

[4] By agreement with the parties, C & C (2002) Limited was substituted as the employer party. For convenience I will refer to it as 'the company' or 'About Me'.

Discussions about entry into an employment relationship

[5] As its trading name suggests, the company operates a beauty therapy clinic. Ms Kidson has a background in beauty therapy and related skills, and at the material time was studying for a relevant qualification.

[6] Early in 2008 the directors placed an advertisement on the Trademe website for a self-employed nail technician to work from their clinic. From their point of view, there were no replies and the advertisement did not generate any interest. They made other arrangements and did not pursue the matter.

[7] Ms Kidson saw the advertisement and although she was not seeking a position of that kind, she made a generalised approach to the clinic through its own website. She followed up by walking into the clinic without an appointment, asking for time to talk. She left her CV with one of the directors, Christine Jones, who worked in the clinic as a beauty therapist and oversaw its day to day running.

[8] On 30 April 2008 Ms Kidson and Ms Jones had a meeting. It was not an interview for a job. There was no vacancy and the clinic was not recruiting, although Ms Kidson's CV was of interest. The associated discussion was exploratory in nature. It was common ground that the discussion canvassed Ms Kidson's work history, and spent time on certain personal issues particularly Ms Kidson's state of health. According to Ms Kidson, the meeting ended with Ms Jones inviting her to think about the discussion and write down any questions.

[9] There was another meeting on 7 May. Ms Jones called it an informal chat, for the purpose of asking Ms Kidson questions about her CV and assessing what Ms Kidson 'had to offer'. By then another beauty therapist, who worked as a contractor for an agreed minimum of 10 hours a week, had advised she was leaving at the end of the month. Accordingly, during the meeting there was a more detailed discussion about Ms Kidson's skills, with Ms Jones being interested in Ms Kidson's skills in hairdressing, spray tanning and manicure. In addition there was a discussion about

massage. Ms Jones said people like to show what they can do, so she discussed the possibility of arranging a demonstration of Ms Kidson's massage skills.

[10] There was a conflict in the evidence concerning the detail of the conversation as it related to hours of work. There was also a conflict over whether Ms Kidson told Ms Jones she had applied for two other positions, including the one she presently holds, but wished to pursue an opportunity with About Me despite being told there was no position currently available.

[11] I consider it likely that both women have conflated various aspects of these conversations, as they occurred over more than one meeting, into a view that the points were discussed in one conversation. There is a further difference about when the conversation occurred.

[12] Regarding the hours of work I consider it likely that Ms Jones mentioned the hours of work of the departing contractor during the 7 May discussion, but not likely that Ms Kidson's own expectations or requirements regarding hours of work were discussed in any detail until later. As for the discussion about other offers of employment, material provided by Ms Kidson's current employer indicates that any discussion about the availability of other positions probably occurred later too, if at all. I observe further that the material does not support Ms Kidson's allegation that she turned down at least that offer of employment in the expectation of employment with About Me.

[13] A demonstration of Ms Kidson's massage skills went ahead some time after the 7 May discussion. Ms Kidson described the circumstances as a 'trade test', and said that is also how Ms Jones described them. Ms Jones denied using such a description. I accept that Ms Jones was doing no more than offering Ms Kidson an opportunity to demonstrate her massage skills, and do not accept that she used terminology of the kind attributed to her.

[14] After the demonstration there was a conversation about the feedback from the recipient of the massage. It was common ground that Ms Jones told Ms Kidson the demonstration had gone well. Ms Kidson said in her written statement to the

Authority that Ms Jones said she would 'get back to me for a discussion in a couple of days.'

[15] On 16 May Ms Jones telephoned Ms Kidson. Ms Kidson said that, when the phone rang, she switched it to speakerphone. Her son, who was present in the room, gave evidence that he heard the opening conversation. Both say Ms Jones identified herself, then said 'we would like to offer you a position at About Me.'

[16] Ms Kidson said 'thank you very much' then took the phone into another room, where she continued the conversation. She says Ms Jones told her she was very happy with Ms Kidson's 'trade test' and would prepare a written employment agreement for further discussion. The call ended.

[17] Ms Jones said she called because the clinic's receptionist had asked her to do so, following several phone calls Ms Kidson had made to the clinic. Indeed it was a theme of her evidence that Ms Kidson would make unsolicited visits to or contact with the clinic, and the conduct was described as 'pestering'. I accept at least that Ms Kidson was proactive in seeking to obtain a position at About Me, and that several of the discussions were initiated by her and were not by appointment.

[18] Ms Jones' view of whether Ms Kidson was to be employed was that, while she hoped to be able to offer Ms Kidson a position, this was not yet possible. She telephoned on 16 May only to advise Ms Kidson of her view.

[19] Ms Jones' account of the 16 May conversation was that she identified herself, and Ms Kidson responded by saying she was busy packing up her house prior to moving. Ms Jones told Ms Kidson she would not keep her long, and advised that she hoped to be able to offer her a job. Ms Jones' evidence was also that she told Ms Kidson she was not yet in a position to make an offer. Ms Kidson denied this.

[20] It was common ground that the parties met on 20 May and that an individual employment agreement was provided to Ms Kidson. The document was a standard agreement or template, and was not a completed document containing full details of Ms Kidson's name, rate of pay, a job description and other specific terms and

conditions of employment. For a standard agreement, it was relatively detailed, lengthy and closely typed.

[21] It was common ground that there was discussion about the contents of the agreement. Ms Jones said Ms Kidson asked a number of questions about it. Indeed it had been provided to her for that purpose. It was also common ground that Ms Kidson asked about whether she could work independently from home as a reiki practitioner and lash extensionist.

[22] Ms Kidson took the agreement away with her at the end of the meeting.

[23] Ms Kidson said that, at a scheduled meeting on Friday 23 May, she met the other director of About Me, Chris Davis, and was provided with a completed employment agreement. The agreement included an addendum covering Ms Kidson's work as a reiki practitioner and lash extensionist.

[24] Ms Jones and Ms Davis deny there was a meeting on 23 May at all, and deny providing Ms Kidson with a completed employment agreement.

[25] Ms Kidson's account of the meeting was that the parties discussed hours of work. Ms Jones believed the discussion Ms Kidson recounted had occurred for the most part on 7 May. More importantly, Ms Kidson says there was an agreement on 23 May that she commence on 20 hours per week, working up to 40 hours per week. She says she was told she would take over the contractor's client base. Ms Jones denied there was any agreement of that kind.

[26] It is not clear precisely when rates of pay were discussed. However according to Ms Jones, there was a discussion in which Ms Kidson indicated that she sought a rate of \$15 per hour, which was more than the rate About Me usually paid its qualified staff. No offer of that rate was made, let alone accepted. Ms Kidson says the rate was discussed, agreed and included in the completed employment agreement.

[27] That evening Ms Kidson went through what she said was the completed agreement, and signed it. Her partner gave evidence that he sighted the agreement, and it was the completed agreement.

[28] As to Ms Davis' and Ms Jones' denial that there was a meeting on 23 May, Ms Davis said she works at the clinic on Saturdays. She met Ms Kidson on Saturday 24 May. While Ms Kidson could have seen her at the clinic before, there was no meeting of the kind Ms Kidson described.

[29] It was common ground that Ms Kidson and her partner visited the clinic on 24 May. No appointment had been made. Ms Kidson said she went to deliver the completed and signed employment agreement. Unfortunately the document is no longer available. Ms Davis accepted she was handed an agreement, without conceding that it was a completed agreement rather than the standard agreement. She said she destroyed the document in the belief that, since Ms Kidson had obtained work elsewhere, it would not be needed. It was also common ground that Ms Davis was working at the reception desk when Ms Kidson handed the agreement to her.

[30] Ms Kidson said that, while at reception, she was told she would most likely be working on Tuesdays, Thursdays and Saturdays. Ms Davis said Ms Kidson asked about the days of work of the departing contractor. Ms Davis advised that the contractor worked on Tuesdays, Thursdays and Saturdays. She then turned to deal with a client. She said further that she would not discuss terms and conditions of employment over the reception desk in the way Ms Kidson was suggesting. Her account of the conversation strikes me as the more likely.

[31] On 27 May Ms Jones sent a message to Ms Kidson saying she would be calling her shortly. The message was sent because, that day, she and Ms Davis had concluded the business was not able to offer any position. Although some additional hours of work were available, Ms Jones would absorb them herself.

[32] At about 2.45 pm on 28 May Ms Jones telephoned Ms Kidson to advise of this. Ms Kidson prepared a letter of the same date, setting out her view of the facts and raising her personal grievance. By letter dated 30 May Ms Davis responded, denying that employment had been offered and explaining the reasons for the decision not to offer a position.

