

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 229
3299580

BETWEEN JULIA TEO
Applicant

AND THE SURREY HOTEL
LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Dave Cain, advocate for the Applicant
Matthew McGoldrick, counsel for the Respondent

Investigation Meeting: 30 January 2025 in Auckland

Submissions received: 30 January 2025 from the Applicant
30 January 2025 from the Respondent

Determination: 28 April 2025

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Under the Employment Relations Act 2000 (the Act), an employee means any person who is employed by an employer to do work for hire or reward under a contract of service and includes a homemaker or a person intending to work.¹ Julia Teo’s claim concerns the latter type of employee of a person intending to work as a result of accepting an offer of employment as a receptionist for the Surrey Hotel Limited, a boutique hotel in Grey Lynn, Auckland (SHL or the hotel). Ms Teo says that the hotel’s offer was clear and unconditional and did not mention it was contingent on a specific start date or commencement of employment.

[2] SHL’s position is that Ms Teo was not a “person intending to work” under the Act (and therefore not an employee) because she was never in fact offered work but if

¹ The Act, section 6(1)(b)(i) and (ii).

the Authority finds that an offer of employment was made, it was on the condition that Ms Teo commence work on Monday 20 November 2023 which she was not able to satisfy (and therefore not able to accept) because she was attending a tangi of a family member up north and would not return to Auckland in time.

[3] The parties have previously attended mediation, but matters did not resolve there. This employment problem falls to be decided on what I consider most probably happened on the balance of probabilities.

How has the Authority investigated?

[4] For my investigation, Ms Teo provided me with a 'statement of evidence' from herself and her younger sister, Ina Teo, both dated 7 November 2024. For the hotel, a witness statement from its then general manager, Louisa Yau, was submitted.

[5] All witnesses answered questions under oath or affirmation from me and the parties' representatives. As permitted by s 174E of 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.

What were the issues?

[6] The issues requiring investigation and determination were:

- (i) Was Ms Teo a person intending to work under s 6(1)(b)(ii) of the Act?
- (ii) If so, was she unjustifiably dismissed?
- (iii) What evidence is there of mitigation of loss?
- (iv) If any remedies are awarded, should this be reduced for blameworthy conduct by Ms Teo that contributed to her own grievance?
- (v) Should either party contribute to the costs of representation of the other party?

What are the relevant facts?

[7] In September/October 2023, Ms Teo saw an advertisement on Seek for a full-time hotel receptionist role at the Surrey Hotel for which she subsequently applied and was shortlisted for an interview. On 30 October 2023, Ms Teo was interviewed in person by Ms Yau who advised her that the person who currently held the role was

leaving in the next three to four weeks, but he had yet to confirm his last day of employment. The individual was transferring to another position within the business.

[8] During the course of Ms Teo's job interview, Ms Yau explained the duties and key responsibilities involved, the full-time nature of the position, the hours and days in which work was to be undertaken, the roster system, remuneration and the starting rate of \$25 per hour, that there would be training for the successful candidate in their first week from Monday to Friday, and that the job itself could start in or around December 2023 because at that stage it had not been confirmed when the person currently in the role would be leaving.

[9] Sometime between Ms Teo's job interview on 30 October and when Ms Yau telephoned her as set out below on 13 November, the owner of the hotel confirmed with Ms Yau that the receptionist who was leaving would be starting their new role on 27 November, making his final day with the hotel as 24 November 2023.

[10] As noted above, on Monday 13 November 2023, Ms Teo received a telephone call from Ms Yau who inquired whether she was still interested in the role. In fact, out of the eight prospective applicants she interviewed, Ms Teo was the best candidate. Upon being told by Ms Teo that she was still interested in the position, Ms Yau stated that she would be happy to offer her the job.

[11] At this point in the evidence, the parties have different recollections as to what happened (or did not happen) during the telephone call which I outline below from Ms Teo's and Ms Yau's points of view respectively.

[12] Ms Teo says that because it was some two weeks after she was interviewed, she thought that she was unsuccessful and expressed to Ms Yau how happy she was to have been told that she was the successful applicant. She was then asked when she was able to start as the hotel wanted her in as soon as possible for training. Ms Teo hoped that she could start the following Monday, 20 November 2023 but could not confirm due to the unexpected death of her uncle whose funeral was to be held 'up North' outside Auckland.

