

NOTE: This determination contains an order prohibiting publication of certain information at [1]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 517
3164604

BETWEEN	NICOLE ROSS Applicant
AND	THE PRIORY IN NEW ZEALAND OF THE MOST VENERABLE ORDER OF THE HOSPITAL OF ST JOHN OF JERUSALEM Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Allan Halse, advocate for the Applicant Charlotte Parkhill and Charlotte Evans, counsel for the Respondent
Investigation Meeting:	8 June 2023 at Hamilton
Submissions received:	16 June 2023 from Applicant 16 June 2023 from Respondent
Determination:	11 September 2023

DETERMINATION OF THE AUTHORITY

Non-publication

[1] A non-publication order was made preventing the publication of Ms Ross' personal medical information with the exception of the diagnosis of epilepsy in the past. This is on the basis there is no public interest in publication of Ms Ross' personal medical information in the context of resolving the employment relationship problem.

Employment Relationship Problem

[2] This determination deals only with the preliminary issue of whether Nicole Ross was an employee or a person intending to work. If Ms Ross was not either of those things, the Authority does not have jurisdiction to hear Ms Ross' grievances lodged in the Authority.

[3] Ms Ross was completing a Bachelor of Health Science majoring in Paramedicine through Auckland University of Technology when she applied for the position of Emergency Medical Assistant (EMA) with The Priory in New Zealand of the Most Venerable Order of the Hospital of St John of Jerusalem (St John).

[4] St John says it commenced a recruitment process with Ms Ross, but no offer of employment was made. Ultimately, she was not offered the role because she did not meet St John's driving standard due to her medical diagnosis and her current medical situation. This was identified after her interview and during pre-employment checks which included a health questionnaire.

[5] Ms Ross says she was successful with her application for the EMA role because immediately after her interview she accepted a conditional offer for the role but was either unjustifiably dismissed or the offer was withdrawn on the basis she did not meet the required driving standard for health reasons. Ms Ross also says St John, in reaching either conclusion, discriminated against her on the grounds of her health status.

[6] A separate claim that Ms Ross was disadvantaged by false accusations of lying and other behaviour that meet the definition of bullying was also set out in submissions. There was reference to bullying in the amended statement of problem and breaches of the Health and Safety at Work Act 2015 by failing to protect Ms Ross from bullying and discrimination. These however, cannot proceed if Ms Ross is not an employee and need not be considered here.

The Authority's investigation

[7] For the Authority's investigation written witness statements were lodged from Nicole Ross and Trevor Hills, Paramedic and for St John Jennifer Smith, Talent Sourcing Advisor, Hugh Davison, Territory Manager and Stuart Cockburn, who at the time was the Central West District Operations Manager. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave written closing submissions.

[8] Having regard to s 174E of the Employment Relations Act 2000 (the Act), it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

Ms Ross' application for the EMA role

[9] St John is a registered charity under the Charities Act 2005. Its ambulance officers provide ambulance services throughout New Zealand. Safety concerns about single crewing led to increased funding and the creation of the EMA role to ensure double crewing of St John ambulances. In 2019 a project to implement the new role and recruit new employees, referred to as the “double crewing” project, saw St John actively recruiting for large numbers of EMA nationally.

[10] St John also has a commercial agreement with AUT to provide clinical placements for students completing degrees in paramedicine. Ms Ross had clinical placements with St John both before and after her application for the EMA role. Ms Ross was also a volunteer for St John.

[11] Ms Smith (nee Philpott), led the national recruitment drive for the “double crewing” project. The focus of the new role was on assisting personnel at higher practice levels to provide optimal patient care. EMA are often tasked with transporting vulnerable and critically ill patients. They are trained in basic emergency skills and assist as part of an emergency ambulance crew with patient assessment, treatment, transport, or referral.

[12] Ms Ross applied for the advertised EMA positions at both the Te Kuiti and Otorohanga stations in July 2019, knowing she had the support of Mr Hills, who had acted as her preceptor during clinical placements. After Ms Ross' interview, the panel recommended Ms Ross progress to the next stage and she was asked to undergo the necessary pre-employment checks. The first was a health check:

As part of the recruitment process, you have progressed to the health check stage of your application.

Please ensure you complete the attached pre-employment Health Questionnaire and return it within 72 hours. ...

Please note it is a requirement to work and/or volunteer with St John and that full clearance will not be granted until such time that the St John Pre-employment Health Questionnaire and all relevant medical reports are received.

Failure to return this questionnaire in a timely manner will result in delays to the appointment process.

[13] Ms Ross immediately called Ms Smith. Ms Ross says that conversation is part of the reason she believed she had the job. Her evidence was that she asked Ms Smith whether the email meant she had the job and she says Ms Smith replied “yes”. Ms Ross says that conversation informed her she all but had the job, subject to some further checks.

