

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 85
5582952

BETWEEN ROBERT YOUNG
 Applicant

AND CENTURY 21 NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Mark Nutsford, Advocate for the Applicant
 John Burley and Alice Stacey-Jacobs, Counsel for the
 Respondent

Investigation Meeting: 15 March 2016

Determination: 16 March 2016

DETERMINATION OF THE AUTHORITY

- A. Robert Young had not accepted an offer of employment by Century 21 New Zealand Limited (C21NZN) before the offer was withdrawn so had not become the company's employee.**
- B. Mr Young must pay C21NZN \$2500 as a contribution to its costs of representation in successfully opposing his personal grievance application.**

Employment Relationship Problem

[1] Robert Young sought a finding that he had accepted a job with Century 21 New Zealand Limited (C21NZN) before the company decided to withdraw the offer of employment.

[2] Mr Young said he had already accepted a role as C21NZN's franchise sales manager, with an agreed start date of 27 July 2015, when its New Zealand manager Geoff Barnett told him on 23 July 2015 that the company had decided not to go ahead

with setting up the new position. Mr Young said the decision amounted to an unjustified dismissal for which C21NZL should be ordered to pay him lost wages, lost commission, lost benefits and compensation for distress.

[3] C21NZL accepted it offered the role to Mr Young but said the letter of offer required him to sign and return the letter to indicate his acceptance of the terms offered. Mr Young had not done so. Instead, according to the former general manager of C21NZL's Australian parent company Paul Mylott and to Mr Barnett, Mr Young sought changes to the offered salary, commission and mileage allowance. No such changes were agreed before Mr Mylott instructed Mr Barnett to call Mr Young and to tell him that the job offer was withdrawn. C21NZL said that call was made on 17 July, not 23 July, and, as the offer had not been accepted before then, no contract of employment was formed.

The Authority's investigation

[4] Mr Young, Mr Barnett and Mr Mylott provided written witness statements. Under oath or affirmation they also answered questions from me and the parties' representatives. Mr Mylott gave his evidence by video conference from Sydney.

[5] After hearing closing submissions from the parties' representatives about the facts and the legal issues, I gave an oral indication of preliminary findings and then heard further submissions from the representatives on costs.¹

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

The legal question

[6] Mr Young's claim turned on a single legal question: had he become "a person intending to work" as defined by the Act?² If he had, he fitted into the statutory definition of an employee and could not justifiably be dismissed without being given relevant information, and a real opportunity to comment on it, before C21NZL made

¹ Employment Relations Act 2000 s 174 and s 174B.

² Employment Relations Act 2000, s 5 "person intending to work" and s 6(1)(a) and (b)(ii).

any decision about the future of his employment. Mr Barnett and Mr Mylott accepted that if Mr Young was found to have accepted the role, how he was then told the job would not go ahead would amount to an unjustified dismissal.

[7] In section 5 of the Act a person intending to work is defined as “a person who has been offered, and accepted, work as an employee”. In Mr Young’s case only the fact of acceptance was in dispute, not the existence of an offer. The Employment Court has emphasised the need to focus on both action and inaction by the parties when trying to discern whether an offer of employment has been accepted. The Court has also confirmed the right of a party to withdraw an offer before acceptance.³

... An employment contract, in common with every other kind of contract, displays certain basic characteristics. There must be an offer by one party to the other and an acceptance by that other. Moreover, that acceptance must be communicated to the party making the offer. It may be communicated by words or by conduct. That conduct may be inferred from silence, if surrounding circumstances signal acceptance. However, before acceptance is actually communicated, the party making the offer may withdraw it. Any withdrawal must also be actually communicated and, to be effective, it must be so communicated before receipt of any acceptance.

It is a feature of certain kinds of contract that they are entered into with a minimum of formality. Two examples are the contract for the sale of goods and the employment contract. The fact that all the terms are not spelled out at the time of the transaction does not defeat the transaction and the consequent application of terms implied by law or by custom. All that is needed is that the transaction should happen.

[8] The formation of the contract of employment – by offer and acceptance of the essential terms – is not necessarily the same as the articulation of those terms in a written employment agreement. As the Court has also noted, an employment contract can be and often is formed in an informal way by conduct, or by words of agreement and conduct, even if negotiation of the detailed terms have yet to be completed.⁴

[9] In considering general principles of contract law for commercial purposes the Court of Appeal has described an essential term as being not only the ‘basic’ elements

³ *Weal v Leusen Holdings* [2002] 1 ERNZ 655 at [30] and [31].

⁴ *Baker v Armourguard Security Limited* [1998] 1 ERNZ 424 at 432

of an agreement but also any matter the parties have reserved for agreement as a “prerequisite”:⁵

... [E]ven where the parties are ad idem [of the same mind] concerning all terms essential to the formation of a contract ... they still may not have achieved formation of a contract if there are other unagreed matters which the parties themselves regard as a prerequisite to any agreement and in respect of which they have reserved to themselves alone the power of agreement.

[10] The Authority’s assessment of whether a person has accepted work is subject to the general direction given by s 6 of the Act. In matters concerning whether a person has been employed, the Authority must consider all relevant matters that indicate the parties’ intentions but should not treat statements made by anyone as necessarily determining the issue. The standard then is an objective one – what would have been apparent to a well-informed and reasonable observer at the time, not the views or beliefs of one or both parties stated in hindsight in support of their own case. The latter views or beliefs are inherently subjective.

[11] The evidence is to be assessed on the civil standard of what is more likely than not to have been true, that is the balance of probabilities. An assessment of the credibility of evidence given may be necessary. Objectively observed conduct at the relevant times can assist with assessing the actual intentions of the parties.

