

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 171/08
5143382

BETWEEN

MICHAEL PAKI
Applicant

AND

ALLIANCE GROUP LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Simon Mitchell for Applicant
Andrew Scott Howman & Matt McGoldrick for
Respondent

Investigation Meeting: 15 December 2008 at Wellington

Determination: 19 December 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem; a preliminary matter

[1] This is a preliminary investigation to determine the issue of whether the applicant is able to bring a personal grievance against Alliance Group Limited (Alliance). The issue relates to whether Mr Paki is a person intending to work. The application arises from my earlier determination (26 September 2008: WA 128/08) where I reinstated Mr Paki to a position with Levin Meats Limited (Levin Meats).

[2] After that determination the assets of Levin Meats were sold to Alliance by way of a sales and purchase agreement, executed on 17 October 2008. During due diligence the litigation between Mr Paki and Levin Meats was disclosed to Alliance. As a result Alliance decided it had no wish to enter into an employment agreement with Mr Paki and he was excluded from the arrangement under the sale and purchase agreement from being offered a position with Alliance following settlement. He was not offered a position with Alliance.

Is Mr Paki a person intending to work for the Alliance?

[3] Mr Paki's employment agreement with Levin Meats contained the following relevant redundancy provisions:

20.3 No redundancy (whether technical or otherwise) shall arise in the following circumstances:

a. by reason of the sale, transfer, lease, amalgamation, succession or restructuring of the whole or part of the Employer's business; or

b. where the location the Employee is required to work is changed by the Employer within the radius specified in the First Schedule;

where the Employee is offered employment by the purchaser, transferee, lessee, amalgamated company, successor or the same employer, in the same or similar capacity (or any other capacity which the Employee is willing to accept) on no less favourable terms and conditions of employment.

[4] The sale and purchase agreement between Levin Meats and Alliance contains the following relevant provisions:

*1.1 Defined terms... **Completion** means the completion of the sale and purchase of the Assets and the Business by the Purchaser in accordance with this Agreement and, where the context requires, also means the time at which such completion takes place or is to take place;...*

***Employees** means all the current employees at the date of this agreement as disclosed to the purchaser, and together any other employees employed by the Vendor in the Business before the completion with prior approval of the Purchaser, but excludes:*

- a. any person whose employment terminates before completion;*
- b. any former employee of the Vendor who has been ordered to be reinstated; and*

c. [Particularised Names withheld]...

10. Employees

10.1 Notice and Offer of New Employment

*(a) At a time agreed between the Parties, the Vendor will notify each of the Employees by notice in writing (the **Vendor's Notice**) that their positions will be redundant with effect from Completion.*

*(b) The Purchaser will in conjunction with the Vendor's Notice issued to each of the Employees pursuant to clause 10.1 (a) makes a written offer (the **Purchaser's Offer**) to each Employee, which offer is to remain open until the Business Day before the Completion Date, offering employment with the Purchaser as from Completion in the same capacity at the salary and wages paid by the Vendor and on terms and conditions which are the same as or are no less favourable than those applying to his or her existing employment with the vendor...*

Mr Paki's submissions

[5] Mr Paki's submission is based on a distinction being made between work and employment, and that Alliance was required to offer Mr Paki work as opposed to employment because the employment relationship was covered under the Levin Meats employment agreement. It was submitted that as an employee he is entitled to raise a personal grievance on the basis that he was intending to work.

[6] It was submitted that there was nothing contained in the definition under the Employment Relations Act of a "*person intending to work*" requiring that employment has to be specifically offered by a new employer when an offer to work would suffice.

[7] Mr Paki relied upon his employment agreement with Levin Meats that he would be employed by Levin Meats and he agreed to accept employment from any other employer, in the event of a sale and purchase of the business.

Alliance's submissions

[8] Alliance entirely rejected the applicant's proposition. It submitted that Mr Paki had to demonstrate that he is an employee of Alliance to bring a claim.

[9] There was an arrangement put in place to cover Levin Meats' employees, but that it did not include Mr Paki being employed by Alliance, and there were no obligations on Alliance to offer him work as an employee.

Determination

[10] Both parties' representatives agree that this is a very unusual situation and does not fit in the usual way where a person intending to work means one who has been offered and accepted employment and before they start work.

[11] It is my conclusion that Mr Paki is not a "*person intending to work*" for Alliance because:

- The definition of *employee* under the Act includes "*a person intending to work*", but that phrase is defined under s 5 of the Act to mean: "*a person who has been offered, and accepted, work as an employee*" (emphasis added). This related under his Levin Meats employment agreement to Levin Meats, not directly to Alliance.
- Mr Paki is not an employee within the definition of the term because it is not sufficient for him to rely on his Levin Meats' employment to satisfy that requirement and to work for Alliance, because Alliance was never bound by Mr Paki's and Levin Meats' employment agreement.
- The Statutory regime under Part 6 Subpart 3 of the Act envisages a process applying for transferring to new employment relationships. Any arrangement includes ending one relationship and entering into a new one.
- Mr Paki cannot rely on his offer and acceptance of employment with Levin Meats to satisfy any employment relationship in the future with an unnamed purchaser. This is because it is

envisaged there would be a break in each relationship by the very nature of the technical redundancy or redundancy provision. Indeed that provision requires an offer to be made for that provision either to be waived or applied depending on the employee's choice or if they are exempted from transfer.

- The provisions, under the Employment Relations Act, for the transfer of “*vulnerable*” and “*other employees*”, mean that an arrangement has to be entered into between a vendor and purchaser of a business where employees are to be transferred. The decision about transferring remains one for the vendor and purchaser, but the choice to transfer or not, if it is arranged, is for the affected employee to make. That arrangement implies a change in the relationship with the termination from one employer and the need for an offer of employment from a new employer.
- An exclusion to employ an affected worker is not precluded from any arrangement: (*Olsen v Carter Holt Harvey IT Limited AC 45/08 24 November 2008 Chief Judge Colgan and JJ C M Shaw and AA Couch* applied).
- Mr Paki was only ever employed by Levin Meats under his terms and conditions of employment and those terms and conditions provided for the circumstances that included any sale or transfer of the business. That provision provided for an offer of employment to be made by the purchaser. There never was one made to Mr Paki because under the arrangement for transfer of employees Mr Paki was excluded, and Alliance says that was for genuine reasons.
- Mr Paki's willingness and ambition to work for Alliance are not on their own sufficient to meet the requirement of an offer and acceptance of employment with Alliance.

[12] Thus, I reject the submission put up to me, and I conclude that Mr Paki is not a “*person intending to work*” for the Alliance Group Limited.

Orders of the Authority

[13] Mr Paki's claim is dismissed.

[14] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority