

**NOTE: This determination  
contains an order prohibiting  
publication of certain  
information at [3].**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 14  
3153621

BETWEEN            EOW  
                                 Applicant  
  
AND                    DOC  
                                 Respondent

Member of Authority:     Sarah Kennedy

Representatives:         Nikkii Flint, counsel for the Applicant  
                                 Glenn Mason, counsel for the Respondent

Investigation Meeting:    28 July 2022

Submissions Received:    25 August 2022 and 11 October 2022 from the Applicant  
                                 3 August 2022 and 12 October 2022 from the Respondent

Date of Determination:    13 January 2023

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1]     EOW sought a permanent order prohibiting publication of their name and identifying details. An interim order was previously made. DOC opposes the order being granted.

[2]     I was satisfied it was appropriate to make the order on the basis there was evidence of the impact on EOW's health that outweighed the public interest in publication in the particular circumstances of this case.

[3] Under Clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act), I make an order for permanent non-publication of EOW's name and identifying details which necessarily includes the name of the employer.

### **Employment Relationship Problem**

[4] EOW was a casual employee teaching classes at the dance school where she was also a student. At a time when ownership of the business changed hands, she says she was a person intending to work and therefore an employee. When negotiations about the terms of her written agreement were unsuccessful and DOC withdrew the offer of employment, EOW says she was unjustifiably dismissed.

[5] DOC says EOW was never an employee. It says the communications between the parties up until an offer of employment was made with the provision of the draft written employment agreement, were only to ascertain whether EOW wanted employment with the new owners and which classes she would be available to teach. DOC says as a matter of law, it was entitled to withdraw the offer of employment at that time.

### **Authority's Investigation**

[6] For the Authority's investigation, written statements were lodged from EOW and her mother. On behalf of DOC, the previous owner, the new owner, and the administrator all provided written statements and gave oral evidence. The witnesses answered questions under oath or affirmation from me and the parties' representatives. Oral submissions were heard on the day of the investigation meeting. Further submissions were made on permanent name suppression.

[7] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

### *Relevant background*

[8] The following is a summary of the relevant facts. Mostly what happened in this case is not in dispute rather the disagreement between the parties is about what the law says about what those facts mean when considering how contracts, including employment contracts or agreements, are formed.

[9] In late June the previous owner circulated information to parents and students announcing that she was stepping down as the Director because she was selling the business and confirmed that new owners were taking over the business and the dance studio.

[10] Also in June the previous owner notified her staff she was considering making all roles redundant due to the fact the business was to be sold and started a consultation process. EOW was a casual employer who regularly worked approximately eight hours each week during the school terms, teaching dance classes.

[11] It was agreed between the previous owner and the new owners that with the sale of the business employment opportunities would be offered to existing staff and the sale and purchase agreement for the sale of the business between the old owner and the new owner recorded that as a term of the sale.

[12] The previous owner took advice on the redundancy process and used a template given to her for written communications with employees about redundancy. She recalled being told she must meet with the employees and convey to them they would all be given an opportunity to discuss potential employment with the new owners. This is consistent with the terms of sale and purchase and also with the relevant clause in EOW's employment agreement which provided:

Whether the employee is offered ongoing employment, and on what terms and conditions, will ultimately be the decision of the new employer.

*Was EOW told her employment was guaranteed with the new owners?*

[13] There is a difference in the evidence between the previous owner and EOW about what was said when they discussed redundancy in person. EOW attended a meeting on 3 July with the previous owner and was advised in writing that her position would be redundant from 23 July 2021 due to the sale of the business. That was the day before teaching was due to start at the beginning of the next term (term three) on 24 July 2021.

[14] EOW says the previous owner told her she would be offered employment with the new owners and confirmed that her employment would stay the same. The previous owner says she believes she said things should stay the same if EOW and the new owners agreed on the terms. At the final meeting about redundancy the previous owner recalls advising each staff member to get in touch with the new owners regarding their possible employment. She denies telling EOW that she was guaranteed employment.

[15] The redundancy proposal letter stated:

The new owner has expressed an interest in offering employment to some of the Business's employees who are affected by the proposal, and they will be contacting the affected employees directly who they wish to offer an opportunity of employment with. The offering of new employment is entirely at the new owners' discretions.

