IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 200
3324000

	BETWEEN	TANYA DUNSTAN Applicant
	AND	THE CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Lauren Donnellan, counsel for the Respondent
Investigation:	On the papers, as submitted up to 5 February 2025
Determination:	10 April 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns whether the Authority has jurisdiction to investigate a personal grievance application Tanya Dunstan wishes to pursue against Oranga Tamariki – The Ministry for Children (OT).

[2] Ms Dunstan's statement of problem said she was "shortlisted for an interview" for a role as a youth resident worker for OT but, after attending an interview, was not appointed. She said she became suspicious this was because OT thought she would "be a whistle blower" about how it ran youth residences. She said she had "reported social workers previously for misconduct". Her statement did not specify if this earlier action concerned OT facilities or some other context.

[3] Ms Dunstan said she genuinely believed this previous activity had resulted in OT unlawfully discriminating against her and failing to act in good faith in its dealings with her over applying for the job.

[4] OT denied discriminating against Ms Dunstan or breaching any duty of good faith to her. It said Ms Dunstan had expressed interest in working for OT, had been told of a position available at a residence and was one of a group of candidates who attended a site visit and completed a written assessment. OT made no further steps to progress her application after the site visit.

[5] OT said no offer of employment was made to Ms Dunstan. This meant, it said, no duty of good faith applied to their interactions because Ms Dunstan and OT were not parties to an employment relationship.

Investigation of jurisdiction

[6] A preliminary jurisdictional issue arose from Ms Dunstan's application to the Authority. Only an employee may pursue a personal grievance. OT questioned whether what had happened with her job application meant Ms Dunstan had ever become an "employee" as defined in the Employment Relations Act 2000 (the Act). If she had not, the Authority lacked jurisdiction to investigate her claim.

[7] By agreement with the parties, the preliminary jurisdictional issue was investigated and determined on the papers.

[8] Those papers comprised Ms Dunstan's statement of problem, OT's statement in reply and sworn affidavits from Ms Dunstan and from three OT employees.

[9] Those three OT employees were involved in dealing with aspects of Ms Dunstan's job application and the site visit to the youth residence. For the purposes of this determination they need only be referred to by their initials.

[10] Ms V, an OT recruitment advisor, provided information about correspondence with Ms Dunstan over her job application and other documents relevant to that process.

[11] Ms W, a team leader at the youth residence, described how site visits to the residence were arranged for applicants and what happened on the site visit by a group of applicants, including Ms Dunstan, which took place on 30 May 2024. Ms W's affidavit included information about a presentation she had delivered and a written assessment exercise undertaken by the applicants while on site that day.

[12] Ms F, a youth worker at the residence who had taken the applicants on a tour of the site that day, also described what she recalled of their visit.

The law

[13] The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including 30 categories of problem specified in s 161 of the Act. Personal grievances are one of those categories.

[14] An employee who believes she or he has a personal grievance may pursue the grievance under the Act.[1] A personal grievance can include claims that "the employee's employment" was affected to the employee's disadvantage by some unjustifiable action of the employer or that "the employee has been discriminated against in the employee's employment".[2] In all instances the person who says they were subject to disadvantage or discrimination must be "an employee".

[15] The Act defines an employee as "any person of any age employed by an employer to do any work for hire or reward under a contract of service". This definition continues on to say an employee includes "a person *intending* to work".[3] This phrase, as also defined in the Act, means "a person who has been *offered*, and *accepted*, work as an employee".[4]

[16] In deciding whether a person is employed by another person under a contract of service, the Authority must determine the real nature of the relationship between them. This considers all relevant matters, including any matters indicating the intention of the persons. It does not treat any statement by the persons describing the nature of their relationship as determining the matter.[5]

The facts

[17] In 2023 Ms Dunstan applied to become a caregiver for OT. An email from an OT administrator dated 13 October 2023 advised that her application was declined "due to concerns that was (sic) revealed to us from the results of your Ministry Systems

[1] Employment Relations Act 2000, s 102.
[2] Section 103(1)(b) and (c).
[3] Section 6(1)(b)(ii).
[4] Section 5, definition of "person intending to work"
[5] Section 6(1) and (2).

Check and Police Vetting Report". Ms Dunstan had included a copy of that email with her application to the Authority.

[18] In January 2024 Ms Dunstan applied for a role as a residential youth worker. OT's recruitment process for the role included asking Ms Dunstan to confirm she would be available to undertake a six week-long full time induction programme and to complete an online video interview.

[19] On 20 March Ms V advised Ms Dunstan that the roles available at that time had been filled but asked if OT could keep her application on file in case other positions arose in the near future. Ms Dunstan agreed to that request.

[20] On 20 May Ms V advised Ms Dunstan by email that some additional casual positions at a youth justice residence had become available and asked if Ms Dunstan was still interested in such a position. Ms Dunstan promptly replied that she was "very interested" and asked when she could "formally apply" for any position.

[21] On 27 May an OT recruitment administrator contacted Ms Dunstan by email to invite her to a site visit. After talking with Ms Dunstan by telephone the administrator sent her invitation by email. The email thanked Ms Dunstan for the time she had put into the recruitment process for the youth worker position and invited her to a site visit. This message said she would "be joined by other candidates interested in the position" and explained the agenda for the visit. This included a tour of units, a discussion on day-to-day activities, a question-and-answer session and "a written 20-30 minute assessment". It said the visit was a "chance to learn more about working with us" and encouraged her to ask questions throughout the visit.

[22] At the same time Ms Dunstan was sent a "vetting service request". This message said OT wanted "to proceed to vetting stage" with her application. It asked her to complete a consent form providing personal information and, because she had worked in Australia, information needed for an Australian National Police history check.

