

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 254  
5413816

BETWEEN

JESSE BUTLER  
Applicant

A N D

THE OPEN POLYTECHNIC  
OF NEW ZEALAND  
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person  
Daniel Erickson, Counsel for Respondent

Investigation Meeting: 10 June 2013 at Auckland

Date of Determination: 17 June 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Butler) alleges that he was offered employment with the respondent (the Polytechnic) at a meeting on 29 January 2013, that he accepted that appointment, was accordingly a person intending to work within the meaning of that phrase in the Employment Relations Act 2000 (the Act), but was subsequently told that he would not be employed thus constituting a personal grievance of unjustified dismissal for which he seeks remedies.

[2] The Polytechnic resists those claims in their entirety, maintaining that there was neither an offer nor an acceptance of employment and that, as a consequence, Mr Butler was not a person intending to work but simply an unsuccessful applicant for a position with the Polytechnic.

[3] In January 2013, the Polytechnic was recruiting student peer mentors to assist Maori students in their learning.

[4] Mr Butler had been an applicant for an earlier role, in which he had been unsuccessful, but the Polytechnic had retained his curriculum vitae on file. As a consequence, Ms Caroline Rawlings, a manager with the Maori Office of the Polytechnic, was able to make contact directly with Mr Butler to see whether he was interested in the advertised position.

[5] There was a telephone discussion between Ms Rawlings and Mr Butler in late January 2013 to discuss the advertised position. Mr Butler says that telephone discussion took place on 28 January; Ms Rawlings' evidence is that there were two telephone calls the first and more significant discussion on 23 January and the second on 28 January. Either way, nothing turns on the date. It is the substance of the discussion that is important.

[6] Ms Rawlings says that in these calls she did no more than give Mr Butler "*a brief overview of the Te Kura Wananga [the Maori Office] and of the Tuakana Ako [the student peer mentor role]*". Ms Rawlings set out the process to Mr Butler for the recruitment, in particular referred to a formal interview, and a final decision to be made by the Polytechnic's Chief Executive.

[7] Mr Butler's evidence on the telephone discussions is rather different. While he did not deny that the various matters referred to above were covered off in the discussions, he also claims that Ms Rawlings made two clear statements concerning his candidacy. The first statement that he alleges Ms Rawlings made was "*you are my first choice for the position*". The second statement Mr Butler alleges Ms Rawlings made was "*I am coming to meet you to offer you the job*".

[8] Ms Rawlings denies making either of those statements and says that all she did was explain the process and establish that Mr Butler was indeed interested in taking the matter further. On that footing, she determined on an informal meeting with Mr Butler at his home which by common consent took place on 29 January 2013. In meeting Mr Butler in his own home, Ms Rawlings was doing precisely what she did with all the other applicants for the position. She described to the Authority the approach as being consistent with a Maori way of approaching recruitment and indicated that the purpose of the 29 January 2013 meeting was simply to enable her to

get to know Mr Butler better and to put him at ease for the forthcoming selection process.

[9] The essence of Mr Butler's claim before the Authority is that in the 29 January 2013 meeting at his home, Ms Rawlings offered him the advertised position as Tuakana Ako and in addition was offered another role as a prison mentor and was told that the employment package would include payment of his current Massey University study fees and relocation costs.

[10] Ms Rawlings denies that any such offers were made. She says that she provided Mr Butler with various documents including an overview of the Maori office, an extract from the Polytechnic's investment plan which included targets for Maori participation and also included some material on a partnership with the Department of Corrections and finally included a position description for the Tuakana Ako role.

[11] Ms Rawlings points out that Mr Butler, in his evidence to the Authority, maintained that hourly rates were discussed for both the prison mentor and the student peer mentor positions when no such rates were applicable. In relation to the student peer mentor role, the position was salaried and so there was no applicable hourly rate and in respect of the prison mentor role, at the point at which the discussion took place between the two principal protagonists, the role had not even been created but was only in prospect and was referred to obliquely in the material relating to the partnership between the Polytechnic and the Department of Corrections. Further and finally, concerning the contention that the Polytechnic would meet Mr Butler's Massey University fees, again Ms Rawlings denies that any such commitment was made; she told the Authority that she had told Mr Butler that her own study fees were partially reimbursed by the Polytechnic on the successful completion of courses but nothing more than that.

[12] Mr Butler told the Authority that during the discussion, the initial focus was understandably on the student peer mentor role and he "*ummed and ahed*" about that because it was a part time position only and he was looking for a full time role because he needed the income. According to Mr Butler, it was at that point that Ms Rawlings offered the prison mentor role as an addendum to the package.

