IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2014] NZERA Christchurch 34
5444559

	BETWEEN	MICHAEL CHARLES MORRIS Applicant
	AND	CHRISTCHURCH POLYTECHNIC INSTITUTE OF TECHNOLOGY Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Kerry Smith, Counsel for Respondent
Investigation Meeting:	Decided on the papers
Submissions received:	14 February 2014 from Applicant 21 February 2014 from Respondent
Determination:	25 February 2014

DETERMINATION OF THE AUTHORITY

The Authority does not have the jurisdiction to investigate Dr Morris' claims.

Employment relationship problem

[1] Dr Morris claims unjustified dismissal and/or a compliance order arising out of the respondent's unilateral withdrawal of an offer of employment.

[2] The respondent denies that an employment agreement was created between Dr Morris and the respondent and that, consequently, the Authority has no jurisdiction to consider Dr Morris's claims.

[3] It was agreed between the parties that the Authority would consider on the papers, following written submissions from them, the preliminary issue of whether or not the Authority had the jurisdiction to consider Dr Morris's claims.

Background

[4] In or around December 2012 Dr Morris applied for a fixed-term, limited tenure position in the respondent's Division of Education and Applied Research as an academic staff member teaching microbiology. Dr Morris asserts that, on 17 December 2012, he was offered a job as a microbiology tutor by way of a telephone message from a member of the HR Department. He states that he tried to ring back all that day, and the morning of the following day, but the HR Department was not taking calls.

[5] He states that, in the afternoon of 18 December 2012, he received a call back to the effect that the respondent had made a budgeting error and that they were *reneging.* The respondent's formal position is recorded in an email to Dr Morris, to the effect that:

> *…closer scrutiny of the budget for 2013 meant the planned staffing and work allocation in the Department required reconsideration and a decision was taken by Management to withdraw the proportional position in favour of fewer part time hours.*
>
> *As the recommended applicant I was obliged to advise you that the position has been withdrawn.*

[6] Correspondence between Dr Morris and the respondent ensued in which Dr Morris argued that he should be entitled to compensation as a result of the withdrawal of the offer and the respondent maintaining that, as it did not enter into an employment agreement with Dr Morris, the decision to withdraw the position and not appoint him did not require notice of termination.

[7] In his application to the Authority Dr Morris sought two weeks' notice pay, plus interest, and also stated:

> *In the interests of natural justice they should also pay every other person short-listed for the job for all the time they spent preparing for the interview, and must pay everyone who applied and did not make the short-list for all the time they spent on their application.*

Issue

[8] The key issue in determining the Authority's jurisdiction is to determine whether Dr Morris has the legal standing to seek a compliance order and/or to bring a personal grievance for unjustified dismissal.

[9] Section 137 of the Employment Relations Act 2000 (the Act) confers on the Authority the power to order compliance of any provision of any employment agreement (s.137(1)(a)(i)).

[10] *Employment agreement* is defined in s.5 of the Act. It provides as follows:

> ***Employment agreement -***
>
> *(a) means a contract of service; and*
>
> *(b) includes a contract for services between an employer and a homeworker; and*
>
> *(c) includes an employee's terms and conditions of employment in:*
> *(i) a collective agreement; or*
> *(ii) a collective agreement together with any additional terms and conditions of employment; or*
> *(iii) an individual employment agreement.*

[11] Section 103(1)(a) of the Act provides that a personal grievance is *any grievance that an employee may have against the employee's employer or former employer because of a claim that the employee has been unjustifiably dismissed.*

[12] Section 6 defines *employee* and states as follows:

> ***Meaning of Employee***
>
> *(1) In this Act, unless the context otherwise requires,* ***employee*** *–*
>
> *(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
> *(b) includes –*
> *(i) a homeworker; or*
> *(ii) a person intending to work; but*
> *(c) excludes a volunteer who –*
> *(i) does not expect to be rewarded for work to be performed as a volunteer; and*
> *(ii) receives no reward for work performed as a volunteer…*

[13] *A person intending to work* is defined in s.5 as:

> *A person who has been offered, and accepted, work as an employee.*

[14] Dr Morris states that the message that was left on his telephone answering machine by the respondent was as follows:

> *Hi, Michael, this is Paula Bennet here from CPIT. Michael, [inaudible] microbiology position we interviewed for. We would like to offer you the position, so look forward to talking to you, very soon.*

[15] The audio recording provided by Dr Morris to the Authority does not provide a clearer record of the message.

