

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2022] NZERA 443

3148464

BETWEEN

CHAD BRYAN VEILLEUX
EDWARDS
Applicant

AND

LAYBUY HOLDINGS LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: Chad Edwards in person
Sheridan Climo and Emma Monsellier, counsel for the
Respondent

Investigation Meeting: 19 July 2022 at Auckland

Submissions Received: 15 June 2022 from the Applicant
13 June 2022 from the Respondent

Date of Determination: 07 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Chad Edwards (Mr Edwards) applied for a role with Laybuy Holdings Limited (“Laybuy”). Mr Edwards was interviewed and then offered a position, which he accepted. Mr Edwards has filed a Statement of Problem asserting that the respondent, Laybuy has failed to pay him seven scheduled salary payments, failed to provide him with a safe place of work and caused him considerable stress with their actions.

[2] Laybuy has filed a Statement in Reply denying the assertions on the basis that Mr Edwards was never an employee because his conditional offer of employment was withdrawn due to unsatisfactory pre-employment checks.

[3] Before Mr Edwards started employment Laybuy withdrew the offer as Mr Edwards's pre-employment checks were not satisfactory.

[4] As a result, Mr Edwards never started work at Laybuy and he raised a personal grievance for unjustified dismissal. Mr Edwards says that there had been an offer of employment which he accepted, and he was therefore a person intending to work. On this basis Laybuy's purported withdrawal of the offer of employment was a dismissal and given the circumstances that was unjustified.

[5] Laybuy says there was only ever a conditional offer of employment, and the conditions were not fulfilled. This means there was never any employment relationship and therefore cannot be an unjustified dismissal.

[6] This is a preliminary determination on two issues as directed at the case management conference on 17 March 2022.

Preliminary Determination of the Authority

[7] There are two preliminary issues:

- (1) Was Mr Edwards an employee for the purposes of raising a personal grievance, and if so, did he raise his personal grievance within the 90-day statutory timeframe? If not, is it just to grant leave out of time?
- (2) Did Mr Edwards enter an employment relationship? Did Laybuy legitimately withdraw the offer of employment prior to entering into a binding employment agreement?

The Authority's Investigation

[8] The parties were unable to resolve Mr Edwards's personal grievance and he lodged a statement of problem in the Authority advancing a claim based on that grievance.

[9] I investigated Mr Edwards's claim for unjustified dismissal by receiving written evidence and documents and holding an investigation meeting on 10 June 2022.

[10] I received witness statements from Mr Edwards and Oliva Gibbons from Laybuy. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement

and gave oral evidence and answered questions from myself and the parties' representatives. The representatives then provided oral and written submissions on 13 and 15 June 2022.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background Facts

[12] Laybuy initially recruited Mr Edwards via LinkedIn and subsequently initiated a recruitment process in November 2020 to employ him on a full-time permanent basis as a full stack developer.

[13] Mr Edwards attended several interviews in both in person and online.

[14] Mr Soong (Chief Technology Officer) called Mr Edwards on 17 December 2020 verbally to present an offer of employment and advising him the offer of the role was conditional on satisfactory pre-employment checks.

[15] On 17 December 2020, Laybuy sent a written offer of employment accompanied by a pre-signed individual employment agreement (IEA). The accompanying letter of offer explicitly states that the offer of employment will be conditional on return of satisfactorily pre-employment checks.

“This offer is conditional upon satisfactory pre-employment checks specific to the role we’re offering you. Should we not be satisfied with the results of the check(s), this offer may be withdrawn...”

[16] The IEA at page 18 contains a self-declaration clause that stipulates that “*prior to signing the agreement the employee has not deliberately failed to disclose anything it may have influenced the employer’s decision to employ the employee.*”

[17] Ms Ann Smith (People Experience Partner) contacted Mr Edwards by telephone on 18 December 2020 to discuss some technical issues that he was having in downloading a copy of the agreement. During the conversation Mr Edwards enquired with Ms Smith about who would have access to his pre-employment checks and indicated he would like to speak to those people. Mr Edwards then consented to the pre-employment checks and signed the agreement at 9.42 a.m. by way of electronic signature.

[18] Later that day Ms Oliva Gibbons (People Experience and Insights Lead) spoke with Mr Edwards. Mr Edwards advised that he had not declared any matters arising out of his pre-employment checks earlier as he had not been asked to do so and advised that in the past, he had job offers withdrawn based on his pre-employment checks.

