



New Zealand Employment Relations Authority Decisions

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Philpott v Athena Footwear Limited (Wellington) [2010] NZERA 973 (24 February 2010)

Last Updated: 22 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 33/10 5156625

BETWEEN JILL PHILPOTT

Applicant

AND ATHENA FOOTWEAR

LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

K J Anderson

M Williams, Advocate for Applicant

D McLeod, Advocate for Respondent

18 February 2010 at Napier

24 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Miss Philpott, says that on 14th February 2009, she was offered, and she accepted, employment with the respondent, Athena Footwear Limited, ("Athena") but that before she commenced employment, she was told that there was no longer a position for her. Miss Philpott says that albeit she never commenced employment with Athena, she was a person intending to work under the provisions of [sections 5](#) and [6](#) of the [Employment Relations Act 2000](#), hence she was an employee with associated rights to pursue a personal grievance. She claims the remedies of reimbursement of lost wages and compensation of \$9,000. Athena refute that Miss Philpott was ever offered employment and say that while she was interviewed for an available position, no offer to employ her was ever made or concluded.

[2] In addition to the evidence of Miss Philpott, the Authority received evidence from Mr Alex Black and a written statement from Ms Ann Minnell. Evidence for Athena was given by Mr and Mrs Skepetaris.

Background Facts and Evidence

[3] In February 2009 Miss Philpott was working in a retail outlet in Napier. As the business was closing down, she would lose her employment on 28th February. Miss Philpott says that she had accepted employment with a local winery and was waiting to conclude final details about commencing employment there. In the meantime, she became aware of a position as a sales person with Athena. Miss Philpott phoned Athena and spoke to Mrs Vicki Skepetaris, one of the owner/directors of the business. Miss Philpott subsequently met at the Soda Bar, Taradale, with Mrs Skepetaris and Mr Andreas Skepetaris, the other owner/director of Athena. While there was some confusion about the various dates when certain things happened, it appears most probable that this meeting took place on Friday 6th February 2009. There was some general discussion about the nature

of the job and what Mr and Mrs Skepetaris were looking for in a sales person. A pay rate of \$18 per hour with a subsequent increase to \$20 per was discussed. Miss Philpott informed that she was considering a job with a winery and Mrs Skepetaris suggested that Miss Philpott could think about their job and they would be in touch in about 3 days.

[4] A further meeting with Mr and Mrs Skepetaris was subsequently agreed to with Miss Philpott going to the retail shop, Athena Shoes, on Friday 13th February at approximately 5:30p.m. It is commonly agreed that Miss Philpott was shown around the shop and that there was a discussion about the pay rate and hours of work, with some further discussion about merchandising and shop window displays. An initial trial period of employment was also discussed with the pay rate going from \$18 to \$20 an hour after 3 months (90 days). Miss Philpott left a copy of her CV for inspection.

[5] There is conflict in the evidence about other matters. Firstly, Miss Philpott says that she filled in a form. In her written statement Miss Philpott says that the form was: "... asking questions like name, phone number and whether or not I had any criminal convictions or illness that would interfere with the job. I did not and said so accordingly." In her written evidence in response, Miss Philpott says that the form asked: ". whether there was any reason why I should not work there including any pending employment issues." In her oral evidence to the Authority, Miss Philpott says she thinks Mr Skepetaris gave her the form and that the one question that; "... stuck in my mind was: are you involved in any employment law or employment issues -something like that." Miss Philpott says that she signed the form which was: "just one page from memory." Miss Philpott says that she left the form at the shop and never asked for a copy. Miss Philpott also says that she tried on some boots and shoes while she was at the shop.

[6] But, Mr and Mrs Skepetaris are adamant that there was never was any form given to Miss Philpott and the reason it cannot be produced is that it never existed. The evidence for Athena is that they did not obtain a comprehensive application form from a human resources source until 5th March 2009. Mrs Skepetaris also refutes that Miss Philpott tried on boots and shoes. The evidence of Mrs Skepetaris is that: "it didn't happen."

[7] Miss Philpott left the shop on the understanding that she would be contacted again on Monday 16th February. It is now commonly accepted that Mrs Skepetaris phoned Miss Philpott on Saturday 14th February. The evidence of Miss Philpott is that Mrs Skepetaris: ". offered me the position and I accepted it and said that we would discuss a starting date soon." Miss Philpott says that as she was finishing in her current position on 28th February, she phoned Mrs Skepetaris and it was "decided" that she would start work on Thursday 5th March 2009. However, Miss Philpott says that she then concluded that as she would not accumulate any holidays for a year, she would have a break for a week, so she rang and spoke to Mr Skepetaris about having a break and asked if she could start on Monday 9th March. The further evidence of Miss Philpott is that Mr Skepetaris indicated this was "fine" and "to have a nice holiday" Miss Philpott also says that it was agreed that she would; ". come in a bit early" so that she could buy a new pair of shoes suitable to work in and that Mr Skepetaris said: "Don't worry Jill, we will look after you" Mr Skepetaris denies making these comments.