[16] Given that is consistent with the clause in EOW's employment agreement, I find that no promises were made by the previous owner about employment with the new owners. The previous owner was aware of her obligations to her current employees in the case of new owners taking over the business because she had taken advice. She knew there was a requirement in the sale and purchase and employment agreements for the new owners to offer employment and was clear that her role stopped with the redundancy of her existing staff. I find she was unlikely to have given assurances to EOW about future employment with the new owners but also accept that there is a fine distinction between hoping that nothing would change for her employees and providing an assurance that nothing would change.

*The 3 July meeting*

[17] On 1 July the new owner says she sought legal advice to assist with preparing employment agreements and contracts for service. She wanted to include trial periods in the new agreements and recalls she was advised not to make any verbal offers of employment to anyone because in order for the trial periods to be valid, offers of employment needed to be in writing.

[18] The new owner says she was in the situation of needing to ensure enough workers to teach all the classes the business was contractually obliged to undertake because enrolments rolled over, so students were already enrolled in the term three classes. She wanted to know if they wanted to be offered employment, what hours they wanted to work, what classes they wanted to teach and what type of employment they wanted, for example, casual, permanent, part time or full time or contractor. To gather this information, she says she entered into quick informal chats with all of the staff.

[19] On 2 July, the new owner had that informal chat with EOW. The new owner's recollection was that she established EOW was interested in receiving an offer of employment to teach the same classes she had been teaching in term two. She gave no specific detail about that meeting and what was said or where it was.

[20] EOW did not initially recall this meeting, but in any event the submissions made on her behalf were that the meeting the next day (3 July) was when the contract was formed verbally because she says that is when an offer of employment was made to EOW, and she accepted.

[21] 3 July 2021 the new owner went back to EOW because another teacher was now no longer available in term three, but that teacher had recommended two students who could take over that class and one of them was EOW. On that basis the new owner had a second meeting with EOW asking her whether she was willing to teach additional classes. EOW says she agreed to teach the extra classes but provided much more detail about that meeting and the communications around it. EOW also says it was after these communications that she reached the conclusion that her employment was confirmed because it had transferred to the new business.

[22] EOW's recollection of 3 July was that the new owner asked to have a quick meeting with her about who would be teaching a particular class next term. EOW taught a class and then went to meet the new owner afterwards at approximately 10.15 am. The door was shut, and they sat down with the Saturday timetable. The new owner told EOW about the current situation with a teacher not coming back next term and asked EOW what she thought and if she had any ideas about whether EOW might be able to teach two extra classes next term.

[23] EOW replied saying she could only teach one particular class to a certain level because of her existing teaching schedule (discussed the day before), and that she was only qualified to teach to a certain level but that she could teach the extra classes on the proviso that she had to check with her parents first. EOW recalls that the new owner replied that was fine but to try and get her a reply quickly so she could insert EOW's hours into her contract.

[24] EOW says they discussed other dance school matters briefly and then talked a bit about EOW's contract. The owner told her she would get a new contract and that the hours and classes she taught would be changed to reflect their talk that day as long as EOW's parents confirmed she was allowed to take the extra classes. EOW said it was also conveyed to her that if she had any questions about her contract at any point that EOW should talk to her mother and come and see one of the new owners.

[25] EOW says she left that meeting and called her mother at 10.24 am to get permission to teach the extra classes in term three and she raced back to tell the new owner before her next class started, that her mother had given permission. EOW said she was really happy that the

new owner wanted her to teach more classes next term because that meant she thought she was a good teacher.

[26] On 5 July the new owner sent an email to EOW's mother to confirm arrangements as she had been previously told not to make arrangements with EOW without consent from her mother:

Just a follow up email regarding what EOW discussed with me on Saturday. I had spoken to her regarding the possibility of her teaching [two extra classes] .... from term three onwards. Obviously there will be times she is unable to so [sic] this especially coming up to exams etc, but she can communicate that with us and we will organise a stand in for her over this time.

She popped back up to see me to say that this was fine, but I wanted to check with you. So if you can possibly confirm if you are happy for her to teach these two classes as well as the ones she already teaches.

We are waiting to get the employment contracts back from the Lawyer, as soon as we have them we will be providing them with a job description to each employee to look over and sign if happy.

If you have any questions regarding this please don't hesitate to contact me.

[27] EOW's mother responded immediately saying she was happy for EOW to teach the additional classes.

[28] A number of communications were sent from DOC to all the parents followed setting out who will be taking which classes in term 3, including EOW and the electronic timetable continued to have EOW's name on it.