[13] Ms Teo further stated that Ms Yau was okay with this but asked that she get back in touch with her by Friday as the person who was leaving was going to do the training. If Ms Teo was not able to start that Monday, Ms Yau said she would need to sort out a plan.

[14] Ms Yau's recollection of what was said during the same telephone conversation differs in one key respect in that she remembers very clearly saying to Ms Teo that she would need to start on the following Monday, 20 November 2023 to ensure a sufficient handover with the staff member whose last day with the hotel was 24 November 2023. Ms Yau recalls Ms Teo telling her about her late uncle's funeral 'up North' and that she was not sure when she was going to be back in Auckland. After pausing briefly, Ms Teo said something along the lines of coming back to Auckland on 20 November 2023 to receive the training before going back up North the following weekend for the tangi.

[15] Ms Yau stated that what Ms Teo proposed could work but that she would need to let her know by Thursday 16 November 2023 at the latest whether she (Ms Teo) was able to start on Monday. Ms Yau said she was giving Ms Teo until that Thursday to let her know. While Ms Yau recalled mentioning that she would need to sort out a plan, she did not mean a plan for Ms Teo but for herself to have a different person start in the role which, as will be seen, is what happened.

[16] Both parties agree that during the above telephone conversation on Monday 13 November 2023, Ms Teo had asked Ms Yau to email her employment agreement so that she could look over it before she started but nothing was provided. According to Ms Teo, Ms Yau had stated that this would be sorted out later. However, Ms Yau explained that it is not her practice to send the employment agreement until the candidate has confirmed the start date of their employment. Because she was still waiting for Ms Teo's confirmation no later than Thursday of that week, no employment agreement or letter of offer was given.

[17] Neither Ms Teo nor Ms Yau made a contemporaneous note of their telephone conversation. Although during the investigation meeting, Ms Teo stated that her now former partner was present during the phone call in question, her written witness statement to the Authority was silent about this. When I inquired about the likelihood of the partner giving evidence to the Authority, I learnt that the couple had separated in

December 2024. Ms Teo's representative, Mr Cain, confirmed that asking the partner to give evidence was not a matter that she wished to pursue.

[18] The evidence of Ms Teo's sister, Ina, did not advance the applicant's case.

[19] On Thursday 16 November 2023, Ms Teo attempted to telephone Ms Yau but was not able to reach her.

[20] On Friday 17 November 2023 at 9.11 am, Ms Teo emailed Ms Yau the following:

I called twice yesterday wanting to speak to you, and the lovely reception lady said that you weren't in your office. So I thought I'll send you an email, as you might be busy.

Unfortunately I am still up north. The funeral is not till next week Thursday and Friday. The body of the deceased relative is coming from Australia and will not [arrive] here till next Tuesday. Which is why the funeral is not till next week, and my family is up here this early so we can prep for it.

I'm sorry I will need to delay my start, as I'm not back in Auckland till next weekend. Can I please start Monday 27th of this month?

Thank you so much for your patience and understanding.

[21] Ms Yau responded by email later that same day (time not recorded) stating:

Apologies, for missing your call earlier.

I've just been caught up with some urgent matters.

Unfortunately that would not work for us.

We will be proceeding with a different candidate for this round of recruitment.

We are anticipating another vacancy sometime in January 2024 for the same position. We will reach out to you during that time to see where you are with your job hunt and if you are still interested in reapplying.

Our condolences to you and your family over the loss of your loved ones during this difficult time. Look after yourself and we will be in touch.

[22] Sometime between Ms Yau's email above and Ms Teo's reply below at [23] which was sent at 1.17 pm the same day, Ms Yau had already reached out to her second-best candidate and offered them the role which they immediately accepted.

[23] At 1:17 pm, Friday 17 November 2023, Ms Teo emailed the following response to Ms Yau:

Oh no, if that's the case I will miss my uncle's funeral and be down there this weekend and attend work on Monday.

I feel like this is unjustified. I clearly mentioned to you over the phone I was out of Auckland for a funeral and I needed to change plans around, funerals happen unexpectedly, you don't plan it, which is why I didn't expect this to happen exactly when you called to offer me the job. It was just bad timing. And you could at least give me the chance as I really love the job and excited about it. Only to get told through email that you have decided to go someone else [sic], and you haven't heard my full story.