[13] A consequence of this arrangement would have been that Mr Butler would have served as Tuakana Ako until June or July of 2013 when the prison mentor role would have become available. As the latter role was full time, and in Wellington, Mr Butler says he understood that he would drop the Tuakana Ako position in favour of the prison mentor position and that the Polytechnic would pay his relocation costs to Wellington as well.

[14] In her evidence, Ms Rawlings emphasises the inherent improbability of this whole structure which Mr Butler claims to have been settled upon. First, she notes the fact that the position of Tuakana Ako was salaried and not paid by hourly rate, second she notes that the prison mentor role was simply not available when the discussion took place (although it became available shortly thereafter), third there was no possibility of her committing to the reimbursement of fees and relocation expenses as Mr Butler claimed because his claimed agreement fell well outside the Polytechnic's policy and therefore would not even have been in her contemplation, even if Mr Butler could have misunderstood what she said.

[15] From the Authority's standpoint, perhaps the most significant aspect of the difficulty with Mr Butler's evidence is the inherent implausibility of the Polytechnic offering Mr Butler the part time student peer mentor role for a short number of months, perhaps at most 5½ months, when, on Mr Butler's evidence, he would then cease fulfilling his obligations there and commence a new role with the Polytechnic based in Wellington as a prison mentor. Given that the prison mentor role was not even available at the time Mr Butler and Ms Rawlings spoke, it is difficult to understand how the parties could have entered into the arrangement Mr Butler claims was made even if he can somehow overcome the point the Authority has just made that the recruitment was for a Tuakana Ako and on his evidence, he was the preferred candidate but would only fulfil the role for a handful of months before moving on to something else. To the Authority, that seems an inherently unlikely recruitment strategy for a State sector organisation dealing with scarce taxpayer funds.

[16] In any event, there was then a period of email exchanges between Mr Butler and Ms Rawlings leading up to the formal interview which took place on 15 February 2013. In those emails, the language used by Mr Butler suggests, as counsel for the Polytechnic astutely pointed out, that Mr Butler was still "*selling himself for the position*". What counsel meant by that expression was that Mr Butler's language was

consistent with the process being still open rather than, as Mr Butler wanted the Authority to accept, that he had been offered the position (or more correctly, the positions), had accepted them and was simply going through the motions.

[17] The interview on 15 February 2013 went badly. By all accounts Mr Butler was incredibly nervous and it is common ground that he was late for the commencement time. There is dispute about how late; the Polytechnic's witnesses say he was 20 to 25 minutes later while he maintains that he was only 5 minutes late.

[18] But what is common ground is that he was extremely nervous and that the interview went badly. Of course, it is a truism of human resources practice that an interview is, amongst other things, designed to put an individual candidate under some sort of pressure to see how they respond, given that most employment opportunities these days have some element of pressure attached to them. That Mr Butler performed badly under pressure seems to be accepted by all parties. And, for the Polytechnic's purposes, Mr Butler's poor performance at interview was fatal to his appointment chances, of which more shortly.

[19] However, the Authority feels constrained to observe that if, as Mr Butler maintained, he had already been appointed, it is particularly difficult to understand why he would have been so nervous at the formal interview. After all, on his analysis of the position, he had already got the job and the interview was a sham which he needed to go through in order to fulfil the process that the Polytechnic had designated.

[20] There is further disagreement between the parties about what happened immediately after the interview. It is common ground that the human resources practitioner from the Polytechnic, Ms Liddle, had to leave the interview quickly after its conclusion, in order to catch an aeroplane, she having been caught out by Mr Butler's significant lateness. According to Mr Butler, he and Ms Rawlings then had a general discussion after the interview in which Mr Butler claims that Ms Rawlings told him the start date would be 4 March 2013 and that he had got the job. He said he was told further that a manager from the Polytechnic would contact him shortly to make arrangements.

[21] Ms Rawlings flatly denies those allegations as well. She says that there was a discussion, she told Mr Butler he had performed poorly, but indicated that even

although his interview performance was poor, the Polytechnic would now contact his referees.

[22] A weekend intervened and during the weekend Ms Rawlings reflected on the apparent disjunct between Mr Butler's impressive curriculum vitae and his very poor interview performance. She discussed those concerns with Ms Liddle the following Monday morning. Then, she decided to assess anything that Mr Butler may have written, given his academic background, and she Googled his name. Two websites that she found concerned her, particularly the interactions that seemed to be evidenced by those websites and the anger Mr Butler expressed through electronic media.