[14] Ms Smith could not recall the specific conversation with Ms Ross, but she gave evidence of the process she generally followed. Ms Smith was unequivocal that she did not make an offer to Ms Ross. She cannot remember the exact words she used but described what her standard response was likely to have been when dealing with recruitment candidates which reflected what was contained in the email.

[15] Ms Smith described the process that was followed. Referee checks and pre-employment checks are done at the same time for candidates who progress past the interview and assessments. The pre-employment checks consist of police vetting, driver licence check, drug test and health screening.

[16] It transpires Mr Davison, who was on the recruitment panel and was the hiring manager, also telephoned Mr Hills and conveyed his confidence that Ms Ross was a good candidate as she interviewed well. Mr Hills told him Ms Ross performed well on her placements and that in his view she would be very good in the role.

[17] Mr Hills also relayed his conversation with Mr Davison to Ms Ross, confirming she had performed well at the interview and that Mr Davison was thinking favourably of her as a candidate. There was a bit of paperwork to do and then she would have the job is how he put it in his evidence.

[18] Ms Ross quickly made arrangements to get the pre-employment checks underway. In the health screen questionnaire she set out that she had a diagnosis of epilepsy. Because that was relevant to the driving standard, she was asked to provide further information as St John went through the process of considering Ms Ross’ health status against its policies and standards.

[19] Mr Davison said he was notified by someone in recruitment or HR that there was a problem with Ms Ross’ pre-employment health check. Mr Davison’s understanding was that because there was an epilepsy diagnosis, Ms Ross was not able to pass the medical standard for driving and St John could therefore not offer Ms Ross employment. Mr Davison telephoned Ms Ross to advise her of this on 12 August 2019.

[20] Ms Smith also emailed Ms Ross on 12 August 2019 after the phone call with Mr Davison setting out in writing that St John was unable to progress Ms Ross' application because she did not meet the applicable standard for driving.

[21] There was an additional concern from St John that Ms Ross had not disclosed epilepsy at the first possible opportunity. There had been a general health question on the recruitment application and its view was Ms Ross should have answered in the affirmative when she initiated her application. Ms Ross says the question used the word "impact" and she was of the view there was no impact on her ability to work caused by her epilepsy diagnosis. There was no issue with the later disclosures Ms Ross made during the pre-employment health screening checks because these were fulsome.

Was Ms Ross an employee?

[22] Section 6 of the Act defines an employee as any person employed by an employer to do any work for hire or reward under a contract of service and includes a homemaker or a person intending to work. A "person intending to work" is defined in the Act as a person who has been offered, and accepted, work as an employee.¹ Volunteers who do not expect reward and receive no reward for work to be performed as a volunteer are excluded from the statutory definition of employee.²

[23] In deciding whether a person is employed by another person under a contract of service (an employee), or whether a person is a person intending to work, the Authority must determine the real nature of the relationship between the parties. Consideration must be given to all relevant matters including matters that indicate the intention of the persons. The Authority is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.³

Was Ms Ross a person intending to work?

[24] Whether a contract of service is formed depends on well established rules of contract law. Whether or not offer and acceptance occurred is the main consideration. In deciding whether a contract was formed all the circumstances are examined to see if one party has made an offer that the other party subsequently accepted. The general rules of contract formation also apply to employment contracts.

¹ Employment Relations Act 2000, s 5.

² Above s 6.

³ Above n1, s 6(3).

[25] An offer is defined as follows:⁴

An offer is an expression, made by the offeror to the offeree, of a willingness to contract immediately upon acceptance by the offeree. Offers can be made expressly or by conduct, although any offer by conduct must be sufficient to indicate the terms on which the offer is made. It is for the court to consider whether the words or conduct amounts to an offer in the particular circumstances in which they occur. In doing so, the court will take an objective approach, and so be concerned not with the person's actual subjective intention but with the apparent outward manifestation of that intention. The court considers the point of view of a reasonable person in the shoes of the offeree. In this way, a person may be found to have made an offer without actually intending to do so.

[26] Submissions were made on behalf of Ms Ross that an employment relationship had commenced in two ways. Firstly, a conditional offer was made earlier in 2017 prior to Ms Ross commencing her study and then a second conditional offer was made in 2019 during recruitment for the EMA position that was later withdrawn by Mr Davison.

[27] Ms Ross says on the basis of the 2017 conversation she applied for and was accepted into the Bachelor of Health Sciences degree programme majoring in Paramedicine. It was her understanding from the 2017 conversation that so long as she obtained her degree and met three requirements, including obtaining her "authority to practice", employment was automatic.

