

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Darcy Malcolm Watson (Applicant)  
**AND** Jason Fell (Respondent)  
**REPRESENTATIVES** Darcy Malcolm Watson In person  
Paul Wallace, Advocate for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 28 September 2001  
**DATE OF DETERMINATION** 23 October 2001

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

Darcy Watson says that he was offered a job by Jason Fell, which he accepted. Mr Fell then withdrew the offer so that Mr Watson never actually started work for Mr Fell. Mr Fell denies that an offer was made or accepted.

Mr Watson says that he has a personal grievance in that he was unjustifiably dismissed, in reliance on the following definitions in the Employment Relations Act 2000:

“5. Interpretation

**employer** means a person employing any employee or employees, ...

**person intending to work** means a person who has been offered, and accepted, work as an employee; and intended work has a corresponding meaning.

6. Meaning of employee

- (1) In this Act, unless the context otherwise requires, employee –
- (a) ...
  - (b) includes –
    - (i) a homemaker; or
    - (ii) a person intending to work;

103. Personal grievance

- (1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee’s employer or former employer because of a claim –
- (a) that the employee has been unjustifiably dismissed; or
  - (b) ...

## **Preliminary matter**

Mr Watson approached the Authority at the end of the investigation meeting to ask whether evidence concerning an admission he alleged was made during a mediation of the problem made any difference to his case.

For his information, s 148 of the Employment Relations Act provides as follows:

“(1) Except with the consent of the parties or the relevant party, a person who –

- (a) provides mediation services; or
- (b) is a person to whom mediation services are provided; or
- (c) is a person employed or engaged by the Department; or
- (d) ...

must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

(2) ...

(3) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document or information that, by subsection (1), is required to be kept confidential.”

This means that I cannot consider evidence of the type Mr Watson drew to my attention unless Mr Fell agrees that I should do so. In the absence of such agreement, the law says the evidence should not be brought to my attention at all. Thus the short answer to Mr Watson’s question is that the evidence does not make any difference to his case because the law does not allow that kind of evidence to be considered.

## **Determination**

Mr Watson was a qualified motor trimmer but had spent some 10 years in other activities, including sales, since last practising his trade. At the relevant time he had a job working for a business called Waikato Clutch and Brake.

Jason Fell operated a car and boat upholstery business known as Waikato Motor Trimmers. He was a qualified motor trimmer and employed an apprentice, and had a colleague who specialised in boat trimming. When the colleague left the business Mr Fell advertised for a new employee in or about April 2001. Darcy Watson became aware of the vacancy and approached Mr Fell about it. By then Mr Fell had appointed someone else, and advised Mr Watson of that on or about 30 April.

According to Mr Watson, Mr Fell indicated during that conversation that he would otherwise have been very interested in employing Mr Watson. While that may have been so, it has no contractual significance. An appointment had been made, and Mr Fell had not even interviewed Mr Watson. However Mr Watson appeared to have taken the indication more seriously than was warranted, and he included it as part of the background to his allegation that he was offered a job some three weeks later.

Mr Fell’s new employee gave notice of his resignation very shortly after he started, and was to terminate his employment on or about 25 May 2001. At the same time there was still some boat trimming work to be completed after the departure from the business of Mr Fell’s colleague. Mr Fell was acquainted with Shayne Forkert, a good friend of Mr Watson’s, so contacted Mr Forkert to find out whether Mr Watson would be interested in helping to finish the boat trimming work on the evenings of 22 and 24 May 2001. Other than as a result of the approach at the end of April, Mr Fell did not know Mr Watson.

Mr Watson was available to work on one of those evenings, Tuesday 22 May, and duly presented himself at the premises of Waikato Motor Trimmers for the purpose. The work involved finishing

off a boat cover, and inevitably Mr Fell showed Mr Watson around the premises and discussed the equipment available for the job. He also introduced Mr Watson to others on the premises that evening, including the apprentice, the departing employee, and friends of Mr Fell's who 'dropped in'.

Mr Watson acknowledged that the job was a 'one-off' and I do not accept that Mr Fell said anything to Mr Watson that night beyond basic courtesies and pleasantness, the need to provide Mr Watson with information to help him to the work, or general chat about work and equipment. Mr Watson was not justified in reading more than he did into that conversation. I am prepared to accept the proposition that Mr Fell made encouraging statements of a general kind, but the statements did not amount to an offer of employment. Mr Watson again seems to have placed more weight on them than was warranted, and to have acted on that basis in his subsequent conversations with Mr Fell.

