IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 188
EMPC 342/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CHAD BRYAN VEILLEUX EDWARDS Plaintiff
AND	LAYBUY HOLDINGS LIMITED Defendant

Hearing:	31 July 2023 (Heard at Auckland)
Appearances:	L Anderson, advocate for plaintiff E Monsellier and S Climo, advocates for defendant
Judgment:	3 November 2023

JUDGMENT OF JUDGE J C HOLDEN

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[1] In December 2020, Chad Edwards accepted a position with Laybuy Holdings Ltd (Laybuy). On 8 January 2021, however, before Mr Edwards started, Laybuy withdrew the offer of employment. This was because it was dissatisfied with the results of a pre-employment check, which it says was a condition of its offer of employment.

[2] Mr Edwards purported to raise a personal grievance in relation to the withdrawal of the offer.

[3] The Employment Relations Authority (the Authority) found that Mr Edwards was never an employee of Laybuy and therefore was unable to raise a personal grievance.[1]

[4] Mr Edwards challenges the determination on a de novo basis.

[5] Mr Edwards says that he was a person intending to work, and therefore an employee, because he had accepted an unconditional offer of employment by signing an employment agreement with Laybuy. He says in the alternative that even if the offer was conditional, he was still able to accept it so as to become a person intending to work. He notes that if employers are permitted to withdraw conditional offers, that undermines the object of the Employment Relations Act 2000 (the Act) in s 3(a)(ii), which is to address the inherent inequality of power in employment relationships.

[6] Mr Edwards also says that his communications, either individually or together, amounted to the raising of a personal grievance within the 90-day timeframe, or that Laybuy consented to the grievance being raised late, or, alternatively, he should be granted leave to raise a personal grievance out of time.

[7] The matters presently for the Court are:

(a) Was Mr Edwards an employee pursuant to the Act, and therefore able to raise a personal grievance?

(b) If so, did he raise a personal grievance within the 90-day timeframe in s 114 of the Act?

(c) If he did not raise a grievance within 90 days, did Laybuy consent to the late raising of the grievance?

(d) Alternatively, should leave be granted for him to raise a personal grievance out of time?

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1 *Edwards v Laybuy Holdings Ltd* [2022] NZERA 443 (Member Gane).

[8] In summary, for the reasons set out, I find Mr Edwards was not a person intending to work and therefore not an employee pursuant to the Act. He was not entitled to raise a personal grievance.

Laybuy was prepared to employ Mr Edwards but that was conditional on a satisfactory pre-employment check

[9] Towards the end of 2020, Mr Edwards was looking for new employment opportunities, at a higher remuneration than he was then receiving.

[10] He had several meetings with Mr Justin Soong, who was the chief technology officer for Laybuy, as well as with other Laybuy personnel.

[11] After a recruitment process, Mr Edwards was orally offered employment with Laybuy by Mr Soong who also advised that there would be some pre-employment checks to go through. Mr Edwards says that Mr Soong said he assumed they would be fine – a formality.

[12] Mr Edwards was then sent documents via an online document sharing app called BAMBOO HR, being:

(a) A letter confirming the conditional offer of employment.

(b) A copy of an individual employment agreement.

(c) A consent form for pre-employment checking (which included consent to a police criminal check).

(d) A tax code declaration form.

(e) A form regarding KiwiSaver.

[13] On 17 December 2020, Mr Edwards requested a copy of the individual employment agreement that he would be able to pass on and take advice on. A PDF copy of the individual employment agreement was emailed to him.

[14] On 18 December 2020, Mr Edwards texted Laybuy's people experience and insights lead (HR lead) about the requested police criminal check, asking if it could be done without providing the requested address history, as he did not have easy access to that.

[15] Mr Edwards also indicated he had digitally signed the documents sent via BAMBOO HR.