[8] There is further conflict in the evidence. This goes to the fundamental point of whether or not employment was offered and accepted. The written evidence of Mrs

Skepetaris is that she did ring Miss Philpott on 14th February and: ". invited her to visit us on 2nd March 2009 (after she finished her job on the 28th Feb 2009) to go through an employment agreement." Mrs Skepetaris says that Miss Philpott postponed the meeting until 5th March and then again until 9th March. The further evidence of Mrs Skepetaris is that after the second postponement, she spoke to a human resources manager and he advised her to give an application form, along with the employment agreement, to any potential employee. A comprehensive application form was then emailed to Mrs Skepetaris on 5th March 2009. The oral evidence to the Authority was that she rang Miss Philpott and told her that they had enjoyed the interview and would like her to come in on Monday 2nd March to: "go through the employment agreement and go over her references." Mrs Skepetaris says that she requested references from Miss Philpott but I have some doubts about this. In a handwritten summary, attached to the statement in reply received by the Authority on 22 May 2009, Mrs Skepetaris writes:

I did ring and tell her we had a position we would like to offer her and she should come in on Monday 2/3/09 (after she had finished her job at Earth Collection on Saturday 28/2/09), and we would go over the employment agreement.

[9] Miss Philpott says that she informed the winery that she was no longer available for the position they had offered then went to Tauranga to visit a friend. Her evidence is that on Friday 6th March 2009 at 11:05a.m, she received a phone call from Mr Skepetaris. Miss Philpott says that Mr Skepetaris told her that she could not work for them as she had lied on the form she had filled out. Miss Philpott says that upon asking him what he was talking about, Mr Skepetaris repeated that she could not work for them [Athena] as she had not told them about "some court issues" The evidence of Ms Philpott is that she was shocked and confused and phoned her friend Mr Alex Black and told him that the job at Athena was no longer available. Mr Black confirms that he received a call from Miss Philpott who was in a distraught state.

[10] The evidence of Mr Skepetaris is that, following Miss Philpott postponing coming to see them until 9th March, he received a phone call from the ex-partner of Miss Philpott (Mr Jim Greenwood)^[1] who told him that he was involved in a court hearing with Miss Philpott. Mr Skepetaris says that he was concerned about this information but he knew that: ". any matters concerning courts would have to be declared in the application form that was to be filled in and it was something we could discuss with her prior to offering her employment. We were going to run reference, credit and police checks after receiving the application forms so we were not concerned at all." Mr Skepetaris also told the Authority that in response to an advertisement, regarding the sales position placed in the local newspaper, they had received more than 50 applications (upon closure on 13th February) and had arrived at a short list of seven or eight people to interview.

[11] In regard to the phone call to Miss Philpott on 6th March, Mr Skepetaris says that because he was annoyed that she had postponed two appointments to come and see them:

"I rang to ask her if she was going to be bothered to come and fill in the employment agreement and the application form seeing as she had postponed twice already. I told her I wanted to discuss what had happened with her previous employer and I thought she should have spoken to us about it."

[12] The evidence of Mr Skepetaris is that Miss Philpott failed to come to Athena Footwear on 9th March and therefore her interest in the position was not progressed, particularly given that they had many applicants for the position and now had a list of other people to interview.

Analysis and Conclusions

[13] [Section 5](#) of the Act provides that a person intending to work means:

... a person who has been offered, and accepted, work as an employee; and [section 6\(1\)\(b\)\(ii\)](#) provides that the meaning of an employee includes: a person intending to work.

[14] The question for the Authority to determine is: Was a binding employment agreement entered into to the extent that the parties went beyond mere discussion and in fact both intended to enter into a binding legal relationship with each other and on the same terms as each other^[2] to such degree that the provisions of [sections 5](#) and [6](#) of the Act are satisfied, in that Miss Philpott can be defined as an employee with consequent rights to pursue a personal grievance?

[15] I conclude that while there was certainly meaningful discussion in regard to Miss Philpott being employed by Athena, and the parties most probably anticipated entering into an employment agreement, a binding legal relationship was not entered into.