Mr Watson also interpreted a discussion on 22 May about rates of pay as being incorporated in an offer of ongoing employment. I do not believe he was justified in interpreting the conversation that way. Mr Fell simply wanted to know what Mr Watson expected to be paid for the night's work, as it had not been discussed before then. There was a brief conversation about the matter, following which Mr Fell gave Mr Watson \$50.00 in cash in payment for that work.

By then Mr Fell had done nothing about seeking a replacement for the new employee. Moreover the employee was also present on the evening of 22 May and Mr Fell did not say anything to Mr Watson about the fact that the employee would be leaving that Friday. For his part Mr Watson advised Mr Fell that he had been approached by another prospective employer about a position. If Mr Fell was giving serious consideration to offering the soon-to-be vacant position to Mr Watson that would have given him an opening to raise the matter, but he did not do so.

A few days later Mr Watson paid what he called 'a social visit' to the premises of Waikato Motor Trimmers. Mr Fell asked him whether he had heard about the other position. He was unaware that Mr Watson was under the impression he was being offered a job, and there was no reason why Mr Fell should have been aware of this. Again I regard Mr Fell's query as no more than a friendly courtesy. In response, Mr Watson advised that his interview with the prospective employer had gone well and that he was to attend a second interview.

There was a direct conflict in the evidence concerning whether Mr Watson, as he put it, was "continually asked if I had heard from the other job or if I would be happy to work at WMT" and "On more than one occasion I said to him 'I can't give you a decision yet, but as soon as I have heard from the other job, I will make my decision and be in touch.'" Mr Fell denied being party to this kind of conversation. I accept Mr Fell's denial because overall Mr Watson's evidence was too inaccurate or inconsistent for me to rely with confidence on what he said. I am able to accept that fragments of conversations occurred as he said they did, but because of the flaws I have indicated I am unable to accept that his versions occurred at the time or in the context he said they did. Mr Fell's evidence was consistent, which has led me to prefer it when accounts of events differed and there was no other basis on which I could reach conclusions as to credibility.

On 5 June 2001 Mr Watson had a second interview with his prospective employer in 'the other job'. The interview went well, and on 6 June Mr Watson was offered the job.

However he did not give an answer immediately. Instead he asked his friend Mr Forkert to contact Mr Fell and request a meeting with him. Mr Forkert duly did so by contacting Mr Fell and asking if Mr Watson could come and see him. Mr Fell wondered why Mr Watson would want to do this, and concluded it must have something to do with the employment prospect he knew Mr Watson was

following up. Hence he asked Mr Forkert if Mr Watson had missed out on that job. Mr Forkert advised that he hadn't.

In his written statement of evidence Mr Forkert said he went on to say to Mr Fell “.. that is why he needs to come and discuss the finer points of your job offer.” However at the investigation meeting he said his reply to Mr Fell was simply “... before he makes a decision he wants to come and see you to discuss a few points.” The difference is significant. If the former were the more accurate account, then Mr Fell would be on notice that Mr Watson believed the two men were discussing an offer of employment already made by Mr Fell. If the latter were more accurate, then Mr Fell would be understandably uncertain about what Mr Watson wanted and would not necessarily be aware that Mr Watson believed at that time Mr Fell was offering him a job. In an attempt to clarify this I asked Mr Forkert exactly what Mr Fell said to Mr Forkert in order to give Mr Forkert the impression that Mr Watson was being offered a job. He was not able to point to anything Mr Fell said, and I consider it likely that his impressions were coloured by Mr Watson's. Mr Watson's own oral account of what Mr Forkert told him of the conversation tends to support Mr Forkert's oral account. Accordingly I prefer Mr Forkert's oral account to his written account.

Thus, while Mr Fell was expecting a visit from Mr Watson, he was not clear about why Mr Watson wanted to see him although he was in a position to assume it had something to do with employment. Indeed he went on to conduct the discussion on the basis that it was at least possible he would employ Mr Watson. While I do not accept that an offer had already been made, I do accept that the possibility was a live one.

There was a conflict in the evidence over whether Mr Watson appeared at Mr Fell's premises for the purpose on 6 or 7 June. However I accept that Mr Watson had with him a piece of paper on which was written: “Is o/t at o/t rates? 8.00 to 4.30 – ½ hour lunch, Do holidays hold over? When will you review pay? Agreement in writing”. These were Mr Watson's notes of the points he wished to raise.

It was common ground that these matters were discussed, although there was a further conflict in the evidence concerning whether rates of pay were discussed. The two men also discussed the amount of notice Mr Watson would be required to give his current employer. Mr Fell said he opened that discussion by saying “if I was to take you on, when could you start?” His understanding of the discussion overall was that it was an interview, given that he had a vacancy, but that he had not offered Mr Watson the job. He was merely discussing the terms and conditions that would be available. He also told Mr Watson he would have to confirm the terms and conditions with his wife, who was a partner in the business.

