



CONDITIONAL OFFERS OF EMPLOYMENT

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It's not uncommon for an employer to require certain conditions to be met before placing a prospective employee into their workforce. Such conditions may include reference checks, background checks, credit checks, and drug testing. This is not unreasonable for an employer to explore as they seek to place the right candidate.

The difficulty we find that employers will commonly run into is when an offer of employment is made and accepted by a prospective employee while the pre-employment checks are concurrently being undertaken. The problem that can arise is the creation of an employment relationship having occurred before an employer fully decides whether to continue onboarding an employee.

If an employment relationship has been

created, the employee will have rights under the Employment Relations Act 2000. Regardless of whether an offer states expressly its conditions, the employer would be required to justify its decision and demonstrate procedural fairness. An offer of employment once accepted and then withdrawn by an employer will amount to dismissal, even if the employee had not started work on what would have otherwise been their first day on the job.

A person intending to work

The Employment Relations Act 2000 defines a person intending to work as a person who has been offered, and accepted, work as an employee. This definition recognises that acceptance of an offer of employment will create mutual obligations

between the parties, which is then sufficient to create a contract for service, an employment relationship.

We refer to a case in the Employment Relations Authority, *Blissett v Te Roroa Whatu Ora and Anor* [2011] NZERA Auckland 248, which in its analysis succinctly set out the surrounding law of offer and acceptance in the employment jurisdiction. This was with reference to a number of decided Employment Court cases. In summary, these concepts were that:

- An employee can include a person who has not yet started work but has been offered work and has accepted that offer of employment. Under ordinary principles of contract law, an offer once accepted cannot be withdrawn.

- An employer who has offered employment can therefore only withdraw the offer prior to the offer being accepted. The withdrawal of an offer before acceptance of that offer must be clearly communicated to the prospective employee.
- An offer of employment is capable of being accepted regardless of the employer and employee still needing to finalise finer details such as the job description or the formal employment agreement documentation.
- The acceptance of an offer of employment may be communicated by words or conduct or a combination of both. It's also possible for acceptance to be inferred from silence if the surrounding circumstances signal acceptance.

In the Employment Court, *The Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152 was a case involving an employee's work trial and to resolve Ms Howe-Thornley's unjustified dismissal claim. Notably in this Employment Court decision, the Court

confirmed obiter (which means in the Judge's other remarks) that fair consultation and fair dealing is required of an employer attempting to revoke a conditional offer of employment.

Therefore, these rules will also apply to a conditional offer of employment being made and being accepted. Once an employment relationship is created in this way, an employee will be entitled to statutory rights under the Employment Relations Act 2000.

An employee's rights when facing dismissal for pre-employment checks not being met

If an employment relationship has been created by way of offer and acceptance before an onboarding process is completed, and should an employer decide to not go ahead with continuing to employ that employee, the employer must be able to justify their decision.

Access to information relevant to the continuation (or non-continuation) of an employee's employment must be provided and

“An employee has statutory rights the moment that employee accepts an offer of employment”

the employee has the right to have an opportunity to comment on the information before the decision is made, this requirement of good faith is prescribed by Section 4 of the Act.

Reinforcing the requirement of good faith dealing, a subsequent test that applies is Section 103A of the Act, the Test of Justification which prescribes an employee's right to natural justice.

Rather than an employer just simply notifying the candidate who has already accepted the offer that they will not be commencing work, the employer is required to undertake a fair and reasonable consultation process.

If an employment relationship has been created during pre-employment checks being undertaken, whether or not inadvertently or by the mistake of an employer, in the absence of substantial justification and procedural fairness being afforded to the employee, an employer may carry serious risk of being liable for an unfair dismissal personal grievance claim.

What we can do for employers and employees

While we take cases for employees and often do so on a 'no win no fee' basis to chase compensation, lost wages, and costs, we also defend employers and give appropriate advice to employers on how to use 90-day trial periods correctly.

We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court.

Whether you're an employee or employer and you need assistance with any employment issue, we're here to help.

No matter the situation, we recommend you speak to us for professional advice before you take action. ■

For more details, contact Lawrence Anderson on 0800 946 549 or 0276 529 529 or Lawrence@AndersonLaw.nz or visit www.AndersonLaw.nz