[16] On the balance of probabilities, I conclude that what happened is that on Saturday 14th February 2009, Mrs Skepetaris invited Miss Philpott to come and have some further discussion about an employment agreement on 2nd March, after Miss Philpott finished her employment with Earth Collection on 28th February. The statement in reply received by the Authority on 22 May 2009 is as close as we can get to a contemporaneous document whereby Mrs Skepetaris says: *"I did ring and tell her [Miss Philpott] that we had a position we would like to offer her and we would go over the employment agreement."* (Emphasis added.)

[17] It is the position of Miss Philpott that she believes that she had then been offered the position with Athena and accepted it and that she was initially to commence employment on 2nd March with subsequent postponements of the starting date to 5th and then to 9th March. However, while I accept that this may have been Miss Philpott's perception of matters, I conclude that this was an erroneous perception.

[18] Rather, I find that it is more probable that, as of 14th February 2009, while Mr and Mrs Skepetaris saw Miss Philpott as a likely employee, there were still some details to be concluded including discussion about the content of the employment agreement (which I accept that Athena uses for all employees) and a 90 day trial period. I conclude that it may well have been the intention of Mr and Mrs Skepetaris to conclude an agreement with Miss Philpott but this was subject to obtaining further information about her references and previous employment, particularly given the meagre nature of the CV that Miss Philpott provided, which I accept, as Mr Skepetaris made clear, would be unlikely to persuade any prospective employer. I also accept that Mr and Mrs Skepetaris are experienced business people and have employed staff over a number of years. It is most unlikely that they would have agreed to employ Miss Philpott solely on the information that she had provided as of 14th February. In regard to the form that Miss Philpott says that she filled in, I found her evidence and that of Mr and Mrs Skepetaris to be equally convincing as to the existence or otherwise of such, but it cannot be produced and I am unable to reach a conclusion about whether or not it existed.

[19] Subsequently however, Mr and Mrs Skepetaris had second thoughts about the suitability of Miss Philpott for two reasons. Firstly, she had twice postponed coming in to see them to discuss an employment agreement and then, more particularly, they were contacted by Mr Greenwood, who acting with some apparent vindictiveness related to his conflict with Miss Philpott, informed Mr and Mrs Skepetaris that they should check out Miss Philpott's employment background. This appears to

have prompted the phone call to Miss Philpott by Mr Skepetaris on 6th March. He acknowledges that his tone of voice when speaking to Miss Philpott would have been forceful as he was frustrated that Miss Philpott had postponed coming to see them twice and he wanted he wanted to confirm that she would definitely meet with them on 9th March. Mr Skepetaris says that he was still expecting Miss Philpott to meet with them on 9th March but I suspect that he thought this would be unlikely given the tone of his conversation with Miss Philpott.

Determination

[20] While I accept that Miss Philpott may have perceived that she been offered the position with Athena and accepted it, I do not accept that a binding legal relationship was entered into. At best, Mr and Mrs Skepetaris were proposing to offer Miss Philpott employment. Had Miss Philpott taken up the opportunity to meet with Mr and Mrs Skepetaris on 2nd March, or even 5th March, it seems possible that a binding agreement may have eventuated. But even then, give the paucity of Miss Philpott's CV and the lack of references; it is speculative as to if this would have happened. Certainly by 6th March, having had time to reflect, and with the perverse intervention of Mr Greenwood, Mr and Mrs Skepetaris had serious doubts about the suitability of employing Ms Philpott and Mr Skepetaris appears to have made this clear enough to Miss Philpott to the extent that she perceived that the purported offer of employment had been withdrawn.

[21] In conclusion, I find that while there was certainly meaningful discussion between Miss Philpott and Mr and Mrs Skepetaris, leading to a possibility that Miss Philpott would become an employee with Athena, that discussion did not culminate in a binding legal agreement sufficient enough to give Miss Philpott the status of an employee under [sections 5 and 6](#) of the [Employment Relations Act 2000](#). It follows that I find that Miss Philpott was not in an employment relationship with Athena and hence is unable to pursue a personal grievance on any grounds.

Costs

[22] The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicant has a further 14 days to file and serve submissions.

K J Anderson

Member of the Employment Relations Authority

[1] Miss Philpott and Mr Greenwood were a couple and in business together. Apparently, after a break down of the relationship, there had been an acrimonious dispute involving the business.

[2] *Canterbury Hotel etc IUOW v The Elm Motor Lodge Ltd* [1989] 1 NZLIR 958.

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