Mr Watson accepted that Mr Fell mentioned a need to consult with Mrs Fell, but his evidence was inconsistent on the point. In his oral evidence he said that Mr Fell said he would consult with Mrs Fell over holiday arrangements only, and that it was ‘early in the piece’. In a set of written answers to questions from the respondent he said that Mr Fell mentioned the need to consult with his wife ‘at a later stage, when I had already been offered the job’. Since the answers indicated Mr Watson believed he had been offered the job on or about 22 May, then Mr Watson was saying the need to consult was raised some time after that date.

It was this kind of overall lack of accuracy in Mr Watson's evidence that led me to prefer the evidence of Mr Fell where there were conflicts. Accordingly I accept that Mr Fell indicated to Mr Watson on 6 or 7 June that no offer of employment would be made until after he had consulted his wife. That means it is not necessary for me to determine whether the meeting was held on 6 or 7 June. At best, on one of those dates Mr Fell made an offer conditional on the outcome of his discussions with his wife.

Acting on his conclusion that Mr Fell had offered him a job, Mr Watson contacted the other prospective employer on 7 June to decline the offer. He also resigned from his existing employment the same day.

Meanwhile Mr Fell was consulting with his wife and some others about whether he should employ Mr Watson. He also spoke to two other potential employees. One of these, Douglas Potts, had an initial discussion with Mr Fell on 8 June, and an interview on 12 June. On or after that date Messrs Fell and Potts concluded that the job was not suitable for Mr Potts.

On 11 June Mr Fell telephoned Mr Watson to advise that he would be interviewing the other two people. Mr Watson protested, saying he had already resigned from his existing employment. Mr Fell suggested that Mr Watson come and see him, which Mr Watson did.

There was another conflict in the evidence over what was discussed at the meeting. Mr Watson said that Mr Fell confirmed everything was 'sweet', and that Mr Watson's start date would be Monday 18 June. Mr Fell said he reconfirmed he was seeing two other people, and told Mr Watson again that he would get back to him. Mr Watson also alleged that there was a further discussion about when he would be given a written employment agreement, and was advised that the agreement was 'at the lawyer's'. Mr Fell said that the discussion about a written employment agreement occurred at the meeting of 6 or 7 June.

I have already found Mr Watson's recollection of when issues were discussed to be unreliable, and the same goes for his placing into context of those discussions. For those reasons the area of conflict in the preceding passage to which I have given most careful consideration concerns Mr Fells' response to Mr Watson when Mr Watson advised that he had already resigned. According to Mr Fell, he replied that he had two other people to see, and Mr Watson was unhappy about that. While Mr Watson acknowledged being unhappy after the 11 June conversation, he was reassured by Mr Fell saying everything was 'sweet'.

The best construction I can place on that exchange is that, if it occurred, it was not sufficient to amount to an offer of employment, or to a confirmation of an offer of employment. I have already concluded that no offer was made on 22 May, and at best a conditional offer was made on 6 or 7 June. In conversations occurring after any conditional offer, Mr Fell made it clear to Mr Watson that there were further interviews to complete. There was no evidence that Mr Fell said to Mr Watson that he had consulted with Mrs Fell and she had given the go ahead. That is the kind of evidence required before I could conclude that any offer of employment became unconditional in the days following the 6 or 7 June discussions. Even if Mr Fell did say everything was 'sweet', Mr Watson was not entitled to take that as a confirmation of an offer of employment given that he knew other people were to be interviewed and that Mrs Fell was to be consulted.

Mr Fell did discuss with his wife the possibility of employing Mr Watson. She initiated inquiries of her own about Mr Watson, and was concerned about what she heard. She was against employing Mr Watson.

After making some further enquiries about Mr Watson, and observing him carrying out a small job on the premises on 13 June, Mr Fell decided not to offer Mr Watson the position. He advised Mr Watson of this on 15 June.

As I am not satisfied that an offer of employment was made to Mr Watson and accepted by him, I conclude that Mr Watson was not a person intending to work in terms of the definition in the Employment Relations Act. He is therefore not able to bring a personal grievance against Mr Fell.

**Costs**

Costs are reserved.

The parties are invited to agree on the matter themselves. If they are unable to do so they shall have fourteen days from the date of this decision in which to file and serve memoranda on the matter. If either wishes to reply to anything on the memorandum of the other there shall be a further three working days from the date of receipt of the relevant memorandum in which to file and serve such reply.

**R A Monaghan**  
**Member, Employment Relations Authority**