[16] Dr Morris sent to the Authority a copy of an email he sent dated 18 December 2012 as follows:

> *Dear Maree*
>
> *I received a call yesterday from Paula Bennett intimating that I have been offered the position as ASM/SASM in microbiology. I called back at 3.00pm, and left a message. I also called this morning and was unable to even leave a message, simply told to call back later via a recording.*
>
> *I am going out this morning, but will be back after lunch. Please could you call me this afternoon on* [number redacted] *or* [number redacted]. *Alternatively, if you find it easier, you can communicate by email.*
>
> *Regards*
> *Michael Morris*

[17] In his written submission to the Authority Dr Morris referred to his email of 18 December stating that, in it, *I state clearly that I left a message the previous day (17 Dec.) soon after the job offer was made, in which I accepted the offer and asked them to call me back.* However, the email in question does not state clearly that Dr Morris called and left a message accepting the offer. Furthermore, during the case management telephone conference with the Authority held on 7 February 2014, Dr Morris stated categorically that he did not accept the offer because he did not have the opportunity to do so.

[18] Mr Smith, in his submissions to the Authority on behalf of the respondent, points out that one of the key elements that the Authority must establish in

determining whether a contract was formed between Dr Morris and the respondent is that there was an offer that was capable of being accepted. Mr Smith asserts that, missing from the expression of the offer that was purportedly made to Dr Morris, were the essential ingredients of the anticipated employment agreement such as terms and conditions and a salary.

[19] On balance, I accept this argument. Whilst Dr Morris applied for a position governed by a collective agreement, the terms of which he appears to be familiar with, or which he could easily have found out, it would appear from an email he disclosed to the Authority dated 20 December 2012 that he was not aware of what point on the salary scale he was to be appointed. This indicates that an essential term of the agreement (salary) had not been agreed and that, therefore, no offer was made by the respondent on 17 December that was capable of being converted into an acceptance. Put another way, the requirement of certainty was not satisfied in the absence of a clear statement by the respondent as to what point on the salary scale Dr Morris was to be offered.

[20] I therefore do not accept that the message left on Dr Morris' telephone messaging service by Ms Bennett on behalf of the respondent was an offer capable of being accepted.

[21] However, even if I am wrong in that respect, I do not believe that Dr Morris actually accepted that offer. Neither the contents of his emails, nor what he told me during the telephone conference on 7 February 2014 support his contention in his later written submission that he communicated an acceptance of the offer.

[22] Given that an acceptance of an offer is a fundamental element of an agreement between parties (and not only in the context of an employment relationship) I cannot find, in the absence of an acceptance by Dr Morris, that a binding agreement between him and the respondent was formed.

[23] No employment agreement having been formed between the parties, the respondent was entitled to withdraw the unaccepted offer. See, for example, the Employment Court case of *Weal v. Leusen Holdings Limited T/A Heather-Lea Rest Home* [2002] 1 ERNZ 655.

[24] Accordingly, in terms of s.137 of the Act, there was no employment agreement formed in respect of which compliance can be ordered. Furthermore, not

having accepted the offer, Dr Morris was also not a *person intending to work*, and so he was never an employee of the respondent, and did not have the standing to raise a personal grievance under s.103 of the Act.

[25] In so far as Dr Morris may have a claim under the Wages Protection Act 1983, I note that the term *wages* means:

> *Salary or wages; and includes time and piece wages, and overtime, bonus, or other special payments agreed to be paid to a worker for the performance of service or work; and also includes any part of any wages.*

[26] In the Wages Protection Act, the term *worker* has the same meaning as that given to the term *employee* by s.6 of the Employment Relations Act 2000. Accordingly, Dr Morris does not have the standing to bring a claim under the Wages Protection Act 1983.

[27] Having found that there was no employment agreement in place and that Dr Morris was not an employee as defined by the Act, the Authority does not have the jurisdiction to investigate whether he is entitled to the remedies he seeks.

[28] Finally, for the avoidance of doubt, the Authority also does not have the jurisdiction to order the respondent to pay anyone else who may have been adversely affected by the decision of the respondent to withdraw the position of Academic Staff Member in the Microbiology Department of the Education and Applied Research Division. I do not accept the submission from Dr Morris that, implicit in any job advertisement is the expectation that somebody will get the position. An offer must be distinguished from a mere *invitation to treat*, which is what most advertisements are, including job advertisements. An invitation to treat is not an offer, but rather an indication of a person's willingness to negotiate a contract. See, for example, *Fisher v Bell* [1961] 1 QB 394 at 399.

Conclusion

[29] The Authority does not have the jurisdiction to investigate Dr Morris's claims.

Costs

[30] Costs are reserved. The parties should seek to agree between themselves how costs are to be dealt with. However, in the absence of such an agreement within 28

days of the date of this determination, if the respondent seeks an order in respect of a contribution to its legal costs, it is to serve and lodge a memorandum of costs and Dr Morris would have a further 14 days within which to serve and lodge any response.

David Appleton
Member of the Employment Relations Authority