[19] Ms Gibbons advised Mr Edwards that Laybuy's escalation process would likely involve informing several people, including Ms Quirk, the Chief People Officer, Mr Soong, and Ms Ballantyne, Head of Risk and Compliance. If necessary, the matter may be escalated to the Managing Director and other relevant members of the Board.

[20] Mr Edwards declared a number of matters of interest to Ms Gibbons who said she would then discuss the matters with the escalation team.

[21] Ms Gibbons forwarded the matter to the escalation team, advising them of the conversation she had with Mr Edwards. Ms Gibbons discussed Mr Edwards's matters with the escalation team, the escalation team agreed that upon receipt of the report from a third party confirming the matters raised by Mr Edwards the apparent next step could be to withdraw Mr Edwards's offer of employment.

[22] Ms Gibbons advised Mr Edwards that the matter was with the escalation team. Mr Edwards was expressly informed that should the matters he declared to her be confirmed in the pre-employment third party report it could be of concern to Laybuy and the offer of employment would most likely be withdrawn. However, no decision would be made until the report has been considered.

[23] Ms Gibbons reminded Mr Edwards that the satisfactory pre-employment checks were a requirement for working at Laybuy. She confirmed that Laybuy would proceed with obtaining a third-party report and advise to Mr Edwards the outcome in due course.

[24] On 18 December 2020 Laybuy requested the third-party report.

[25] Mr Edwards sent several follow-up emails to Ms Gibbons to check the progress of the report between the period of 18 December 2020 and January 2021.

[26] Mr Edwards emailed Ms Gibbons on 7 January 2021 noting that the third-party pre-employment checks had been completed and requested a telephone call to check whether any issues had been raised.

[27] At 3.16 pm on 7 January 2021 Mr Edwards electronically signed the offer letter.

[28] Laybuy received the third-party report on 7 January 2021. The escalation team confirmed that the matters listed in the report matched what Mr Edwards had declared to Ms Gibbons.

[29] Based on the contents of the report the escalation team decided to recommend withdrawing the offer of employment. The Managing Director agreed with the escalation team's recommendation and Mr Edwards offer of employment was withdrawn.

[30] Ms Gibbons contacted Mr Edwards on 8 January 2021 advising that the report had been received and referred to the escalation team and a decision had been made. Mr Edwards was advised that Laybuy had now withdrawn its offer of employment based on the unsatisfactory pre-employment checks. Ms Gibbon's evidence was Mr Edwards was pleasant to deal with and seemingly accepted the decision of Laybuy. He was then notified he would receive written confirmation of its employment offer being withdrawn.

[31] Ms Gibbons emailed a written confirmation of withdrawal of offer to Mr Edwards on 12 January 2021.

[32] Mr Edwards acknowledged receipt of the letter via email to Ms Gibbons and set out his frustrations at Laybuy's decision on 13 January 2021. Mr Edwards then questioned whether he should attend the office on his first scheduled day of work. Mr Edwards then advised he wasn't abandoning his employment.

[33] Ms Gibbons gave evidence that Laybuy was concerned by Mr Edwards's behaviour as it had been made expressly clear to him, both verbally and in writing, that the offer of employment had been withdrawn.

[34] On 14 January 2021, Ms Gibbons responded to Mr Edwards's email stating Laybuy had withdrawn the offer of employment due to non-satisfactory results of pre-employment checks that were conditional on the offer. No employment relationship had been entered into between Mr Edwards and Laybuy.

[35] On 15 January Mr Edwards responded to Ms Gibbon's email stating:

Thank you understood. Apologies for wasting your time. Best luck finding the right person for the job. I hope you guys have a great weekend and wonderful

great year. Would have loved to have been there with you. A lesson learned my end.

[36] On 9 April 2021 Mr Edwards sent an email headed up “Personal Grievance – Unpaid Salary’ which attached a letter addressed to the Head of Human Resources. In the letter Mr Edwards claimed three outstanding salary payments by way or remuneration pursuant to clause 11.2 of the IEA. Mr Edwards also alleged that he was due and owing salary payments which were unpaid on the 20th of each month and instructed Laybuy to take action to remedy the matter.

First issue

Was Mr Edwards an employee for the purposes of raising a personal grievance?

[37] There is a preliminary issue as to whether Mr Edwards was an employee and able to raise a personal grievance. Section 5 of the Employment Relations Act 2000 (the Act) defines “employee” and refers to s6 of the Act for a meaning of the word. Specifically, s6 of the Act includes in the definition an employee “a person intending to work.”¹

[38] The issue being if he is not an employee then he cannot have a personal grievance and the Authority does not have jurisdiction to investigate and determine any claim arising out of his relations with Laybuy.