[28] The name or position of the person Ms Ross spoke to or any exact details of what was said could not be provided. That means there is simply insufficient information for me to conclude the 2017 conversation could be considered on an objective basis to be an offer of employment.

[29] St John also provided evidence about the difference in the relationships it has with students completing clinical placements as compared with its employees which suggests an offer being made in the 2017 conversation is unlikely. The requirements of a tertiary training institute, as compared with that of an employer and indeed a statutory regulatory authority are all necessarily different as they fulfil different roles and purposes. The submission that acceptance by one automatically leads to the other is unsustainable.

Was a conditional offer made in 2019?

[30] St John say no offer was made to Ms Ross. It says the words and actions of Ms Smith and Mr Davison taken as a whole cannot be objectively viewed as comprising of an offer. While

⁴ Burrows, Finn and Todd on the *Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [41-42].

the panel was favourable towards Ms Ross as a candidate the process it followed was not unusual in that after the interview it decided to move her to the next stage involving the four pre-employment checks. It says no offer was made after the interview because that was not what was said and not the process it followed. Ultimately no offer was made after the pre-employment checks because it was established Ms Ross did not meet the driving standard.

[31] Ms Smith says she conveyed in her email and was likely to have conveyed in her telephone conversation that Ms Ross was through to the next stage. Ms Smith had not intended to talk to Ms Ross because she had updated Ms Ross by email about the next step being the health questionnaire. That was the process for all candidates she was involved with during the recruiting drive for EMA across the country.

[32] Ms Ross, however, relies on conversations with both Ms Smith and Mr Hills and says taken together they are sufficient to amount to a conditional offer. She also points to the discussion of start dates and location of the EMA role during the interview as further evidence of an offer.

[33] St John says those conversations about location and start dates were had with all candidates during the interview and were general discussions to test out availability for the induction programme and preference for the location of the role, should they be successful. These conversations were not intended to be an outward manifestation of an offer.

[34] It is possible that an offer can be made by conduct rather than expressly but I would need to be satisfied the conduct was sufficient to indicate the terms on which it was made. While it was clear that St John were wanting to indicate it was positive about Ms Ross as a candidate, there is a difference between thinking favourably about a candidate and making an offer.

[35] The conversation with Mr Hills about what Mr Davison said to him does not assist. Mr Davison's evidence was that conversation was an unofficial and informal check because Ms Ross had been working with Mr Hills during her clinical placements. It is not clear that conversation was anything more than conveying the panel's favourable view of Ms Ross. Mr Hills was a referee, and it was not in dispute that Mr Hills was not asked formally as a referee to provide information to the recruiters.

[36] The email Ms Ross received before telephoning Ms Smith is helpful. The first sentence states "you have progressed to the health check stage of your application.". This is consistent

with Ms Smith's evidence that all she would have conveyed was that Ms Ross was through the interview and into the next stage which was the pre-employment checks. Even if Ms Ross had thought that Ms Smith had conveyed an offer to her, the opening words of this email help to clarify the position that the conversation they had was about moving to the next stage.

[37] Looking at the written communications and noting there is no offer of employment, I find it unlikely that St John would have conveyed an offer verbally when its written communications were about moving Ms Ross to the next stage which involved the pre-employment checks. The health check was highlighted as being particularly important and the email stated that a full medical clearance "will not be granted until such time that the St John Pre employment Health Questionnaire and all relevant medical reports are received."

[38] This was a large recruiting drive for which Ms Smith was the lead and has considerable experience in recruiting. There is nothing in terms of Ms Ross' application that would convince me on the balance of probabilities that St John would deviate from its standard process and make a verbal offer of employment to one particular candidate before the other standard pre-employment checks were completed.

[39] Equally, questions about candidates' availability for induction and preferences for start dates and the location of work during an interview are also not sufficient to have conveyed with any certainty the terms of any verbal offer. There was no discussion of salary, no actual start date, or location confirmed by Ms Smith or by Mr Davison when he spoke to Mr Hills.

Conclusion

[40] The communications from St John were on the whole standard for a recruitment process. Candidates are frequently informed they are through to the next stage which involves some further checks including referee checks. That is different from a conditional offer of employment. In the circumstances of this case, I find on an objective assessment the words and conduct used by St John were not sufficient to have amounted to an offer.

[41] That means I have concluded there was no offer of employment meaning no employment contract or agreement existed between the parties and Ms Ross cannot have been a person intending to work.

[42] The Authority does not have jurisdiction to hear Ms Ross' claims because there was no employment relationship between the parties at the time the grievances were alleged.

90-day issue

[43] There was also a 90-day issue raised by St John and it did not consent to Ms Ross raising her grievances outside of the statutory 90-day time frame. Give my finding above it has not been necessary to make a finding on this issue.

Costs

[44] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, St John may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Ms Ross would then 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.

[45] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁵ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1