[16] The letter confirming the conditional offer of employment advised that "This offer is conditional upon satisfactory pre-employment checks specific to the role we're offering you". In the letter, Laybuy advised that, should it not be satisfied with the results of the check(s), the offer may be withdrawn.

[17] The individual employment agreement did not contain any conditions regarding pre-employment and had been signed by Mr Soong prior to it being sent to Mr Edwards.

[18] On 18 December 2020, Mr Edwards had a conversation with the HR lead and told her of various matters that likely would show up on his police criminal check. He said he had not advised the company of these matters sooner as he was not explicitly asked and because previous offers of employment had been withdrawn based on that information.

[19] The HR lead advised Mr Edwards that, once received, the results from the police criminal check would be escalated within Laybuy for consideration.

[20] On 5 January 2021, Mr Edwards emailed Mr Soong to advise him that he was back from his holiday break and that:

> Hopefully you guys will receive the results from the pre-employment checks soon. Liv told me she has been keeping you in the loop on that, and that we should know the outcome in the next few days.
>
> I just wanted to touch base, let you know I am well and see how you are doing.
>
> Chat soon.

[21] On 7 January 2021, the police criminal check came back. That check confirmed the matters Mr Edwards had previously mentioned to the HR lead.

[22] The next day, she called Mr Edwards and advised him that the offer of employment was withdrawn because of the outcome of the police criminal check.

[23] It seems that at some point either on 7 or 8 January 2021, Mr Edwards re-signed the offer letter and downloaded a copy of the signed individual employment agreement.

[24] On 8 January 2021, Mr Edwards called Mr Soong. He asked Mr Soong why the offer had been withdrawn and attempted to reopen the decision.

[25] During that conversation, Mr Edwards noted that he had previously said that:

> …if anything came up I would appreciate the opportunity to discuss it with whoever was making the decision, just to provide clarity and more information. And, I also did offer for the HR Manager at [his then current employer] to provide additional details and reference in order to get things across the line.

[26] Mr Soong advised that there would be a formal letter coming from the company but that he did not feel able to elaborate further.

[27] The letter confirming the withdrawal of the offer was sent to Mr Edwards on 12 January 2021. It said:

> Dear Chad,
>
> This letter summarises our discussion via phone on the afternoon of Friday 8 January.
>
> As previously advised and outlined in our offer letter, your offer of employment with Laybuy Holdings Ltd was conditional upon receipt of satisfactory pre-employment checks specific to the role being offered to you.
>
> You were made aware that should we not be satisfied with the result of the check(s), we reserved the right to withdraw the offer.
>
> Following receipt of your pre-employment checks and consideration of the information contained within we have determined your pre employment checks not to be satisfactory and we therefore reserved the right to withdraw our offer of employment in the role of Full Stack Developer at Laybuy Holdings Ltd.

> If you require any additional information regarding this, please feel free to contact [name and contact information].
>
> All the best.

[28] On 13 January 2021, following receipt of the letter on 12 January 2021, Mr Edwards emailed Laybuy advising:

> I was very clear that I wanted to maintain my right to discuss the findings of the check with anyone involved in seeing those results. I also asked to be kept informed as to who was being looped in on this. Neither of these things happened, so it seems safest to just go by what is in the contract for now.

[29] He then advised that, as his contract required him to start at work the following Monday, he wanted to make it clear that he was not abandoning his employment and was awaiting further instruction on what to do on the morning of Monday 18 January 2021.

[30] Laybuy replied, saying that there was no employment relationship entered into between Mr Edwards and Laybuy and no requirement for him to attend the Laybuy office as the offer of employment had been withdrawn. On 15 January 2021, MrEdwards emailed:

> Thank you, understood. Apologies for wasting your time. Best of luck finding the right person for the job. I hope you guys have a great weekend and a great year. Would have loved to have been there with you. A lesson learned at my end.

[31] Laybuy responded:

> Thanks for your email, all the best.

[32] Mr Edwards had previously given notice to his then current employer, but they were amenable to him withdrawing that notice, and so he was able to stay there until he moved to another employer.

[33] There was no further contact between Mr Edwards and Laybuy until 9 April 2021 when Mr Edwards sent a letter headed “Personal Grievance - Unpaid Salary”. He sought what he said were three outstanding salary payments due on 20 January 2021, 22 February 2021 and 22 March 2021.

[34] By letter dated 20 April 2021, the chief people officer at Laybuy rejected that claim, with the response concluding "There has been no employment relationship entered into between yourself and Laybuy Holdings Ltd and therefore we have no obligation to make any payment to you, and we consider this matter closed".

[35] Mr Edwards emailed back on 4 May 2021, apologising for the delay in responding and then saying:

> I find the response a little confusing, as I cannot find anything in our employment agreement that talks about pre-employment conditions.
>
> To state that there is no employment agreement between us seems very strange given the title of the contract is titled "Permanent individual employment agreement".
>
> If you could provide any information that might help resolve this confusion, that would be greatly appreciated.
>
> Certainly, as far as I am aware I am an employee of Laybuy, and if there are any issues with my performance you would need to raise those with me.
>
> I will try to get a more formal response back to you shortly, but it seems based on the response here we may need to move to a formal mediation.

[36] Mr Edwards sent further emails and endeavoured to get Laybuy to agree to attend mediation, which it declined to do. By letter dated 25 May 2021, the general counsel for Laybuy confirmed the company's position that Mr Edwards was never an employee. He also confirmed that Laybuy considered the matter to be closed. This was reiterated in an email of 28 May 2021, which advised that Laybuy did not intend to engage further.

[37] The matter proceeded to the Employment Relations Authority.

The question is whether Mr Edwards was a person intending to work

[38] Section 6(1)(b)(ii) of the Act includes an extended definition of "employee" to include "a person intending to work". A person intending to work "means a person who has been offered, and accepted, work as an employee".[2] The Act does not define the words "offered" or "accepted".

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[2] Employment Relations Act 2000, s 5.

[39] Laybuy made Mr Edwards a conditional offer of employment, which he accepted. The question is whether he is a person intending to work, as defined in the Act.

To be an offer, there must be an intention to be legally bound

[40] In its determination, the Authority reasoned that, as the offer of employment was conditional, and the conditions attached to the offer were not fulfilled or waived by Laybuy, there was never a completed offer and acceptance, and therefore Mr Edwards was not a person intending to work.[3] This it said meant he was not an employee for the purposes of the Act and could not bring a personal grievance.[4] The Authority referred to *Hunt v Wilson*[5] and *Buhrer v Tweedie*.[6] It says its finding is consistent with three Authority determinations: *Barnes v Telecom New Zealand Ltd*,[7] *Gwilliam v KPMG*,[8] and *Kennedy v Field Nelson Holdings Ltd*.[9] In those determinations, the Authority found that, in order for a person to be a person intending to work, they had to be in an employment relationship with the employer but determined that would not happen until the conditions in a conditional offer had been met.

[41] It also says this proposition is consistent 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.[10] I do not, however, consider that the Employment Court decisions referred to by the Authority are of a great deal of assistance, given the circumstances in which they arose.

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3 *Edwards,* above n 1, at [44]–[45].
4 At [47].
5 *Hunt v Wilson* [1978] 2 NZLR 261 (CA) at 267–268.
6 *Buhrer v Tweedie* [1973] 1 NZLR 517 (SC) at 519–520.
7 *Barnes v Telecom New Zealand Ltd* ERA Christchurch CA20/06, 14 February 2006.
8 *Gwilliam v KPMG* ERA Auckland AA354/03, 26 November 2003.
9 The Authority refers to *Edwards v Field Nelson Holdings Ltd*, but that would seem to be an error, with the correct reference being *Kennedy v Field Nelson Holdings Ltd* [2022] NZERA 421.
10 *Edwards*, above n 1, at [46], citing *Philson v Air New Zealand Ltd* EmpC Auckland AEC 35/96, 3 July 1996; *Scullin v Airways Corp of New Zealand Ltd* [2021] NZEmpC 180, [2021] ERNZ 979; and *Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152, [2013] ERNZ 326.

[42] The meaning of the definition of "person intending to work" must be ascertained from its text and in light of its purpose and context.[11]

[43] Prior to the inclusion of the extended definition, which refers to persons intending to work, the Arbitration Court held that a person who had entered a contract of employment but had not yet started work could not bring a claim of unjustifiable dismissal.[12] The Court stated:[13]

> We hold that there was a contract between Mrs Gurney and Dr Wilson in that there was an exchange of promises; Mrs Gurney promised to work for Dr Wilson, Dr Wilson promise to pay Mrs Gurney, and that Mrs Gurney relying on the agreement, altered her position to her detriment by giving notice and leaving her previous employment. But the contract means that the *employment* was to commence on 1 October 1979. At the time of the alleged dismissal on 26 September 1979 Mrs Gurney was not employed by Dr Wilson, she merely had a contractual right to be employed as from 1 October 1979. If this proposal is correct, as we believe it to be, then the personal grievance procedures are not available to Mrs Gurney. The employment had not commenced. … any remedies Mrs Gurney may possess sound in contract at common law and not under the Industrial Relations Act 1973.

[44] It appears that the extended definition was first added to the Labour Relations Act 1987 to reverse the effect of this decision.[14] In that context, it seems clear that the mischief aimed at by Parliament was where an employee had signed an employment contract and that contract had been subsequently reneged on prior to the term of employment beginning. This history supports a contractual approach to the definition of "person intending to work".[15]

[45] The words "offer" and "acceptance" have long-accepted legal meanings under contract law. Their use, in the context in which they appear in s 5 of the Act, also indicates that Parliament intended a contractual approach to the definition.

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11 Legislation Act 2019, s 10(1).

12 *Auckland Clerical and Office Staff Employees Industrial Union of Workers v Wilson* [1980] ACJ 357 (AC).

13 At 358.

14 *Tucker Wool Processors Ltd v Harrison* [1999] 3 NZLR 576 (CA) at [39].

15 See also *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 482, [2016] ERNZ 225 at [56]–[57]; and *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [48]–[53].

[46] On that approach, a proposal would constitute an offer if it were sufficiently definite and indicated the intention of the offeror to be bound in the case of acceptance.[16] In other words, an "offer" in the contractual context is:[17]

> … an expression, by … the offeror … made to another, of the offeror's willingness to be immediately bound to a contract with the other person on terms either certain, or capable of being rendered certain.

[47] A conspicuous element of these definitions is that, for a "proposal" or "expression" to be an offer in contract law terms, the offeror must indicate an intention to be legally bound.

[48] In *Buhrer v Tweedie*, referred to by the Authority, Wilson J considered the issue of a conditional offer, agreeing that: [18]

> A statement is clearly not an offer if it expressly provides that the person who makes it is not to be bound merely by the other party's notification of assent.

[49] In a general sense, the Act departs from a strictly contractual approach to employment, with its emphasis being on the relationship between the parties.[19] Nevertheless, the requirement that, for there to be an offer and acceptance, the offeror must intend to be legally bound is consistent with the concept of an employment relationship. Where parties have not yet begun to act on that relationship, the only thing tying them together is any understanding or agreement between them. If one or both of the parties do not intend to be bound by that understanding or agreement, it seems implausible to describe the situation as an "employment relationship", giving rise to the rights included in the Act, including the right to bring a personal grievance.