[24] Sometime later that same afternoon, Ms Yau emailed Ms Teo the following response:

We understand that this is upsetting news for you while having to deal with a family funeral at the same time.

In my conversation with you over the phone on Monday, 13 November 2023, the offer was contingent to your availability to start on Monday, 20th November 2023. In addition, I did stress that we needed the position to start on Monday, 20 November 2023.

However, in light of your circumstances, we have graciously delayed our hiring process, awaiting your response. And [your] response was very clear that you will not be able to start on Monday, 20th November.

Based on your response and the urgency in filling the role, the decision was made to proceed with a different candidate.

[25] The following Friday, 24 November 2023 at 4.52 pm, Ms Teo emailed Ms Yau for the final time:

You never mentioned I had to start that Monday. I would have if I knew it was a deal breaker!

You offered me the job Hotel Receptionist role over the phone and I accepted this. Everything was ready to go, and you were ready to have me and now you have given this job to someone else.

I am very devastated.

Was there an offer of employment or a conditional offer of employment?

[26] Mr Cain submitted that an employment agreement between the parties was formed even though the start date for Ms Teo's employment had yet to be agreed upon.

To underscore this point, Mr Cain referred to the Employment Court's decision in *Baker v Armourguard Security Limited* in which it was held:²

It is elementary to employment law that there is an important distinction between the formation of the employment contract itself and the formation or articulation of its terms. The employment contract can be and often is formed in an informal way by conduct, or words of agreement and conduct. There is no requirement for writing at the formation stage.

[27] *Baker* was a case in which the employer of staff lost its contract following a re-tendering process and as a result, its employees were to be made redundant. However, the successful tenderer invited the employees to apply for positions with it as the replacement contractor. The employees were interviewed and each were given a letter of advice setting out the core terms and conditions of employment, job description, proposed individual employment contract and further uniform details.

[28] A union representing the employees sought to meet with the new contractor regarding a draft collective agreement and while the new contractor refused to negotiate, it was prepared to make some amendments to its proposed individual employment contract. However, an impending contract transfer date meant that the new contractor required the employees to confirm almost immediately their assent to the amended individual employment contracts. When it heard nothing from the employees or their union by the specified time, the new contractor appointed other employees instead.

[29] Similar to Ms Teo's case, the employees in *Baker* argued that they were unjustifiably dismissed. However, the new contractor claimed that there was no dismissal because the employees were never employed. Notwithstanding the similarity in claim with *Baker*, the case can be distinguished in that the new contractor's offer of employment included sufficient essential terms and conditions such as rates of pay, working hours, annual holidays, provision of a uniform, job description, and a proposed individual employment contract none of which Ms Teo can say by analogy had been provided to her by SHL.

[30] Although during her job interview Ms Yau provided Ms Teo with general information about the receptionist role, timing is important. At that stage, no decision

²*Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424 at p 432, line 15.

was made to employ Ms Teo and the information she received about the role as set out in [8] above was not conveyed with the intention of forming an employment relationship, but to give her a greater sense of what the role was about than had been set out in the hotel's job advertisement on Seek.

[31] It was submitted by SHL's counsel, Mr McGoldrick, that during the 13 November 2023 telephone conversation, no offer of employment was made to Ms Teo because she was not able to meet the requirement of being able to start on Monday 20 November. However, Ms Yau's email in response at [24] makes clear that an offer of employment was made to Ms Teo but that it was contingent or conditional on Ms Teo being able to start on Monday 20 November 2023.

[32] I acknowledge that Ms Teo is adamant that no such condition or requirement was spelled out to her by Ms Yau during their telephone conversation. Ms Yau says she clearly did.

[33] While this is a matter to be determined substantially on credibility, such an assessment requires me to carefully evaluate all the evidence, looking for inconsistencies between witnesses and with evidence given or stated on an earlier occasion, the plausibility of what has been said and how that makes the evidence more (or less) reasonable or probable, the existence of contemporary materials or other verifying sources of information, third-party testimony from other witnesses, how the evidence hangs with all the other information before the court or tribunal, acknowledging that memory is not infallible, and that while there may be good reason for a witness to invent or fabricate their evidence, there are occasions where the witness is simply mistaken.

