

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2021] NZERA 394  
3134656

BETWEEN

TE RINA RATIMA  
Applicant

AND

ROSA FOODS LIMITED  
Respondent

Member of Authority: Trish MacKinnon

Representatives: No appearance by the Applicant  
Stuart Gordon, advocate for the Respondent

Investigation Meeting: 31 August 2021 by Zoom

Submissions Received: Orally on the day from the Respondent

Date of Determination: 7 September 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Te Rina Ratima claims she was an employee of Rosa Foods Limited and that she was unjustifiably dismissed on 13 December 2020. She seeks wages and compensation as remedies for her personal grievance.

[2] Rosa Foods Limited ("Rosa Foods" or "the company") denies Ms Ratima was an employee and rejects her claim for financial remedies.

[3] Ms Ratima did not attend the Authority's investigation meeting and has not engaged with the Authority since her former representative attended a case management conference on her behalf on 12 July 2021. The matter was set down for investigation on 31 August 2021 in

the course of that case management conference and evidence was timetabled. Ms Ratima's representative subsequently informed the Authority he could no longer represent her as she had failed to respond to any of his attempts to communicate with her.

[4] The Authority, through an Authority Officer, has communicated directly with Ms Ratima since granting leave for her former representative to be removed from the matter. It extended the timeframe for her to provide a witness statement and invited her to contact the Authority Officer if she had any queries. Ms Ratima has not responded to any of the Authority's communications to date.

[5] The Authority advised Ms Ratima on 4 August 2021 of its intention to proceed with the investigation meeting unless it heard from her to the contrary. Following the Alert level 4 Covid-19 lockdown implemented on 17 August 2021, the Authority advised Ms Ratima of its intention to proceed by way of Zoom.

[6] When Ms Ratima failed to attend the Zoom investigation meeting I delayed the start of the meeting and, at my instigation, the Authority Officer attempted to contact Ms Ratima on her mobile phone but received no response.

[7] I was satisfied that Ms Ratima had been properly notified of the date, time and method of conducting the investigation meeting and that she had ample opportunity to advise the Authority if she had any difficulty in attending. I decided to proceed with the investigation meeting in the absence of Ms Ratima, in accordance with Schedule 2, clause 12 of the Employment Relations Act 2000 (the Act).

### **Relevant facts**

[8] Ms Ratima applied for a position as a High Risk Assembler with Rosa Foods and participated in a pre-employment assessment on 10 December 2020.

[9] The statement of problem claims that on 10 December, at the end of Ms Ratima's assessment, she was informed of her starting date, pay rate, scheduled shifts, days off, and the hours she would work and she agreed to all the terms. It says she agreed to start work on 14 December 2020 and was told her employment agreement would be provided to her on that day.

[10] Ms Ratima claims she had received and accepted an offer of work, and fully intended to work, and therefore was an employee of Rosa Foods.

[11] Rosa Foods agrees it made an oral offer of employment to Ms Ratima but says it was made clear to her that the offer was conditional on her acceptance of the detailed terms and conditions in the letter of offer and individual employment agreement. The company did not have those documents prepared and says it informed Ms Ratima on 10 December 2020 it would prepare them that day and email them to her.

[12] The company says Ms Ratima asked that the documents be printed out and left for her to collect from the Rosa Foods' office, rather than being emailed to her, as she had no means of printing them. The documents were compiled that day and left in the office for Ms Ratima to collect, complete and return before Monday 14 December 2020, which had been discussed as a commencement date. As Rosa Foods is a seven day a week operation, its office was open throughout that period.

[13] On 13 December 2020 Rosa Foods emailed Ms Ratima stating that "with regret" it needed to withdraw its offer of employment to her effective immediately due to "unforeseen business circumstances" which had forced the company to make changes to its existing employment structure.

[14] The letter invited Ms Ratima to discuss the matter with the company and proposed a meeting at 2 p.m. on 15 December 2020 if she wished to talk through its withdrawal of the offer.

[15] Ms Ratima did not attend the meeting because, according to her statement of problem, she did not see the need to do so as her employment had already been terminated.

[16] Ms Ratima had not collected the letter of offer and employment agreement from Rosa Foods' office before she received the company's emailed letter withdrawing its offer of employment.

### **Issues**

[17] The first issue for determination is whether Ms Ratima was already an employee of Rosa Foods when she received its email on 13 December 2020 withdrawing, or purporting to withdraw, its offer of employment.

