New Zealand Employment Relations Authority Decisions

Au v Style Hairdressing (2012) Limited (Auckland) [2017] NZERA 184; [2017] NZERA Auckland 184 (28 June 2017)

Last Updated: 5 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 184
3003575

BETWEEN TAI CHENG AU Applicant

A N D STYLE HAIRDRESSING (2012) LIMITED

Respondent

Member of Authority: Rachel Larmer

Representatives: Ian Westwood, Advocate for Applicant

Raj Pardeep Singh and Annie Talakai, Counsel for

Respondent

Investigation Meeting: 13 June 2017 at Auckland

Date of Determination: 28 June 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Mr Tai Cheng Au is known as Steven Au. Mr Au was employed by Style

Hairdressing (2012) Limited (Style Hairdressing) from 20 November 2012 until

07 June 2016.

[2] Style Hairdressing had two directors and shareholders, Ms Rajshree KC and her husband Mr Dinesh Khadka. Ms KC was Mr Au's manager and she worked alongside him in the business each day.

[3] Mr Au claims that on the afternoon of 07 June 2017 Ms KC handed him the telephone. Mr Au says that Mr Khadka was on the telephone and he (Mr Khadka) told him (Mr Au) that he (Mr Au) was to finish up work for good that day because he was

no longer needed. Mr Au also says that Mr Khadka told him (Mr Au) he had to go to

his (Mr Khadka's house) after work in order to get his final pay.

[4] Mr Au says that when he got to Mr Khadka's house he (Mr Au) was presented with two letters and told to sign them. The first was a resignation letter which stated that Mr Au was resigning effective immediately and would get paid an extra week's pay. Mr Au says he signed that believing he had no other option or he would not be paid.

[5] The second letter recorded that Mr Au had received 38 hours pay in full and final settlement of all wages he was owed. Mr Au says he declined to sign it that evening because the letter stated that he had no concerns about his final pay payment and

he could see that it had recorded his employment dates incorrectly so he assumed the final figures must have been incorrect.

[6] Mr Au didn't sign the letter but instead says that he asked Mr Khadka if he could review the letter overnight. Mr Au says he phoned Mr Khadka to tell him the final pay was wrong but Mr Khadka said he would not be seeing his accountant again for two weeks so couldn't pay the missing money until then.

[7] Style Hairdressing denies dismissing Mr Au. Style Hairdressing says Mr Au decided to resign so he asked it to prepare the two letters Mr Au has referred to.

[8] Mr Au also claims that he is owed wage arrears because he was not paid for his contractual hours of work and did not receive any holiday pay or other Holidays Act 2003 (HA03) entitlements upon termination. Mr Au seeks that a penalty be imposed on Style Hairdressing. Mr Au also seeks interest on the amounts he is owed plus recovery of his costs.

[9] Style Hairdressing says it paid Mr Au for the hours he actually worked, not the hours set out in his employment agreement. Style Hairdressing says the parties entered into a verbal agreement some time in 2013 where it was agreed that Mr Au would not be paid as per his contract but would only be paid for the hours he actually worked.

[10] Mr Au denies any such discussion occurred or that such an agreement was reached. Mr Au says there was an agreed variation but that related to his request for unpaid time off to collect his daughter from school.

[11] Mr Au says that Ms KC gave him verbal permission from 18 August 2013 until 17 December 2015 to take his half hour unpaid lunch break at 2.30pm on days when he was required to collect his daughter from school and deliver her to after school care.

[12] Mr Au says he did that on Tuesdays and Wednesdays and other sporadic days if his daughter's mother could not do so. Mr Au says the school was 4.8 km from his work so the round trip did not take more than half an hour, which he only needed to do during term time.

[13] Mr Au says that he and Ms KC agreed he would work one less paid hour per week when he was doing his daughter's pick up and drop off but that arrangement stopped when his daughter changed school at the end of 2015. Ms KC agreed that she said that Mr Au could take additional unpaid time off work to collect his daughter.