[29] 9 July 2021 was settlement date for the sale and purchase of the business. On 16 July the new owner emailed out all the draft employment agreements. On 19 July she messaged again saying she hoped everyone had had a chance to read their draft employment agreement and reminded everyone that if they wanted to discuss anything to contact her.

[30] EOW's position with the previous employer became redundant on 23 July and the first teaching day in term four was 24 July. On 21 July having not heard back from EOW, the new owner messaged again checking whether there were any issues with the employment agreement and reminded EOW it needed to be printed out and signed by 23 July at the latest so EOW could start teaching on Saturday 24 July. EOW responded on 22 July 2021 saying her mother was talking to her lawyers that day and would get back to the new owner. On 23 July EOW's

mother emailed DOC raising concerns with the employment agreement, in particular, the inclusion of the trial period and the restraint of trade clauses.

[31] The new owner withdrew that offer on 26 July saying she had considered the request to make the changes specified by EOW's mother and took the weekend to consider it but had decided she was not willing to make those changes.

[32] In order to determine this matter, I must decide whether the conversation between EOW and the new owner on 3 July amounted to a verbal employment agreement. If that was the case, EOW was in fact an employee before the draft written employment agreement was sent to her and she would be successful with her claim that she was unjustifiably dismissed.

[33] On the other hand, if no employment agreement was entered into on 3 July, her role would have ended on 23 July when her employment with the previous employer became redundant. In that case, as the offer of employment made by DOC was withdrawn before there was acceptance, no employment agreement could have been entered into between the parties and EOW was never an employee of DOC.

### **Was EOW a person intending to work?**

[34] Submissions were made on EOW's behalf that despite there being no signed written agreement, EOW was an employee from 3 July because she was a person intending to work. A "person intending to work" is defined in the Act<sup>1</sup> as a person who has been offered, and accepted, work as an employee. EOW says the conversation on 3 July was when a verbal offer of employment was made to her and she accepted. That was the conversation where EOW was asked if she could teach two additional classes. She said:

I agree I had two meetings with [the new owner]. At the first meeting she confirmed that I wanted to stay working for her in Term 3 and in the second meeting on 3 July 2021, she offered me additional hours on top of my current ones. I accepted this offer, and mum told her that I could do so.

[35] On the other hand, the new owner says she did not make any verbal offers. She wanted trial periods in the agreements, and she had legal advice not to make any verbal offers because of that. She characterises the conversation they had on 3 July as a follow-on discussion from the one they had had the day before, that was about availability to allow her to plan for the term ahead. She also notes in the email to EOW's mother she was seeking confirmation of the

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<sup>1</sup> Employment Relations Act 2000, s5.

“possibility” EOW could teach the extra classes and it was made clear that written agreements would follow.

*Was an offer of employment made to EOW by the new owner?*

[36] Whether or not offer and acceptance occurred determines whether or not there was an employment contract between the parties. In determining whether a contract was formed it is settled law that the court examines all the circumstances to see if one party has made an offer that the other party subsequently accepted. An offer is defined as follows:<sup>2</sup>

An offer is an expression, made by the offeror to the offeree, of a willingness to contract immediately upon acceptance by the offeree. Offers can be made expressly or by conduct, although any offer by conduct must be sufficient to indicate the terms on which the offer is made. It is for the court to consider whether the words or conduct amounts to an offer in the particular circumstances in which they occur. In doing so, the court will take an objective approach, and so be concerned not with the person’s actual subjective intention but with the apparent outward manifestation of that intention. The court considers the point of view of a reasonable person in the shoes of the offeree. In this way, a person may be found to have made an offer without actually intending to do so.

[37] Despite the new owner’s evidence that she did not to make a verbal offer, I find this is a case where she made an offer perhaps without actually intending to do so. The starting point for reaching that conclusion is there was a clear intention from both parties to enter into an employment relationship. EOW’s desire to continue teaching was made clear to the new owner in the 2 July conversation and the new owner was contractually obliged under the terms of the sale and purchase agreement to offer an employment opportunity to EOW.

[38] The new owner did not give detailed evidence about the 3 July conversation. EOW on the other hand could recall the detail of the conversation which is set out above. The conversation they had, with the door shut, looking at the rosters for the following term, with a request to EOW to teach two additional classes to the ones she ordinarily taught represent and request the EOW get back to her quickly so the hours could go into EOW’s contract represent collectively particular circumstances where I am satisfied the new owner was declaring her readiness to contract.