Determination

[12] Overall the evidence of Mr Young, Mr Barnett and Mr Mylott amounted to a “he said, he said” contest. No account was inherently more likely than another. Contemporary notes of any of the relevant conversations with Mr Young were limited to one note Mr Barnett said he made in his diary on 6 July which read: “[Mr Young] had some issues with the conditions – I am to discuss with him again after he had had a think”. Emails between Mr Barnett and Mr Mylott after the offer was made to Mr Young, but before Mr Mylott directed Mr Barnett to tell Mr Young that the offer was withdrawn, revealed nothing sufficiently conclusive or unequivocal as to whether Mr Young had or had not already accepted it.

⁵ *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433 at [52].

[13] Mr Young said that at the end of the meeting on 6 July he and Mr Barnett shook hands and that indicated he had agreed to accept the job offered. Mr Barnett said the hand shake was simply “a common courtesy” at the end of the meeting. Mr Barnett’s evidence was that Mr Young had questioned the salary level offered, lower than that of his previous role, but said he could accept it if other conditions were changed, including commissions.

[14] After the meeting on 6 July Mr Barnett got an email from Mr Mylott in Australia directing him not to offer the franchise manager job to Mr Young because Mr Mylott wanted to meet him first. Mr Barnett called Mr Mylott to explain the offer was already made but Mr Young was considering the terms offered. He then arranged a meeting with Mr Young on a date that Mr Mylott was due to be in New Zealand. They met on 9 July.

[15] In his account of that meeting Mr Young said the three men had agreed on his base salary, commission and targets with “the only contention” being the amount that he might receive as a per kilometre allowance for travel. Mr Young said the allowance was a minor issue, quickly discussed, and was not “a deal breaker”.

[16] Mr Barnett’s evidence was that Mr Young had raised both the vehicle allowance and an “ongoing concern” about the base salary being offered. Mr Barnett also said Mr Mylott told Mr Young he needed more time to think about whether Mr Young was the right person for the position and the meeting ended with Mr Young saying he would “wait to hear” from Mr Barnett and Mr Mylott.

[17] Mr Mylott’s evidence was to the same effect as that of Mr Barnett. He insisted that, by the end of the 9 July meeting, it was “crystal clear to all that the offer was up in the air and that a final decision was yet to be made regarding the offer”. Mr Young was equally emphatic in describing that description as “simply untrue”. He said he left the 9 July meeting “in the full belief that the job was mine” and that he would start work on 27 July.

[18] In the following days Mr Barnett and Mr Mylott discussed various issues about the New Zealand business, including whether to go ahead with the offer of a role to Mr Young. Their discussion concluded with Mr Mylott directing Mr Barnett to call Mr Young and tell him that C21NZL would not take the offer further. Mr

Barnett and Mr Young agreed in their evidence that when Mr Barnett made that call Mr Young asked for the decision to be reconsidered. Mr Barnett said he had called on 17 July. Mr Young insisted he received the call on 23 July.

[19] While the contest of evidence about what was said in the meetings of 6 and 9 July could not be readily resolved, I concluded Mr Young had not established that it was more likely than not that he had accepted the position before C21NZL before withdrew the offer. He failed to establish the parties' interactions demonstrated a mutual and concluded intention to hire him for work under a contract for services. I reached that view for the following reasons.

[20] Firstly, Mr Young is an experienced business man. He had worked for the previous nine years as the head of acquisitions of a private equity business. He also had interests in a software company and a broadband business. He had previously worked in sales in two British firms dealing with banks and retailers. Although he described himself as "a little naïve" in employment matters, he was familiar with a business environment where general contractual principles about offer, acceptance and the formalities of reaching agreement are practiced and well understood.

[21] Secondly, the letter of offer given to Mr Young on 6 July stated a clear formal requirement for him to communicate his acceptance of the employment:

After reviewing our terms of employment, we ask that you please sign and date the attached copy of this letter and the confidentiality agreement and return them with (sic) as your acceptance.

[22] Mr Barnett's evidence, which I accepted, was that he pointed out that requirement when he and Mr Young went through the letter page by page on 6 July. Mr Young confirmed in his oral evidence that he never provided the requested signed copy. I have not accepted Mr Young's explanation that it was merely "paperwork" that he understood he could bring with him when he started work on 27 July. His failure to return the 'acceptance' copy of the letter supported C21NZL's argument that he had not provided an unequivocal statement that he would take the job as offered but, rather, was still seeking to negotiate the terms of the offer at the time that it was withdrawn.

[23] Thirdly, Mr Young's reaction when told that C21NZL was withdrawing its job offer was not consistent with what might be reasonably expected of someone who had already accepted the job. He made no protest to Mr Barnett that it was too late to withdraw the offer. Instead he merely asked Mr Barnett to try to get Mr Mylott to reconsider the decision.

[24] Fourthly, Mr Young's evidence revealed that he came to challenge C21NZL's actions because someone else told him "they can't do that". Significantly it was not his own view but the comment of a recruitment consultant he spoke with in late August that led him to seek further advice and to make an application to the Authority. His delay, in either forming or doing something about that view, was not consistent with the actions of someone of Mr Young's business experience who understood they had already accepted an offer before the other party withdrew it.

Costs

[25] Mr Young sought an order that costs should lie where they fell while C21NZL submitted costs should follow the event of its success in opposing his claim. C21NZL accepted costs should be awarded on the Authority's usual tariff, which was significantly less than its actual legal costs. C21NZL had not made any settlement offers that needed to be taken into account in assessing costs.

[26] The investigation meeting began at 10am and finished around 3pm. No particular circumstances or factors required an upward or downward adjustment of the tariff, which applied to the part-day was in the range of \$2500 to \$3000.⁶ On the principle that awards should be modest, \$2500 was the appropriate amount to order Mr Young to pay C21NZL as a reasonable contribution to its costs.

Robin Arthur
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].