[18] If that matter is determined in Ms Ratima's favour, issues of appropriate remedies will require consideration.

## **Legal considerations**

[19] The definition of "employee" in s 6 of the Act includes "a person intending to work". Such a person is defined in s 5 of the Act as "a person who has been offered, and accepted, work as an employee."

## **Discussion**

[20] Rosa Foods relies on the verbal offer of employment it made to Ms Ratima on 10 December 2020 being conditional on her acceptance in accordance with its letter of offer and written employment agreement.

[21] The four-page letter of offer of employment covered several matters including information about the company's policies, hours of work and remuneration, employment checks and an attached Declaration of Confidentiality that the company required Ms Ratima to sign.

[22] The letter had a section headed "Acceptance Process" starting with the statement that Ms Ratima was entitled to seek independent advice about the offer of employment. It then gave detailed information and instructions about how Ms Ratima would accept the offer of employment.

[23] The process for acceptance included Ms Ratima initialling each page of the letter of offer and attached schedules; signing an attached "Acceptance" document and an attached Declaration of Confidentiality document; and completing a number of attached forms.

[24] At the end of the "Acceptance Process" section the letter instructed Ms Ratima as follows:

Please return completed documents to your hiring manager before your first working day. When you have completed all details and returned all documentation your start date can then be confirmed.

We acknowledge that you may have questions about this offer. If so, please do not hesitate to contact either myself, or your hiring manager.

On behalf of Rosa Foods Ltd, it gives me great pleasure to offer you employment on the terms set out in this letter.

[25] As noted above, Ms Ratima did not attend the investigation meeting and accordingly the Authority has had no oral or written evidence from her and no opportunity to question her

about her views of the employment relationship she claims existed between her and Rosa Foods.

[26] For Ms Ratima to have qualified as an employee under the "person intending to work" definition in the Act, there had to be an offer and an acceptance. In this case I find there was an offer that was conditional upon Ms Ratima's acceptance being made in accordance with Rosa Foods' requirements for completion and return of documentation before the starting date of the employment.

[27] Ms Ratima's non-compliance with the conditions of the offer resulted in there being no acceptance of the conditional offer and no employment relationship being formed between her and Rosa Foods. I have no doubt both parties intended an employment relationship to occur but, as matters eventuated, the offer of employment was withdrawn before Ms Ratima accepted it.

[28] I note Ms Ratima was given a short timeframe to collect, complete and return the documentation to Rosa Foods. The verbal, and conditional, offer of employment was made on 10 December 2020 and the parties had discussed 14 December 2020 as the starting date. The letter of offer advised Ms Ratima that she was entitled to seek independent advice about the offer but, as a weekend occurred within the timeframe, she was given little time to do so.

[29] Potentially, this was a breach of s 63A of the Act, which requires an employer to do more than provide an employee with a copy of the intended agreement under discussion, and advise the employee that s/he is entitled to seek independent advice about it. The employer must also give the employee a reasonable opportunity to take that independent advice, and consider and respond to any issues the employee may raise.<sup>1</sup>

[30] After considering the detail of the letter of offer, which made it clear Ms Ratima should not hesitate to contact the Human Resources person who had signed the letter, and which stated that the start date would be confirmed after the return of the completed documentation, I accept the company's position that the start date in the employment agreement was an indicative date only.

[31] I also note, although this was not raised in the statement of problem, that it is unusual for an offer of employment to be made, only to be withdrawn three days later. It is not

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<sup>1</sup> In accordance with s 63A(7), in that section, "employee" includes a prospective employee.

necessary to disclose in any detail Rosa Foods' reasons for doing so, but I will observe those reasons had nothing to do with Ms Ratima personally. They resulted from an analysis of recent accounting data that was not available at the time the verbal and conditional offer of employment was made to her.

### **Conclusion**

[32] I have concluded that Ms Ratima was not an employee of Rosa Foods on 13 December 2020 when it withdrew the conditional offer of employment it had made to her. In the absence of Ms Ratima's acceptance of the offer, in accordance with the conditions for such acceptance that the company had stipulated, Rosa Foods was entitled to withdraw the offer when it did.

[33] As Ms Ratima was not an employee of Rosa Foods, there was no dismissal. I therefore dismiss her claims.

### **Costs**

[34] Costs are reserved. The parties are encouraged to resolve any issue as to costs between themselves. If they are unable to do so, Rosa Foods, as the successful party, may make application in the usual way.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**