

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 772
3268599

BETWEEN	SHAUN CAVANAGH Applicant
AND	DYNES TRANSPORT TAPANUI LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Applicant in person Stephen Divers for the Respondent
Investigation Meeting:	24 September 2024 in Dunedin and by AVL
Further Information received:	11 October 2024 from the Applicant 29 October 2024 from the Respondent
Date of Determination:	20 December 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dynes Transport Tapanui Limited (Dynes) operates a transport business and employs truck drivers and other staff. It offered employment as a truck driver to Shaun Cavanagh in August 2023.

[2] Mr Cavanagh says he accepted the offer. However, he became unwell before he started work and was later told by Dynes that the offer was withdrawn. Mr Cavanagh says he was unjustifiably dismissed and he seeks compensation and reimbursement to settle his personal grievance.

[3] Dynes says that its offer was subject to certain conditions, Mr Cavanagh did not fulfil the conditions and it withdrew its conditional offer. It says that Mr Cavanagh was never its employee, so he cannot take a personal grievance claim against the company.

The investigation

[4] Despite mediation, the problem was not resolved.

[5] Mr Cavanagh provided a statement and appeared by AVL to answer and ask questions and support his claim. Mr Marshall, Mr Divers and Mr Carter provided evidence and attended the meeting to answer questions.

[6] Some information was provided later.

[7] It is not necessary to set out all the evidence provided and submissions made by Mr Cavanagh and Dynes. But it is helpful to set out what happened, before I turn to resolving the problem.

What happened

[8] Dynes advertised for truck drivers, Mr Cavanagh saw it, contacted the company and gave his contact details.

[9] Mr Marshall is a general manager of one of Dynes' sections. Mr Cavanagh's details were passed to Mr Marshall and he arranged to interview him. Messages included a request for Mr Cavanagh to bring boots and a hi-viz vest as they might go for a drive.

[10] The interview was on 16 August 2023. Following the interview, Mr Cavanagh went for a drive so his driving could be assessed.

[11] At some point on 16 August 2023, there was a discussion about when Mr Cavanagh could start. It is common ground that Mr Cavanagh said he could start in four weeks.

[12] Later that evening, in a message to Mr Cavanagh, Mr Marshall asked him to get a "new employer form" from his bank with his bank details and to bring his IRD information. Mr Cavanagh agreed to that.

[13] Mr Marshall arranged a draft employment agreement, associated forms and a letter of offer to be generated for Mr Cavanagh. On 24 August 2023 Mr Marshall messaged Mr Cavanagh:

Got your contract on my desk should I post it or do you want to pick it up.

[14] Mr Cavanagh replied the next day (Friday 25 August). He said he would respond on Monday and organise to come and see Mr Marshall and sign the contract. Mr Cavanagh later collected the proposed agreement and letter of offer.

[15] Dynes' letter of offer was expressed as conditional on Mr Cavanagh's consent to undergo a drug test, a negative result from that test, receipt of a signed copy of the employment agreement from him and him ensuring an ACC pre-employment claims history check was carried out. The letter included:

...

4. In the event that you do not consent to undergo a drug test (a consent form is attached for this purpose), or a positive test result is returned, the consequence may be that the company withdraws its offer of employment to you and does not confirm your appointment to this position.

...

6. Once the results of the drug and alcohol testing outlined above are made available to us and we are able to confirm our offer of employment, we will contact you to arrange a suitable start date.

...

9. Once you have considered this conditional offer, we would be grateful if you would sign below to indicate your acceptance, in order that we may arrange drug and alcohol testing. Upon completion of a negative drug test being returned we would be grateful if you would signify your acceptance (or otherwise) to the terms of your ... Agreement by initially each page, signing and dating this document where indicated and returning it to us within one week's time. ...

...

I, Shaun Cavanagh _____ have read and understood the terms of the above job offer, which is conditional upon undergoing and achieving a negative drug test result. I full accept the terms of this conditional offer.

...

[16] The letter was accompanied by a Dynes' employee Profile form, an IRD tax code declaration form, Kiwisaver forms and information and a proposed employment agreement. The agreement was in Mr Cavanagh's name and gave 18 September 2023

as a commencement date but the other documents were template forms for him to complete.

[17] On 12 September 2023, Mr Cavanagh provided a copy of his employment agreement to a lending organisation to support his loan application. The loan was approved, subject to the provision of an employment agreement signed by both parties. Later the same day, Mr Marshall emailed Mr Cavanagh to say that his agreed start date was 20 September 2023, when they would both sign the employment agreement. Mr Cavanagh forwarded that message to the lending organisation.

[18] Mr Marshall's evidence is that Mr Cavanagh told him he would get a call from a person, which happened after his email to Mr Cavanagh. Mr Marshall's recollection is that the call was from a rental agency. His evidence is that he told the person that Dynes had made a conditional employment offer to Mr Cavanagh and that he would not vouch for or be a referee for Mr Cavanagh. It is likely that the call Mr Marshall received was from the lending organisation and he confirmed that Dynes had offered employment to Mr Cavanagh to start on 20 September 2023.

[19] Nothing further happened until 20 September 2023. Mr Cavanagh was unwell that day and his partner messaged Mr Marshall. Mr Marshall acknowledged the message, asked Mr Cavanagh to call later and said they would "try starting you on Monday". Mr Cavanagh later provided a medical certificate. He was certified medically unfit for one week but likely for a further week to 2 October 2023.

[20] On 27 September 2023, Mr Marshall messaged Mr Cavanagh to ask how his health was progressing. Mr Cavanagh did not reply, but the next day he sent Mr Marshall a further medical certificate dated 28 September 2023. It certified that Mr Cavanagh was medically unfit to drive but likely to be fit from 9 October 2023.

