

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 27  
5578106

BETWEEN            TIFFANY PORTER  
                                 Applicant  
  
AND                    GREYTOWN MOTORS LIMITED  
                                 Respondent

Member of Authority:    M B Loftus  
  
Representatives:        Jills Angus Burney, Counsel for Applicant  
                                 Adam Parker, Counsel for Respondent  
  
Investigation Meeting:    On the papers and telephone conference on 2 March  
                                 2016  
  
Determination:            2 March 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Tiffany Porter, seeks to enforce the terms of a calderbank offer made by respondent, Greytown Motors Limited (Greytown Motors) on 24 September 2015.

[2]     Greytown Motors asks the claim be dismissed on the grounds it is completely untenable.

[3]     During a telephone conference conducted today the parties agreed I determine the claim on the basis of the Statement of Problem, Statement in Reply and attached documents.

## **Background**

[4] Ms Porter commenced employment with Greytown Motors in March 2015. While engaged as an administrative assistant she performed a variety of tasks.

[5] On 8 June 2015 Ms Porter was advised Greytown Motors *would have to let her go for financial reasons*. She challenged the dismissal and the non-payment of her final wages.

[6] This led to various exchanges between the parties including a calderbank offer made by Greytown Motors on 24 September 2015. Ms Angus Burney responded on Ms Porter's behalf the following day (25 September 2015). Her response, also couched as a calderbank, contains advice that *we cannot accept this proposal* and that is followed by a counter offer. The key reason for the rejection was Ms Porters view the offer fell short in respect to outstanding wages and, in particular, the non-payment of a contractual notice period.

[7] Further offers and counter offers followed and the wage issue was resolved on 18 November 2015. Following that (24 November 2015) Ms Angus Burney wrote and advised resolution of the wage issue meant Ms Porter was now of a view she could resolve the dismissal claim by accepting the 24 September offer.

[8] Ms Porter says this was an option available to her as the 24 September offer did not specify an expiry date. Greytown Motors replied by e-mail via counsel the following day (25 November 2015). It advised Ms Porters attempt to rely on the 24 September was *doomed to failure* as it neglected to take account of the 25 September counter offer (as well as further subsequent offers and counters).

[9] The dismissal claim remains unresolved with Ms Porter now seeking to resolve the matter by enforcing the terms of the 24 September offer as if it *was a binding contract of the terms of settlement of all matters between the parties*.<sup>1</sup>

## **Determination**

[10] As Mr Parker pointed out in his e-mail of 25 November, the attempt to now rely on and enforce the 24 September offer is doomed to fail.

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<sup>1</sup> Statement of Problem dated 18 December 2015 at [1.1]

[11] It is well established that acceptance must be complete and unconditional.<sup>2</sup> Ms Porter did not accept the offer when it was proffered. Indeed she expressly rejected it and made a counter offer the following day which brings into play the principle a counter offer is final rejection and the offer can no longer be revived by virtue of the offeree changing his or her mind and tendering a subsequent acceptance.<sup>3</sup> In other words the 24 September offer was cancelled the following day and not therefore available for acceptance on 24 November 2015.

[12] In any event, and even if the offer could have been accepted, the Authority would be incapable of enforcing it as it was not the subject of a settlement pursuant to s 149 of the Employment Relations Act 2000.<sup>4</sup>

[13] For the above reasons this application must be dismissed.

[14] The parties should however recognise this conclusion means there remains a live and unsettled grievance. They are to be encouraged to revive their attempts to settle it.

[15] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority

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<sup>2</sup> See for example *Reporoa Stores Ltd v Treloar* [1958] NZLR 177

<sup>3</sup> See for example *Hyde v Wrench* (1840) 3 Beav 334 and the commentary in Burrows, Finn & Todd, Law of Contract in New Zealand at 3.3.8

<sup>4</sup> [JP Morgan Chase Bank NA v Lewis](#) [2015] NZCA 255