[39] A person intending to work is defined as a person who has been offered and accepted work as an employee. Laybuy argues that although it offered Mr Edwards employment, he was never capable of accepting the offer of employment because the offer of employment was conditional on satisfactory pre-employment checks and the offer could not be accepted until those conditions had been satisfied.

[40] Mr Edwards signed the offer letter electronically at 3.16 pm on 7 January 2021, prior to Laybuy formally withdrawing the offer of employment on 8 January 2021.

[41] Mr Edwards did accept an offer of employment from Laybuy, however, he did not commence work with Laybuy, so he was not an employee in that sense. A person who has been offered and has accepted work as an employee is a person intending to work pursuant to

¹ Employment Relations Act 2000, s.6(1)(b)(ii).

the definition in s4 of the Act. And a person intending to work is an employee for the purposes of the Act, pursuant to s6 of the Act.

[42] The issue of whether Mr Edwards was an employee of Laybuy turns on whether he was a person intending to work pursuant to s5 of the Act because he had accepted the offer from Laybuy.

[43] I have made the following findings based on the facts:

a) Laybuy made a conditional offer of employment. That was clear from the offer and the communications about the offer and the fulfilment of the conditions.

(b) Mr Edwards accepted the conditional offer by signing and returning the IEA.

(c) Laybuy maintained its position in respect of the conditions needing to be fulfilled before employment could commence. It did not waive any of the conditions.

(d) Not all the conditions were fulfilled to Laybuy's satisfaction, and it withdrew the conditional offer as a result. On 8 January Ms Gibbons verbally advised Mr Edwards the offer of employment had been withdrawn as Mr Edwards was not able to satisfy the pre-employment conditions to Laybuy Holdings Limited's satisfaction. On 12 January 2021 Ms Gibbons emailed a written confirmation of withdrawal of offer to Mr Edwards.

[44] 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. Mr Edwards was not a person intending to work. Mr Edwards had not accepted an offer of employment as it was incapable of being accepted before the conditions attached to it were fulfilled.

[45] In reaching this conclusion I have relied on the following reasons:

(a) Although Mr Edwards had signed the IEA, he had not complied with all the requirements necessary for proper acceptance of the conditional offer. Laybuy Holdings Limited withdrew the offer of employment as Mr Edwards was not able to satisfy the pre-employment conditions to Laybuy Holdings Limited's satisfaction. Neither party was expected to perform obligations under the IEA until the conditions were met as set out by the correspondence and discussions about the pre-employment checks needing to be completed.

(b) Expressing the offer as being conditional contrasts with the approach taken when a contract is expressed as conditional such cases the Courts have deemed these agreements to be binding contracts with performance suspended until the condition is fulfilled.

(c) This proposition is supported by the approach taken by the Courts which has modified and replaced the old contractual law principles of condition precedent and subsequent. See for example, *Hunt v Wilson* and *Buhrer v Tweedie*²

(d) This finding is consistent with three Authority determinations; *Barnes v Telecom New Zealand Ltd*, *Gwilliam v KPMG* and *Edwards v Field Nelson Holdings Ltd*.³

[46] 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 contract⁴.

Conclusion

[47] Mr Edwards was not a person intending to work, so he was not an employee and cannot bring a personal grievance against Laybuy. As Mr Edwards fails on the first preliminary issue there is no reason to investigate whether he raised his personal grievance within the 90-day statutory timeframe. I have no jurisdiction to investigate and determine any claim arising out of the events concerning the application, interview and offer of employment with Laybuy.

[48] In the circumstances Mr Edwards claim cannot succeed. Mr Edwards's claim is dismissed.

Costs

[49] In the circumstances I consider it appropriate in this matter that costs lie where they fall.

[50] However, if Laybuy Holdings Limited seeks costs, 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, they should serve a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that

² *Hunt v Wilson* [1978] 2 NZLR 286; and *Buhrer v Tweedie* [1973] 1 NZLR 517.

³ *Barnes v Telecom New Zealand Ltd* ERA Christchurch CA20/06; and *Gwilliam v KPMG* ERA Auckland AA354/03 and *Edwards v Field Nelson Holdings Ltd* ERA Christchurch CA421/22.

⁴ *Philson v Airways Corporation of New Zealand Ltd* EmpC Auckland AE35/96; *Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152; and *Scullin v Airways Corporation of New Zealand Ltd* [2021] NZEmpC 180.

memorandum Mr Edwards 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] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.⁵

Andrew Gane
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost.