

- [2] The Company says no employment agreement was ever executed by either party: it agrees an offer had been made to Ms Jones, but the offer was conditional on her providing a start date. Ms Jones agreed to that offer but failed to provide on 7 February 2008, as agreed, a start date and the Company therefore advised her that the “*offer had been pulled*” (2nd page, statement in reply).
- [3] In the alternative, the Company says Ms Jones frustrated the contract and therefore cannot be and was not dismissed; and, in the event the Authority determines otherwise, Ms Jones’ contribution should be assessed at 100% (submissions received 14 August).
- [4] Mediation did not resolve this employment relationship problem.
- [5] On 7 May 2009 the Company advised it would not be pursuing a counter-claim against Ms Jones.
- [6] The parties usefully provided the Authority with an agreed bundle of documents.

Background

- [7] In January 2008, and via a recruitment agency, Ms Jones inquired about employment with the Company as a sales design consultant.
- [8] Ms Jones first met with the Company on 22 January.
- [9] On 24 January the applicant received an email from the agency stating her application had been successful; a possible start date was sought.
- [10] On 26 January Ms Jones asked the agency for a draft employment contract and advised she would communicate a start date once she had spoken to her then employer.
- [11] On 29 January the applicant was advised the respondent was “*really flexible*” (par 2, statement of problem) about a start date.

- [12] Ms Jones' second meeting with the Company was on 5 February: the parties differ on what was agreed at that meeting. While both agree that some changes to the draft employment agreement were settled upon and they shook hands, Ms Jones says she accepted the offer and an employment relationship was thereby created on that day. The Company on the other hand says the offer of employment was conditional on the applicant advising on the 7th of February of her notice period/starting date.
- [13] The applicant says that, while the respondent was keen for her to start as soon as possible, there was a delay in her getting back to the Company with a start date, *"partly due to the Waitangi Day holiday, and partly due to having to negotiate the matter with my then current employer"* (above). As it happened, Ms Jones was ill on 7 February and – as she did not attend work at the time – a further delay occurred before a notice period was finalised. She did not advise the respondent of that delay.
- [14] Ms Jones subsequently negotiated 2-weeks notice effective from 11 February. When she telephoned the agency and the Company on that date to advise the same she was told the offer of a job was withdrawn. The agency confirmed the withdrawal by email on the same day.

Ms Jones' Position Summarised

- [15] Ms Jones says she was hired on 5 February 2008 and dismissed on 11 February. While an employment agreement was not signed on 5 February all the terms were agreed.
- [16] So as to mitigate her losses, Ms Jones found vineyard work for periods of time during February and March 2008; during this period she also continued with other part time work, one day a week.
- [17] Because of depression she sought and obtained a sickness benefit from April until 9 June. She began her current employment from 9 June.

The Company's Position Summarised

- [18] The Company accepts it met with Ms Jones for a second time on 5 February 2008: it says that at that meeting queries around sick leave entitlement and a probation period were discussed *"and agreed upon"* (1st page, statement in reply). The Company also says that, on 5 February, the applicant agreed she would tender her resignation by 7 February and contact the respondent on the same date to confirm the notice period she had negotiated with her employer. At that time it was stressed *"that, due to the delays, the offer of employment was subject to an agreed start date which we advised must be forthcoming by 7 February 2008"* (par 10, Simon Morrison's evidence).
- [19] The Company also accepts it interviewed Ms Jones on 22 January and says that, on 24 January, it signalled to the agency its wish to finalise employment contract negotiations and obtain a start date.
- [20] It says that, on a number of occasions and because of a heavy work load, it raised its concerns with Ms Jones about delays in obtaining a start date.
- [21] Because nothing was heard from the applicant by 7 February, and relying on its conditional offer, the Company advised its agency on 11 February to tell Ms Jones that the *"offer had been pulled"* (above).
- [22] The Company says no employment agreement had been signed by either party, no formal offer of employment had been given and no job description was provided. By not supplying a start date on the date agreed (7 February), and because she had continually frustrated the process by tardy responses, it was presumed Ms Jones did not accept the terms and conditions and was no longer interested in the position.
- [23] The Company also advances alternative arguments summarised in par 2 above.

Discussion and Findings

- [24] Ms Jones says she was offered and accepted employment by the Company: the Company says its offer was always conditional on an agreed start date, and as no start date was ever given no agreement was entered into.