[33] Also on or about 28 May, Ms Kidson visited another beauty therapy clinic to enquire about the possibility of work. She forwarded her CV to the clinic by email

message timed at 2.53 pm on 28 May. Although there was no vacancy at the time, the next day a full time vacancy became available. Arrangements were made for a meeting on 30 May. A formal offer of employment was made on 8 June 2008.

Determination

[34] The personal grievance procedure is available to employees. The applicable definitions in the Employment Relations Act 2000 are set out below.

[35] Section 6 reads in part:

“6. Meaning of Employee

(1) In this Act, unless the context otherwise requires, **employee**—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes –

(i) ...; or

(ii) a person intending to work; ...”

[36] Section 5 reads in part:

“**person intending to work** means a person who has been offered, and accepted, work as an employee; and **intended work** has a corresponding meaning.”

[37] My task is to decide whether, on the facts as set out above, there was an offer and acceptance of work.

[38] The conversations up to 16 May were informal and exploratory and I do not believe anything in them amounted to an offer of employment. At the same time by 16 May Ms Jones had identified that between 10 and 20 hours’ work per week could become available as a result of the contractor’s departure, and that Ms Kidson was someone who could be suitable to take up that work.

[39] A difficulty posed by the evidence is whether Ms Jones went further on 16 May, deciding to offer the work to Ms Kidson and conveying the offer, or whether Ms Kidson read more into what was said to her than was intended. Flowing from this is a question about whether Ms Jones’ subsequent actions in respect of the employment

agreement in particular amounted to finalising the detail of the employment arrangement, or remained part of her exploration of whether a position could be offered.

[40] There were aspects of both parties' accounts which make a resolution less than straightforward. It is of concern that Ms Davis destroyed the employment agreement as she did, but at the same time parts of Ms Kidson's account were unlikely.

[41] I resolve the matter as follows. From an objective point of view, in all of the circumstances, Ms Jones was not in a position to offer employment to Ms Kidson on 16 May, so I accept her word that was the case. At the same time Ms Kidson appeared to have considerable relevant skills and experience, and there was no dispute that Ms Jones was at least interested in offering a position. Accordingly if I accept that Ms Jones expressed her intentions by saying on 16 May 'we would like to offer you a position at About Me', then in its proper context the words used meant 'we are interested in offering you a position' or even 'we hope to offer you a position'. They did not mean 'I am hereby offering you a position.' On a grammatical analysis the words 'would like to' were being used in the subjunctive in that they were expressing a hoped-for outcome, rather than as a polite or formalised way of making an offer there and then.

[42] Discussions continued, although from then on each party had a different view of what was being discussed. Ms Jones was still exploring the possibility of offering employment, while Ms Kidson was discussing detailed terms of employment she believed had been offered.

[43] When Ms Kidson was given a standard agreement to look at, this was still part of the exploratory process. I accept there were discussions about the contents as well as matters such as the parties' expectations regarding rate of pay, hours of work, and work from home. That does not necessarily elevate the discussions beyond the exploratory.

[44] I am not persuaded that a meeting was scheduled for 23 May, and that it went ahead as Ms Kidson said it did. Ms Davis' evidence about her attendance at the clinic leads me to consider it unlikely she would have agreed to a special meeting on 23 May when she would have been at the clinic in the normal course of events on 24

May. I do not discount the possibility that Ms Kidson attended the clinic for some purpose on 23 May, but do not accept that the visit proceeded as she described it.

[45] There is a question about whether Ms Kidson was ever given a completed written agreement. I accept that her partner genuinely believes he saw such a document on the evening of 23 May. I accept that Ms Kidson signed a document that night. It would be unusual if she signed a document that was a standard rather than a completed agreement. However I was not persuaded of her account of the circumstances in which the document was given to her. The production of the document in evidence might have strengthened her position, and it is not her fault that the document she returned on 24 May was no longer available. On the other hand the document might have confirmed About Me's position. On that matter I can say only that I am not persuaded a completed agreement was produced to Ms Kidson for her signature.

[46] For the above reasons I conclude that no offer of employment was made. Discussions did not proceed beyond the stage of exploration and discussion.

Costs

[47] About Me has asked that costs lie where they fall. It was the successful party, and that is a reasonable position.

[48] If Ms Kidson has anything to raise regarding costs, she should do so in writing to the Authority by the close of business on 30 January 2009 and send a copy of her comments to About Me. About Me shall have 14 days from the date of receipt of that information in which to file and serve any written response.

[49] In the absence of anything further from Ms Kidson, costs shall lie where they fall.

R A Monaghan

Member of the Employment Relations Authority