[21] Mr Marshall contacted Mr Cavanagh later on 28 September 2023. He told Mr Cavanagh that he was under pressure to fill the position and if he did, there might be other options within Dynes for him.

[22] On 29 September 2023 Mr Cavanagh messaged Mr Marshall to say he wanted to hold his employment, that he was concerned his sickness would impact the opportunity and to ask if he should be worried or could concentrate on getting well.

[23] Mr Marshall responded on Monday 2 October 2023. In this message and letter, Mr Marshall withdrew the offer of employment. Mr Cavanagh replied to say that he considered it was unfair and asked for the position to held for a week for him to recover.

[24] Mr Cavanagh called Mr Marshall on 16 October 2023. Mr Marshall told Mr Cavanagh that he had filled the position, but he gave him the contact details for another Dynes' manager who was looking for staff. Several days beforehand, Mr Marshall had given Mr Cavanagh's details to that manager. The number noted by the other manager differs from the number that Mr Cavanagh originally forwarded to Mr Marshall.

[25] A representative on Mr Cavanagh's behalf wrote to Dynes on 7 November 2023 to raise a personal grievance claim of unjustified dismissal.

Issues

[26] A personal grievance includes a grievance that an employee may have against their employer because of their claim to have been unjustifiably dismissed. Other types of claims by an employee against their employer may also be grounds for a personal grievance.¹ To make a personal grievance claim, the person must be or have been an employee, as defined in the Employment Relations Act 2000.

[27] If the Authority determines that the employee has a personal grievance, it may in settling the grievance provide for remedies in accordance with the Employment Relations Act 2000.

[28] The following issues emerge:

- (a) Was Mr Cavanagh an employee?
- (b) If yes, did Dynes unjustifiably dismiss him?
- (c) If yes, what remedies are required to settle his personal grievance?

Was Mr Cavanagh an employee?

[29] To paraphrase for present purposes, an employee is a person employed under a contract of service, including a person intending to work.²

¹ Employment Relations Act 2000 s 103(1).

² Employment Relations Act 2000 s 6(1).

[30] A person intending to work means a person who has been offered and accepted work as an employee.³ Mr Cavanagh says that he was a person intending to work as he had been offered and had accepted work as an employee.

[31] In *Edwards v Laybuy Holdings Limited*,⁴ the Employment Court held that a proposal would constitute an offer if it was sufficiently definite and indicated the intention of the offeror to be legally bound in the case of acceptance. In that case, the letter from Laybuy Holdings advised that it would only employ Mr Edwards if it was satisfied with the result of pre-employment checks. If not satisfied, the offer would not proceed, but would be withdrawn. The Court found that Laybuy Holdings made it clear that it did not intend to be bound to employ Mr Edwards merely by his notification of assent.

[32] Mr Cavanagh's situation is not materially different from that of Mr Edwards.

[33] The offer was conditional on Mr Cavanagh's consent to and the result of a drug test. It had been anticipated that Mr Cavanagh would provide his consent and be tested when he first reported for work. But he was unwell and never consented to or underwent a test.

[34] The offer was also conditional on Dynes receiving a copy of the employment agreement signed by Mr Cavanagh. Although Mr Cavanagh picked up a copy of the proposed agreement, he did not return a signed copy of it to Dynes. Again, it had been anticipated that he would sign it when he reported for work on 20 September 2023.

[35] The third condition was for Mr Cavanagh to arrange for a pre-employment ACC claims history check to be forwarded to Dynes prior to his employment start date. Mr Cavanagh did not do so.

[36] Mr Cavanagh was also asked to sign the letter of offer to acknowledge the offer was conditional on undergoing and achieving a negative drug test result. He did not return that acknowledgement to Dynes.

[37] Mr Cavanagh points to clause 2 in the employment agreement. It provides that the agreement replaces all earlier agreements and understandings, and records their entire agreement. Under clause 4, the agreement commenced on 18 September 2023.

³ Employment Relations Act 2000 s 5.

⁴ *Edwards v Laybuy Holdings Limited* [2023] NZEmpC 188.

Mr Cavanagh submits that the agreement was in force from then, rather than the letter conveying the conditional offer. In any event, Mr Cavanagh also drew my attention to paragraph 9 in the letter of offer saying that Dynes “may” arrange drug and alcohol testing.

[38] I do not accept that the employment agreement had come into force. The sequence was expressly set out in the offer letter. Mr Cavanagh was asked to consider the “conditional offer”, then sign and return the letter so Dynes “may” arrange the drug and alcohol testing. After completion of a negative test, Mr Cavanagh was to sign and return the employment agreement. Mr Cavanagh took none of these steps.

[39] While paragraph 9 of the letter includes the phrase “we may arrange drug and alcohol testing”, Dynes required Mr Cavanagh to provide a test. Understood in context, Dynes was saying it would arrange the test once Mr Cavanagh signed and returned the offer letter.

Conclusions

[40] Applying the principles set out in *Edwards v Laybuy Holdings Limited*, I find that Dynes withdrew its offer before Mr Cavanagh gained the status of a person intending to work.

[41] As he was never an employee of Dynes, Mr Cavanagh cannot pursue a personal grievance against the company. His claim must be dismissed.

[42] Neither side was legally represented. However, as the issue was not canvassed during the investigation meeting, I will reserve costs in case there are grounds to seek costs. Dynes may lodge and serve any supporting submissions within 28 days of the date of this determination. Mr Cavanagh may lodge and serve submissions in reply within a further 14 days. I will then determine costs, with regard to those submissions and the Authority’s approach to costs.