[14] Style Hairdressing says that it was experiencing financial problems in 2016 so it had no choice but to sell the business. Mr Khadka says that a potential purchaser indicated it wished to purchase the business and wanted to take on the existing staff under new terms of employment.

[15] The potential purchaser presented two proposed new employment agreements to Mr Au who declined both of them on the basis he considered them too unfavourable. The potential purchaser then advised Style Hairdressing that it did not want to proceed with the purchase.

[16] Mr Au believes that Style Hairdressing dismissed him because it blamed him for the sale of the business falling through because the other staff had accepted the terms offered by the new employer and he was the only one who refused to sign the proposed new employment agreement. Ms KC admitted that she blames Mr Au for the sale falling through.

Credibility

[17] This case involves conflicts in the evidence which have required the Authority to carefully assess and then make credibility findings.

[18] In all material respects I have preferred Mr Au's evidence over the evidence given by Mr Khadka and his wife Ms KC . I find that Mr Au's evidence is more likely

than not to be correct in relation to key events because it makes more logical sense and is corroborated by my interpretation of the available documentation.

[19] Contrasted with that is the evidence given by Mr Khadka and Ms KC. I consider their evidence was internally contradictory, as well as contradicting each other, did not make logical sense and did not align with the documents I reviewed.

[20] Neither Mr Khadka or Ms KC could give explanations about key parts of their evidence which I consider undermined their accounts of what had occurred. I also consider their account of key events was inherently unlikely.

Wage and time records

[21] Section 130 of the Employment Relations Act 2000 (the Act) requires an employer to keep wage and time records for each employee in a form that can easily be accessed. The specific information that an employer is legally required to record is set out in s.130(1)(a)-(j) of the Act. I find that Style Hairdressing did not fully comply with this obligation.

[22] The point of imposing such an obligation on an employer is to ensure that wage and time record information is easily accessible. That has not been the case here. It has taken considerable time and resources to attempt to gain clarity on the days, dates and hours Mr Au worked and what he was paid while employed and upon termination. I consider that the evidence about such matters provided by Style Hairdressing is inadequate and not in compliance with what is required by the Act.

[23] In accordance with s.132 of the Act, I find that Mr Au's ability to bring an accurate wage arrears claim under s.131 of the Act has been prejudiced by Style Hairdressing's failure to comply with its obligations to keep and produce accurate wage and time records for his employment.

[24] In accordance with s.132(2) of the Act, I accept as proven Mr Au's evidence about the days, hours and times he worked and the wages he was actually paid as proven to the required standard in the absence of Style Hairdressing providing reliable evidence to satisfy me that Mr Au's claims were incorrect.

[25] The practical effect of this finding is that, for the purposes of assessing

Mr Au's contractual entitlements, I have applied the contractual rate of pay and days

and hours of work and then adjusted those to account for Mr Au's evidence about the hours that he told the Authority he did not work over the entire period of his employment.

Timesheets

[26] Style Hairdressing produced timesheets which it claimed were for Mr Au. Mr Au told me that he never completed timesheets while employed and that he does not consider that the hours recorded are an accurate reflection of the hours he worked.

[27] I have accepted Mr Au's evidence about that. Ms KC admitted that she prepared the timesheets without any input from or consultation with Mr Au. She was unclear about when the timesheets had been prepared but thought they had been done before each pay cycle.

[28] I consider the timesheets to be an indication only of the hours which Style Hairdressing believed Mr Au had worked. I am not satisfied that the information on the timesheets was recorded contemporaneously with the days and hours Mr Au actually worked. Where there is a conflict in the days, dates or times worked then I have preferred Mr Au's evidence on the basis I consider it more likely to be correct.

[29] I also consider the evidence around the completion of the timesheets is unsatisfactory which therefore undermines its probative value. The timesheets were not signed by Ms KC or Mr Au. Nor were they dated so it was not evident from the face of each timesheet which date the alleged hours of work related to.

