr McDonald needs to prove that there was an offer and acceptance of the terms and conditions of employment offered by DTL, a mutual intention to create legal relations, consideration and certainty of terms.

[27] Mr McDonald's evidence discloses two contradictory positions. First, he says that he verbally accepted the offer of the head chef's position when Ms Blake offered it to him on either 28 or 30 January, or on both of those days. However, secondly, he says that he did not want to sign the proposed IEA until he compared it to his Coldwater IEA and took legal advice. Therefore, he did not sign it before speaking to Ms Blake on 3 February. That indicates that Mr McDonald did not intend to accept

the offer from DTL until he had taken legal advice and until he was certain he was satisfied with the terms offered in the proposed IEA.

[28] Mr McDonald not wanting to accept the DTL offer by signing the proffered agreement until after he had taken legal advice is fundamentally at odds with him saying he had already verbally accepted the job. Even if Mr McDonald had verbally indicated that he was interested in or keen in remaining the head chef I am not convinced there was sufficient certainty of terms in the type of verbal enquiry Ms Blake made of Mr McDonald; whether he was interested in staying on as head chef.

[29] I do not accept that on or before 30 January when DTL made the written offer to employ Mr McDonald that a contract already existed between the parties.

[30] DTL made it very clear in its letter of offer to Mr McDonald that the way to accept its offer was by signing and returning the IEA and other attached documents by the end of the day on 2 February. Mr McDonald did not do that and DTL was entitled to withdraw the offer when he did not accept in the way DTL had stipulated.

Conclusion

[31] Jason McDonald did not become an employee of DTL and so could not have been dismissed by Ms Blake on 3 February 2015. I dismiss the claim.

Costs

[32] At the investigation meeting, counsel indicated they did not wish to make submissions on costs. They expected that the usual course of the unsuccessful party making a reasonable contribution to the successful party's costs would apply. Counsel agreed that a half of the Authority's usual daily tariff of \$3,500 would be appropriate. Mr McDonald must pay a contribution of \$1,750 towards DTL's legal costs.

Christine Hickey
Member of the Employment Relations Authority