[39] No evidence was given suggesting that conversation was premised with a caveat that the discussion about classes was hypothetical and dependent on whether the new owner decided

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<sup>2</sup> Burrows, Finn and Todd on the *Law of Contract in New Zealand* (7<sup>th</sup> ed, LexisNexis, Wellington, 2022) at [41-42].

to make an offer. The new owner was pleased EOW had solved her problem of finding a teacher for those two extra classes because she was only made aware in the last week of term two with the holidays about to start that she did not have a teacher available for term three, for a class the EOW was able to teach. I also note the EOW was only able to teach up to a certain level and could teach these classes.

[40] The new owner then followed up with EOW's mother by email to confirm what EOW had told her which is again evidence that this was something more than feeling the way towards an agreement or initiating negotiations from which an agreement may or may not eventuate.

[41] While it is submitted that there was no discussion of the essential terms of the employment agreement, EOW as a student who was teaching was only ever on the minimum wage and said she knew that was what students who were teaching were all paid. When the draft employment agreement was provided, it was drafted as a permanent part-time agreement whereas EOW's employment with the previous owner had been casual. EOW gave evidence that she did not know what that meant or the difference between them and it likely made no difference to EOW as the context of the employment was to teach agreed classes at regular times over a term. It did not appear that these changed. The hours were discussed and agreed on 3 July and the new owner made it clear she needed confirmation from EOW's mother quickly so those could be inserted into the new contract.

[42] While the new owner says other essential details were not discussed such as the trial period and the restraint of trade clauses, the addition of those was the choice of the new owner and I do not consider them to be essential terms of any agreement with EOW.

[43] I do note that the email to EOW's mother used the word "possibility" when seeking permission for EOW to teach those extra classes. That was the only reference to the extra classes being a possibility and based on the particular circumstances of the conversation on 3 July, I am satisfied that conversation and the context in which it occurred was a manifestation of the new owners' intention to offer employment to EOW.

*Was there acceptance by EOW of the offer of employment?*

[44] An employment agreement or contract was only formed if EOW accepted the offer made by the new owner. Acceptance requires a final and unqualified expression of assent to

the terms of the offer. Whether acceptance occurred depends on the words and documents passed between the parties and the totality of EOW's conduct.

[45] In this case I find EOW's conduct such as her excitement and immediately contacting her mother to ensure she could teach the two extra classes after conveying her intention the day before to continue to be employed were objective indicators of her acceptance.

[46] However, EOW was 16 years old at the time and in law considered to be a minor because she under 18 years of age.<sup>3</sup> While the law says minors fully competent and able to enter into contracts,<sup>4</sup> there are some special rules regarding the enforceability of contracts against minors. EOW's age is however only relevant in this case because everyone involved knew that all matters to do with EOW had to be confirmed by EOW's mother and EOW and her mother both acknowledged that this was because of EOW's age.

[47] The effect of that was acceptance of DOC's offer to EOW in this case was conditional on EOW's mother's acceptance. The evidence is unequivocal that EOW's mother did not accept the terms of the employment agreement when the draft employment agreement from the new owner was made know to her. She sought her own legal advice, asked for the contact details of the new owner's legal representative so she could enter into negotiations and sent a considered response setting out the clauses she wanted removed and seeking clarification about several other clauses.

[48] Without EOW's mother's acceptance a contract could not have formed in the overall circumstances of this matter. To the extent that the offer was made on 15 July when the draft contract was emailed out with a covering email offering employment, the new owner withdrew that offer on 26 July when an email was sent on her behalf withdrawing the offer:

On 15 July 2021 EOW was sent an offer of employment and draft employment agreement. The final paragraph of the letter sent to EOW on 15 July 2021 asked her to let the new owner know if she wished to accept the position being offered. I am instructed that at no time between the offer being made (15 July) and today has EOW communicated her acceptance of the offer to the new owner. I am also instructed that the offer has now been withdrawn and is no longer capable of being accepted by EOW.

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<sup>3</sup> Contract and Commercial Law Act 2017, s 85.

<sup>4</sup> Above n3, ss 85 – 91.

[49] This means that no employment contract or agreement existed between the parties because DOC's offer was not accepted by EOW and EOW's claim for unjustified dismissal has not been successful.

### **Costs**

[50] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, DOC may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum EOW would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[51] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

**Sarah Kennedy**  
**Member of the Employment Relations Authority**

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<sup>5</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)