Employment agreement

[30] The parties signed an employment agreement on 18 November 2012. The agreement was signed by Mr Au's manager, Ms KC on behalf of Style Hairdressing.

[31] The employment agreement recorded that Mr Au's employment began on

18 November 2012 and that he was employed as a full time hairstylist. Mr Au's employment agreement stated that he would be paid $18.50 per hour and was to be paid weekly on Mondays into his nominated bank account.

[32] Mr Au's normal hours of work were stated to be *"40 hours per week, between the hours of 9am and 7pm Tuesdays and Thursdays, 9am and 5pm Wednesdays and Fridays and 9am-2pm on Saturdays"*.

[33] Mr Au also had a contractual right to overtime payments for additional hours he was required to work. No overtime rate was specified in the employment agreement so he was paid his normal hourly wage when he worked in excess of 40 hours per week.

[34] Clause 10 of the agreement dealt with restructuring and redundancy. Clause

10.1 required Style Hairdressing to provide Mr Au with information and to consider his feedback on it relating to any proposed restructuring or in a situation where it was proposing to sell the business to a new employer. I find that did not occur regarding the proposed sale of the business.

[35] Clause 10.2 required Style Hairdressing to negotiate with any new employer including about whether employees affected by a restructure would transfer to the new employer on the same terms and conditions. There was no evidence that had occurred because the potential purchaser offered Mr Au less favourable terms and conditions of employment than he already had.

[36] Clause 10.3 required Style Hairdressing to activate the redundancy provisions in the employment agreement if the employee chose not to transfer to a new employer or if Style Hairdressing's employees were not offered employment by any new employer.

[37] Clause 10.4 provided that the employee would be provided with one month's

notice in writing of redundancy but that no redundancy compensation was payable.

[38] Clause 11 dealt with termination of the employment. Clause 11.2 required either party to terminate the employment by providing one month's written notice. Style Hairdressing had the discretion to make a payment in lieu of some or all of the notice period. It could also deduct any notice arrears from an employee's final pay if they terminated their employment without giving the required notice.

[39] The redundancy, restructuring and notice clauses in Mr Au's agreement were not applied because Mr Au's employment ended immediately on 07 June 2016. Style Hairdressing paid Mr Au 38 hours' notice as full and final settlement of all outstanding wages.

The issues

[40] The following issues are to be determined:

(a) Was Mr Au paid correctly while employed? (b) If not, how much is he owed?

(c) Was Mr Au's final pay correct?

(d) If not, what is he owed?

(e) Should Mr Au be awarded interest on his wage arrears? (f) Should a penalty be imposed on Style Hairdressing?

(g) Was Mr Au dismissed?

(h) If so, was his dismissal justified?

(i) If not, what if any remedies should be awarded? (j) What if any costs should be awarded?

Was Mr Au paid correctly while employed?

Hours of work

[41] Clause 6 of Mr Au's employment agreement stated:

"6.1 Full Time Hours with an obligation to perform overtime as necessary with an entitlement to extra pay.

The Employee's normal hours of work shall be 40 hours per weeks, between the hours of 9am and 7pm Tuesdays and Thursdays, 9am and

5 pm Wednesdays and Fridays and 9am – 2pm on Saturdays. The Employee may be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. Where extra hours are performed the Employee shall be entitled to an overtime payment as set out in the wages clause below."

[42] Although clause 6.1 of Mr Au's employment agreement says that his normal hours of work would be 40 hours per week, the specified days and hours set out in that clause amount to 39 hours per week, accounting for a half hour unpaid lunch break each day apart from Saturday.

[43] Mr Au says he worked the hours the business was open which were longer than the specific start and finish times recorded in the employment agreement.

[44] I find that Mr Au was contractually entitled to be paid $18.50 for 40 hours per week.