Mr Edwards was not "a person intending to work"

[50] The letter from Laybuy advised that Laybuy would only employ Mr Edwards upon being satisfied with the results of the pre-employment checks. If it was not so satisfied, then, if Mr Edwards had not started work, the offer would not proceed – it

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16 Contract and Commercial Law Act 2017, sch 4 art 14(1).
17 Stephen Todd and Matthew Barber *Laws of New Zealand* Contract at [18].
18 *Buhrer v Tweedie* [1973] 1 NZLR 517 (SC) at 519–520.
19 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [33]–[35].

would be withdrawn. Laybuy thereby made it clear that it did not intend to be bound to employ Mr Edwards merely by his notification of assent.

[51] Mr Edwards argues that, because the employment agreement itself did not include a condition requiring pre-employment checks, and was signed by Mr Soong, Mr Edward's signing of the agreement created an employment relationship.

[52] I do not accept that argument. The documents provided, in particular the letter confirming the conditional offer of employment and the individual employment agreement, were a package. The provision of the employment agreement allowed Mr Edwards to consider the proposed terms and conditions of employment and to obtain advice on them, in compliance with s 63A(2) of the Act. I do not attach any significance to the agreement having been signed by Mr Soong, and I find that the employment agreement simply set out the terms upon which Laybuy was prepared to employ Mr Edwards, should the condition in the letter be met.

[53] That condition was not met, and Laybuy did not proceed with the employment. This means that Mr Edwards was never an employee and was not entitled to pursue a personal grievance.

The Court has developed key principles as to whether a personal grievance has been raised

[54] Having found Mr Edwards was not an employee under the Act, it is not strictly necessary to address whether his communications within the 90-day period following the withdrawal of the offer would have been sufficient to raise a personal grievance.[20] However, I make the following comments.

[55] The Court has developed key principles to determine whether a communication, or series of communications, amounts to the raising of a grievance.

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[20] Employment Relations Act, ss 114.

These key principles are summarised in *Chief Executive of Manukau Institute of Technology v Zivaljevic*:[21]

(a) The grievance process is designed to be informal and accessible.[22]

(b) A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used.[23]

(c) Where there has been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.[24]

(d) It does not matter what an employee intended their complaint to be, or their preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.[25]

(e) It is insufficient for an employee simply to advise an employer that the employee considers that they have a personal grievance, or even to specify the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.[26]

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21 *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36]–[38].
22 *Idea Services Ltd (in stat man) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [40].
23 *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].
24 *Liumaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958 (EmpC) at 963; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139 (EmpC) at [45]; and *Idea Services Ltd*, above n 22, at [41].
25 *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37].
26 *Creedy v Commissioner of Police*, above n 23, at [36]–[37].

[56] Mr Edwards's complaint was made clear both from the conversation between Mr Edwards and Mr Soong on 8 January 2021 and the email of 13 January 2021. He was unhappy about the process followed by Laybuy leading up to it deciding to withdraw the offer and, in particular, that nobody discussed that with him before reaching a final decision. It is also clear that Mr Edwards was seeking for the offer to be made unconditional so that he could start employment on 18 January 2021, as originally anticipated.

[57] Laybuy had sufficient information on which it could have responded to the complaint on its merits, with a view to resolving the matter.

[58] Accordingly, had Mr Edwards been an employee of Laybuy, his communications would have been sufficient to raise a grievance about the process that led to Laybuy's decision not to proceed with the offer, and about the decision itself. As these communications were within 90 days of the withdrawal of the offer, Mr Edwards would have met the requirements of s 114 of the Act and could have proceeded without the need for consent from Laybuy or leave of the Court. In the circumstances, this finding is of no use, and probably of little comfort to Mr Edwards.

Laybuy is entitled to costs

[59] Having been successful in its defence of the challenge, Laybuy is entitled to costs. The parties are encouraged to agree on costs, but if that is not possible, Laybuy may file a memorandum seeking costs within 21 days of the date of this judgment. Mr Edwards then has 14 days within which to respond, with any reply from Laybuy to be filed within a further seven days. Costs then will be determined on the papers.

J C Holden
Judge

Judgment signed at 11.45 am on 3 November 2023