[23] Ms Dunstan replied that day advising she had completed the online vetting form and provided details for three referees. Her message thanked OT for "the opportunity to join the team" and said she was "looking forward to the group interview".

[24] According to Ms V's affidavit some 12 applicants attended the site visit on 30 May. Six applicants were being considered for permanent positions. The other six had applied for and were being considered for casual positions. After the visit two of those latter six were later hired into casual roles at the residence.

[25] Ms W described the presentation she gave as team leader to the applicants attending that site visit. She recalled Ms Dunstan asking questions during her 20-minute presentation.

[26] The applicants were then led on a 30-minute tour of the site by Ms F. Ms F said she recalled Ms Dunstan asking a lot of questions.

[27] At the end of the tour the applicants returned to Ms W to complete a written assessment. This included an exercise describing how they would prepare an activity plan for a new resident. Ms W collected the completed assessments. She recalled Ms Dunstan asked when she would hear back about the job. Ms W said she had replied that she did not know because she was not the contact advisor but someone should let Ms Dunstan know if she was to be progressed forward to an offer stage.

[28] Ms Dunstan, in her affidavit, disagreed with Ms W's evidence about what she was told. Ms Dunstan said Ms W confirmed "the next stage was police vetting and as long as that came back clear, the six-week training course could begin".

[29] A site visit observation form was completed for each applicant.

[30] The form for Ms Dunstan recorded a score of 12/15 for the descriptors of capabilities needed for the role and 4/6 for her written assessment. The form included a question about whether to "progress to offer". Ms W said she had circled 'yes' but somebody else had later crossed out that answer and circled 'no'. Ms W said she did not know the reason for this.

[31] Ms Dunstan, in her affidavit, said Ms W's initial 'yes' confirmed she was eligible for the role and suitable to begin training, pending the police vetting clearance. She said the change made on the form, to 'no', showed someone from OT had "deliberately discriminated against me, amounting to an act of bad faith".

[32] By email on 14 June Ms V told Ms Dunstan her application had "not been progressed to the next stage of the recruitment process". The message also advised that she could ask for feedback on her application, if she wished.

[33] In an email seeking an explanation, dated 27 July, Ms Dunstan described herself as having "attended an online interview", being "shortlisted for a physical induction" and being interviewed and attending with all of the other candidates.

[34] In response, by email on 30 July, an OT representative gave this explanation of why Ms Dunstan was not appointed to one of the available casual roles:

> For this role, we received a high number of applications that were of a high calibre. We had limited positions available and therefore assessed candidates closely to ensure those that were progressed demonstrated the highest level of skills, experience and knowledge in relation to the role and shortlisting criteria.
>
> In this instance your application was not progressed as there were other candidates that demonstrated skill sets, capabilities and experience that more closely aligned with the key selection criteria required to succeed in the residential youth worker position.
>
> After the site visit, as you were not nominated as preferred candidate, we did not progress with your application any further, meaning we did not action your vetting consent form or complete any background checks or vetting to support your application.

Assessment

[35] To proceed with an investigation of Ms Dunstan's application, the Authority must first be satisfied the real nature of her dealings with OT made her a "person intending to work". To reach that conclusion the evidence must show she was a person who had been offered and accepted work under a contract of service.

[36] The evidential standard is the balance of probabilities, that is what is more likely than not to have been the case. The standard is also objective, that is, what would be apparent to a reasonable person, aware of the context and relevant facts? A subjective intention, by one party but not the other, is not sufficient to create an employment relationship.[6]

[37] An agreed intention to work can be formed in a verbal exchange of offer and acceptance.

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[6] *Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894 (CA), at [39]

[38] Ms Dunstan relied on her conversation with Ms W as amounting to a verbal offer of employment, conditional only on clearing a Police vetting check.

[39] On the balance of probabilities, it is unlikely that any descriptions Ms W, or other OT staff, gave during the 30 May site visit about steps in the recruitment process amounted to an offer of employment capable of acceptance. Ms W, for example, describing the next step in the process as involving Police vetting did not mean she was, at that stage, offering Ms Dunstan employment subject only to a satisfactory vetting check.

[40] Similarly, Ms Dunstan's claim that she "attended the site in good faith with the intention to work" did not mean an employment relationship was established.

[41] The invitation to a site visit indicated, as it said, that she had been "shortlisted" as an applicant. It was not an offer of employment.

[42] In the context of their invitation Ms Dunstan and the other applicants visiting the site that day to find out more about work at the residence would have understood, assessed on the objective standard of what would be apparent to a reasonably well-informed person, that any offer of employment would be a later step in OT's process. They had already completed some steps in an online application process, including answering questions in a video interview and signing a vetting consent form. It is unlikely any applicant reasonably believed any of the OT staff they spoke to during the visit could or would make an offer of employment to them that day. In light of the formalities of the process they had already begun, it was most likely understood they would have to wait for a formal, written offer of employment, if one was to be made to them at all.

[43] In light of that assessment, Ms Dunstan had not established to the necessary objective standard that an offer of employment was made to her, and accepted, through any of the events or conversations before or during her site visit on 30 May. As a result, she had not established she was a person intending to work, or in any other way met the definition of being an employee required by the Act. Consequently, the Authority does not have jurisdiction to consider her application or concerns about how OT dealt with her job application.

Outcome

[44] The Authority does not have jurisdiction to consider Ms Dunstan's application.

Costs

[45] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[46] If unable to do so, and an Authority determination on costs is needed, OT may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, Ms Dunstan would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[47] 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.[7]

Robin Arthur
Member of the Employment Relations Authority

[7] See www.era.govt.nz/determinations/awarding-costs-remedies.