- [25] I prefer the applicant's version of events and her overall position for the following reasons.
- [26] The first key communication between the parties is an email dated 24 January from the Company's recruitment agent advising, "*We're delighted to be able to tell you that your application ... has been successful*" (emphasis added, doc 2). Appropriately, Ms Jones' reaction to that advice was to seek a copy of her terms and conditions of employment. She subsequently, prudently and consistent with her legal entitlements, sought clarification of those terms.
- [27] The written employment agreement offered the applicant on or shortly after 30 January 2008 (docs 6 & 29) makes no mention of an agreed start date and/or the offer of employment being conditional on Ms Jones advising by a specified date that she had given her employer notice and a notice period had been agreed. No communication from the Company emerged from the meeting on 5 February recording that requirement.
- [28] While the Company's email messages to its recruitment agent make clear its increasing concern to have a start date (see docs 5, 6, 9 and 10), the advice from the recruitment agent to the Company made it equally clear that Ms Jones was keen to have an employment agreement finalised before giving her employer notice (docs 5 & 7): consistent with its legal obligation, the Company properly accepted that requirement.
- [29] Because of this documentary trail, and taking "*... a broad view and objectively evaluating the dealings between the parties ...*" (*Hayden v Wellington Free Ambulance*, [2002] 1 ERNZ 399), and notwithstanding the absence of a signed employment agreement, I prefer Ms Jones' evidence as to offer and acceptance of employment – by a handshake – being effected by the parties on 5 February, consistent with the terms of the employment agreement communicated to her, without condition as to advice of notice and/or an agreed start time. It was because of the parties' agreement that Ms Jones proceeded, albeit later than the Company wished, to effect her notice and negotiate a notice period.
- [30] My conclusion is reinforced by a plain reading of the Company's email of 11 February, to the recruitment agency, in which it advised as follows:

*(We) have **reviewed our decision on the employment of Kristy.***

We felt she has not conducted herself in a way that examples how we would like her to communicate with us and our clients.

The process has been far to slow. An initial interview on 22/1, then was offered the job within about a day and a half?

Then a further appointment not until the 5th of Feb when we ere promised a phone call directly on Thurs 7th to inform us of a two week or four week start date.

*It is this phone call that we are still waiting as at today, Monday lunchtime 11/2. As far as we were concerned, since the job offer, **we expected (the applicant) to be starting this week** and she hasn't even had the courtesy of responding with a start date.*

We have an uneasy feeling now and this, on top of a couple of our initial concerns, has brought us to this decision.

Please advise Kristy as soon as possible of our decision.

(emphasis added, doc 11)

- [31] This message is clear: the Company understood it had employed Ms Jones but was no longer satisfied with its decision ('we have reviewed our decision on the employment of Kristy') and elected to 'pull its offer', i.e. to unilaterally dismiss the applicant.
- [32] In the absence of fair process and substantive justification it inevitably follows that Ms Jones' termination was grossly unjustified.

Remedies

Lost Wages, etc

- [33] Ms Jones is not eligible for any lost remuneration from the Company as she elected, for her own reasons which are unconnected to any actions by the respondent, to resign ongoing employment available to her: after first handing in her notice and then withdrawing it, Ms Jones reinstated the notice (refer

docs A, B & C) to her previous employer. The applicant thereby failed to mitigate her losses and there is no reason for that failure to be visited on the respondent.

Hurt

[34] Ms Jones gave no evidence of hurt and humiliation before the investigation on 4 August, either in her statement of problem or witness statement in reply. At the investigation, and in response to questions from me, the applicant gave limited evidence of hurt and humiliation. Specifically, Ms Jones said she broke down at work, was under *“immense stress and embarrassment”* (oral evidence) as a result of having to ask for her job back, that she saw her doctor and was prescribed anti-depressants. She said she felt insecure and stuck with out a job – a situation made worse by the absence of any family, etc support.

[35] On her behalf it is claimed by way of submissions that the *“dismissal had a significant effect on (Ms Jones and) she felt immense stress and insecurity in losing the job”* (applicant’s submissions of 11 August).

[36] In the absence of any supporting evidence, and in the face of commonsense, I do not accept the follow-up claim that, embarrassed by resigning and asking for her job back, Ms Jones was led to *“continue with her initial resignation”* (par 32, above). Ms Jones clearly had problems at the time, including unspecified issues with her previous employer, but those matters are irrelevant to this investigation. The clear impression I have is of Ms Jones having a very difficult time but that only part of her difficulties are attributable to the actions of the respondent.

[37] Having regard to the above I am satisfied an award of \$3,000 compensation for hurt is appropriate in all the circumstances.

Contributory Fault

[38] Ms Jones could not account for her failure to contact the Company as agreed on 7 February. Had she have done so she would have advised the respondent that, because of illness, she had not been able to give notice to her then employer and negotiate a notice period. However, while dilatory, it

cannot be said that her failure contributed in any way to the Company's actions, in particular its failure to investigate the matter and its decision to unilaterally terminate her employment. Indeed, I am left with the strong impression that a call on 7 February may well have resulted in the same outcome.

Determination

[39] The Company is directed to pay to Ms Jones the sum of \$3,000 (three thousand dollars).

[40] As agreed, costs are reserved. I can indicate to the parties that, in light of this being a straight forward half-day investigation but subject to the parties' submissions, a costs award to the successful party in the order of \$1,500 to \$2,000 can be anticipated.

Denis Asher
Member of the Employment Relations Authority