[34] All this is to say that assessing credibility is a multi-faceted process that requires the decision maker to sift through all the evidence in a robust and commonsense way and to render a decision having regard to the legal framework of the particular jurisdiction and the relevant standard of proof.

[35] Both Ms Teo and Ms Yau strike me as witnesses who honestly believe in the evidence each gave under affirmation to the Authority. However, at the investigation meeting, Ms Teo stated for the first time that her former partner was with her when Ms

Yau telephoned her on Monday 13 November 2023. There is no reference of this in Ms Teo's letter raising a personal grievance with the hotel dated 12 December 2023, her Statement of Problem lodged with the Authority on 24 May 2024, and in her statement of evidence to the Authority dated 7 November 2024.

[36] When I put to Ms Teo why she had not mentioned this new information in her witness statement, she said she wasn't thinking. This is not plausible. As stated already, there was no contemporaneous written notes of the telephone call and to be clear there was no audio recording either or an email or correspondence that was immediately generated after the pair's conversation. To learn at this late stage that all along there may have been a potential third-party witness to what may have been said between Ms Teo and Ms Yau is a matter that I cannot safely give weight. Further, Ms Teo's email to Ms Yau on the morning of Friday 17 November 2024 (see [20] above) in which she asks if she could delay her start to Monday 27 November was her asking for something that had not been mutually agreed earlier. I am not able to discount the possibility that Ms Teo was therefore aware that her employment was conditional on her being able to start the Monday prior, the 20th of November.

[37] In contrast, Ms Yau's evidence was internally consistent with other information before me. She maintains that she made it clear to Ms Teo that the offer of employment was contingent on her availability to start on Monday 20 November 2023, which is consistent with her rather blunt email to Ms Teo on the afternoon of Friday 17 November. The curt nature of that email is also consistent with the direct manner in which Ms Yau gave her evidence during the investigation meeting. The start date or commencement of employment was not arbitrary but was to ensure there was sufficient time for the receptionist who was leaving to do a proper handover with his successor and to provide the necessary training. The urgent nature of appointing someone to the role and Ms Yau's email at [24] all hang together and are internally consistent.

[38] Further, no letter of offer or employment agreement was provided, which is consistent with Ms Yau's practice of not providing such documents until the successful candidate had confirmed the start date of their employment. In the absence of a letter of offer or an employment agreement, and where the employment has yet to begin, the only thing tying Ms Teo and SHL together was an understanding that Ms Teo was able to start as required, which she could not. As her Honour Judge Holden found in

Edwards v Laybuy Holdings Limited,³ the present situation cannot be described as an employment relationship giving rise to the rights included in the Act, including the right to bring a personal grievance.

Conclusion

[39] I prefer Ms Yau's evidence that the offer of employment made to Ms Teo was conditional on her being able to start on Monday 20 November 2023. While I empathise with Ms Teo's personal circumstances and acknowledge that passings happen unexpectedly, her response that she was not able to meet the condition prompted Ms Yau to offer the role to someone else. That person was able to start at short notice which reinforces the urgency upon which the business required the position to be filled.

[40] As Ms Teo was not able to meet the condition upon which her offer of employment was made, she is not, in terms of s 6(1)(b)(ii) of the Act, a person intending to work to be an employee of SHL in order to raise a personal grievance of unjustified dismissal. The application is unsuccessful and is declined.

What about costs?

[41] Costs are reserved. While acknowledging that SHL is entitled to seek costs, given the circumstances in which Ms Teo was not able to take up her offer of employment through circumstances not of her choosing, I encourage the parties to resolve costs between themselves if possible. If they are not able to do so and an Authority determination on costs is needed, SHL may lodge and serve a memorandum on costs within 21 days of the date of issue of this written determination. From the date of service of that memorandum, Ms Teo shall 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.

[42] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff. For more information as to how costs are awarded in the Authority the parties are referred to the Practice Direction of the

³ *Edwards v Laybuy Holdings Limited* [2023] NZEmpC 188 at [49].

Employment Relations Authority, Te Ratonga Ahumana Taimahi, effective 1 February 2024.⁴

Peter Fuiava
Member of the Employment Relations Authority

⁴<https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>