[23] Ms Liddle did not see those websites. She reached the conclusion that Mr Butler should not be offered the position exclusively because of his poor interview performance. For Ms Rawlings, the poor interview was the "*main reason*" for not offering Mr Butler the position, but Ms Rawlings identified that the material on the websites also influenced her negatively.

[24] On 19 February 2013, Ms Rawlings telephoned Mr Butler to indicate that he had not been appointed to the position. She says that she told him that it was principally to do with his poor interview performance but she also says in her evidence that she told Mr Butler that she had Googled him.

[25] Mr Butler then emailed Ms Rawlings privately on 6 April 2013 seeking to settle the alleged dispute between himself and Ms Rawlings or his legal proceedings that would follow would "*affect [Ms Rawlings] current and future employment*".

### **Determination**

[26] The only issue the Authority has to decide in the present proceeding is whether or not Mr Butler became an employee of the Polytechnic. The Authority concludes that Mr Butler did not become an employee of the Polytechnic at any stage during the recruitment process for the Tuakana Ako position which he applied for.

[27] The Authority's conclusion in that regard is based on the evidence it heard. In order for Mr Butler to be successful, he needed to prove that there had been an offer of employment, an acceptance by him, and an intention by both parties to create a legal relationship which would evidence consideration for the bargain between them.

In the Authority's opinion, on the facts it heard, none of those essential elements are present.

[28] The Authority was not persuaded by Mr Butler's recollection of the meeting at his home with Ms Rawlings. His account, as the Authority has already noted in this determination, is inherently implausible. He refers to three significant elements in what he claims to have been offered, all of which have some significant degree of implausibility to them.

[29] His claim to have been offered the Tuakana Ako position on 29 January 2013 refers to a particular hourly rate which does not apply to the role. Further, as the Authority has already noted, it seems extraordinary that a public sector organisation with scarce State funding would spend its recruitment budget appointing someone to an important role for a handful of months before moving them on to another role which would presumably necessitate yet another recruitment. to fill the then established vacancy.

[30] Further, the prison mentor position was simply not available at the time the parties had the discussion on 29 January 2013 and the Authority is at a loss to understand why it could have been part of the package in those circumstances.

[31] Finally, the contention that Mr Butler would receive reimbursement of both removal expenses (to fulfil the Wellington prison mentor role) and study costs both seem frankly implausible, first because Ms Rawlings had no authority to offer them and second they greatly exceeded the Polytechnic's standard policy, certainly in respect of reimbursement of study fees.

[32] Next, the Authority relies on the email exchanges after the initial discussion and before the interview, to support the conclusion that the job was still open; Mr Butler's language in those emails suggests that he is still marketing himself for the role rather than that the role has already been allocated to him.

[33] Next, the Authority refers to Mr Butler's evident nervousness at the interview and the Authority observes it is difficult to understand why Mr Butler would have been so nervous if he already had the job. But further than that, it seems difficult to understand why, if Mr Butler was appointed on 29 January 2013, as he maintains, there is a need for any further process. He told the Authority that "*the Maori way is to appoint the person you want and then make the paperwork fit*" and that this was

what was happening in the present case. He also said that this was an example of culture getting in the way of process.

[34] But the Authority prefers Ms Rawlings's recollection of events. She said that she invariably conducted a process similar to this one for Maori applicants for Maori positions. She referred to that process in its cultural context and maintained that it was appropriate in all the circumstances. The Authority opined in passing that the process seemed an eminently desirable one, whatever the cultural context.

[35] But the short point is that Ms Rawlings maintained throughout her evidence that she was always very clear with Mr Butler in all of her communications that there was a complete process beginning with these informal engagements, continuing with a formal interview and ending with an offer to the successful applicant after reference checking and sign off by the Chief Executive of the Polytechnic. Her evidence, which the Authority prefers, is that none of that process was abrogated, shortened or done away with in respect of Mr Butler's application for the position.

[36] On that basis then, there was no offer made on 29 January 2013, therefore no offer to be accepted and no prospect of a legal relationship being formed because of the absence of an offer and of course the absence of any intention of the Polytechnic to create a legal relationship at that time. Had Mr Butler passed the subsequent tests, and in particular interviewed well, he might have been offered the role once his reference checks had come back satisfactorily and the Chief Executive had been satisfied that Mr Butler was the best person for the role.

[37] Sadly for Mr Butler, that was not the position in the present case and it follows from the Authority's conclusion that Mr Butler's claim fails in its entirety.

### **Costs**

[38] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority