IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 437/08
5107351

	BETWEEN	WHITNEY DAVIS Applicant
	AND	KIDS KLUB CHILDCARE LIMITED Respondent

Member of Authority:	Dzintra King
Representatives:	Mike Tolhurst, Counsel for Applicant Alan Knowsley, Counsel for Respondent
Investigation Meeting:	3 September 2008
Submissions Received:	3 and 6 September 2008 from Applicant 10 September 2008 from Respondent
Determination:	23 December 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Whitney Davis, says that she was unjustifiably dismissed from her employment by the respondent. The identity of the respondent was also at issue. Ms Davis also claims that the offer of employment originally made to her differed from that which was implemented and that she was treated in a demeaning manner during the course of employment.

Identity of Respondent

[2] The respondent was originally named as Kidz Club. Mr Tolhurst then asserted that the employer was Michelle Masefield trading as the Kids Klub Childcare Centre. Ms Masefield is a director and shareholder of a company called Kids Klub Childcare Limited.

[3] The employment agreement cites the employer as Kids Club Childcare Centre. Mr Tolhurst noted that Ms Masefield had signed the agreement as the employer and not as a director of the employer. He maintained that Ms Davis had entered into an agreement with Ms Masefield personally and not with the company.

[4] The name of the employer was shown on the wages report as being Kids Klub Childcare Ltd. This is the entity that was the employer.

Advertising of and Acceptance of Position

[5] An advertisement was placed on the Northcote College notice board for a full time childcare position at the Kids Klub Childcare Centre. The position was said to offer the chance to train to diploma level while being paid. Applicants were to see Ms Mercer in Support Services for application details.

[6] Ms Davis was unhappy at school and wished to leave. She had achieved NCEA level 1 and was 17 years old.

[7] Ms Davis first worked on a voluntary basis for one or two weeks. She was then offered a position as a casual reliever working as a kitchen hand/general staff member. This was not the position that Ms Davis had anticipated being offered. The agreement provides that the employee will work "*as and when and where required*". It states that "*Each period of employment is a separate engagement and there is no continuity or expectation of ongoing employment"* and that *"Termination of employment may be made during the term, or at the end, of each agreement period by either party for any reason"*. There is no entitlement to redundancy. The contract was signed on 27 September 2006.

[8] Ms Masefield said she offered Ms Davis this position once she realised that Ms Davis was only 17 and had insufficient NCEA credits to enrol in an appropriate course of study. Ms Masefield incorrectly believed that Ms Davis could commence study once she reached the age of 18, which would have been in mid 2007. The correct age, with Ms Davis' level of academic qualification, would in fact have been 20.

[9] Mr Tolhurst provided me with a print out from the Open Polytechnic of New Zealand which states that the age limit for studying for a Diploma of Teaching (Early

Childhood Education) is 17. However, a perusal of the brochure for this programme indicates that there are also academic prerequisites which were not held by Ms Davis.

[10] Mr Tolhurst maintained that Ms Davis had been coerced into signing this agreement and that it was unconscionable, constituted unfair bargaining and was in breach of a promise made that she would have a full time position with payment during study. He contended that Ms Davis had not been given an opportunity to seek independent advice and that she had not been provided with a copy of the agreement. The employment agreement has been witnessed by Ms Davis' father. It is apparent, therefore, that Ms Davis was given a copy of the agreement and had the opportunity to seek advice. There is no basis to these claims.

[11] Mr Tolhurst submitted that Ms Masefield had an obligation to contact Mr Davis as she knew he did not want his daughter to leave school without undertaking tertiary study. There was no evidence that Ms Masefield had knowledge of that.

[12] Mr Tolhurst maintained that Ms Masefield had pre-approved the notice placed on the notice board by Ms Mercer. However, Ms Mercer confirmed that she had not provided a copy of the notice to Ms Masefield or sought her approval. Ms Mercer said she had contacted Ms Masefield and asked if she was still looking for someone to fill the position. Ms Mercer then arranged for Ms Davis to meet Ms Masefield.

Employment Status and Alteration of Status

[13] Ms Davis agreed that she was advised of the hours and days she was required to work each week in advance. The records show that Ms Davis' hours varied from 16 to 88 per fortnight.

[14] Mr Tolhurst claimed that Ms Davis had been employed on a full time permanent basis a week or two after beginning employment and that she should have been given a permanent employment agreement. However, Ms Davis deposed that she understood she would get a permanent full time position once she commenced study. Ms Masefield spoke to her about undertaking study when she turned 18 but Ms Davis declined as she had moved into a flat with her boyfriend and wanted to leave studying for a year.

[15] Mr Tolhurst contended that Ms Masefield knew Ms Davis would sign anything to carry on working at the centre and that her decision to change her offer

from a full time one with study to a casual relieving position was "callous and calculating". There is no basis for this assertion. Ms Masefield made the offer believing that she could not employ Ms Davis full time unless she was studying towards a childcare qualification and that Ms Davis was unable, at that stage, to undertake such study. This is also supported by the fact that when Ms Davis did turn 18 Ms Masefield discussed the study possibility with her.

[16] Ms Davis was offered and accepted a casual relief position and the nature of the employment did not change.

Termination

[17] Ms Davis arranged to work for her father from 4 to 12 August 2007. Upon her return Ms Davis contacted Ms Masefield via text and said she would not be in on the Monday as she was "drained". Ms Masefield texted her back stating that that had not been arranged. Ms Davis texted that she would also be going to the doctor as she was covered in ringworm. Ms Masefield then called her at 8.48pm and according to Ms Davis said she was lying and told her to make better excuses if she wanted time off. Ms Masefield then told her she needed to look for another job and hung up.

[18] Ms Masefield said that when she phoned Ms Davis she was confused and wanted to know if Ms Davis was exhausted or had ringworm; if the latter, staff and clients had to be informed.

[19] It is clear that the tenor of the conversation deteriorated. Ms Masefield said Ms Davis told her that she didn't need that shit, that Ms Masefield should back off and leave her alone, that another staff member had left because of Ms Masefield and that nobody liked Ms Masefield, that the staff talked about her behind her back so not to give her any shit. Ms Masefield said she needed her the following week as she had two staff away on practicum. Ms Masefield told Ms Davis that she needed to get her act together, that lying wasn't going to help anyone. She told Ms Davis that she needed to be upfront with her and she needed to decide what she wanted to do because it was not good enough. She said that Ms Davis could not just lie and expect to be given time off because she felt like it, that if she was sick she needed to provide a medical certificate and maybe she needed to decide whether childcare was really what she wanted to do, and when she had decided to get back to her and let her know.

Ms Masefield said she finally hung up as Ms Davis was extremely angry and she didn't want to get into a personal slanging match.

[20] Ms Davis claims she sent texts to Ms Masefield apologising and asked whether she had been fired. Ms Masefield said she did not receive any texts. Ms Masefield said she felt that because Ms Davis had been so angry that she had walked out. Ms Davis had been rostered to work the following week.

[21] On 28 August Ms Davis wrote to Ms Masefield saying she had not heard from her since 12 August and setting out her view of the situation. She asked for a reply within 7 days. None was received. On 12 September 2007 Ms Davis wrote notifying a personal grievance, saying that she had been unjustifiably dismissed.

[22] In an undated letter in early October Ms Masefield replied and referred to the two letters sent by Ms Davis. She denied that she had told Ms Davis that was dismissed but said that she had told her she needed to consider whether childcare was what she really wanted to do. As Ms Davis had failed to return to work she believed she had abandoned her employment.

Decision

[23] Ms Davis was employed as a casual reliever. There was nothing untoward about the manner in which her employment agreement was entered into.

[24] The casual employment agreement did not become a permanent one. Ms Davis was offered the opportunity to become permanent when she commenced studying but declined. The fact that Ms Masefield was under a misapprehension about the age requirement does not alter the fact that she offered Ms Davis the opportunity to take up permanent employment and Ms Davis declined.

[25] There is no evidence of any unfair treatment of Ms Davis at any stage.

[26] It is clear that the telephone conversation on the Sunday evening became heated. I prefer Ms Masefield's version of the phone call. She included comments made by her that were not favourable to her. I accept Ms Masefield's evidence that she did not receive texts from Ms Davis after the Sunday evening phone call. Ms Masefield did not dismiss Ms Davis. From the manner in which Ms Davis spoke to her Ms Masefield was entitled to conclude, as a reasonable employer, that when Ms

Davis did not come to work the following week for which she had been rostered on, she had abandoned her employment.

[27] While the Court of Appeal stated at para 26 of *E N Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97 (CA) that *"clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment"* it also held that there was no obligation to check whether the abandonment was genuine.

Costs

[28] Costs were reserved. If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Comments in Applicant's Closing Submissions

[29] It is unfortunate that Mr Tolhurst has chosen to make unfounded and unhelpful comments in his closing submissions. The maligning of Ms Masefield on a personal level with no evidential basis is inappropriate. I refer particularly to the remarks about her calling witnesses in a callous manner, the comment that employees are under no illusion that unless they malign the character of the applicant or endorse the character of the respondent their position at the childcare centre could be under threat and the assertion that the change in Ms Brannon's evidence was undoubtedly the result of bullying by Ms Masefield.

Dzintra King
Member of the Employment Relations Authority