Did the parties vary the contracted hours of work?

[45] Style Hairdressing says the parties agreed in 2013 that Mr Au would only be paid for the actual hours he worked. I did not find that evidence credible.

[46] Ms KC, who says she entered into that agreement with Mr Au, was unable to provide any specific details about it, such as when it occurred, what was said, and what specifically was agreed. There is also no supporting documentation recording any such agreement.

[47] I am not satisfied that the normal contract formation elements such as offer, acceptance, intention to create legal

relations, mutual agreement, certainty, consideration and the like exist with sufficient certainty to satisfy me that the contractual hours of work were varied by agreement so that Mr Au had no minimum hours of work and would only be paid for the hours he actually worked.

[48] I have preferred Mr Au's evidence that the only variation mutually agreed on was that he could take a late lunch at 2.30pm on Tuesdays and Wednesdays (the days he had the care of his daughter) together with an extra half hour of unpaid time to enable him to drive the 4.8km to his daughter's school to pick her up and drop her at after school care. This arrangement also applied on other occasions when the daughter's mother could not do her normal pick up due to other commitments.

[49] I find that the parties agreed that during term time Mr Au's normal contracted hours of work were 39 not 40. This applied to the school terms that fell over the period 18 August 2013 to 17 December 2015.

[50] I reached this conclusion because I am satisfied that the normal contract formation elements were established and therefore this limited variation was mutually agreed.

[51] I do not accept Style Hairdressing's evidence that this variation applied every day because Mr Au did not work on Mondays. Mr Au only had the care of his child from Sunday to Wednesday so there was no need for him to have left work to collect her from school on Mondays at all or on Thursdays or Fridays unless he had to cover for his daughter's mother, which occurred sometimes but not every week.

[52] Nor do I accept Style Hairdressing's evidence that Mr Au was away for 2-3 hours each trip. This was a 4.8km trip and I accept Mr Au's evidence that it did not take more than an hour at the most. Half an hour of that time was accounted for by Mr Au taking a late unpaid lunch break while the other half hour was deducted from his wages by agreement.

Wages shortfall

[53] I find that Mr Au was to be paid for at least 39 hours during school term time over the period 18 August 2013 and 17 December 2015 and for at least 40 hours in all other weeks. If he worked more than 40 hours in any given week he was to be paid for those extra hours at his contractual hourly rate.

[54] Style Hairdressing admits that Mr Au was not paid on that basis because it only paid Mr Au for the work it believed he had done. So if the business wasn't busy or if Mr Au didn't have clients booked in then Style Hairdressing would send Mr Au home and then deduct his pay.

[55] Mr Au's employment agreement did not contain written consent for Style Hairdressing to make any deductions from Mr Au's wages apart from the right specified in clause 8.1 to recover, upon termination of the employment, any advance annual holiday pay he had taken before the employment ended but had not become entitled to at the time the employment ended.

[56] The only other written consent to deductions being made as per s.5 of the Wages Protection Act 1983 (WPA) is contained in clause 11.2 of Mr Au's employment agreement which permitted Style Hairdressing to make a deduction from his final pay if he failed to give the full one month's contractual notice of resignation.

[57] That means there was no contractual right for Style Hairdressing to make deductions from Mr Au's wages without his express consent when he was sent home early.

[58] I am therefore satisfied that Mr Au has proved his wage arrears claim. He was a permanent full time employee who had minimum contracted hours of work. I find that Mr Au was ready willing and available to work so it was Style Hairdressing's unilateral decision to send Mr Au home early on the occasions it did so.

[59] Ms KC admitted that she did not explain to Mr Au that he would have his pay docked if he followed her instructions to go home early. So there was therefore no mutual agreement for Style Hairdressing to make the deductions from Mr Au's wages that it did.

[60] I am satisfied that Mr Au has proved to the required standard that he was short paid while employed.

Holiday pay arrears

[61] Style Hairdressing's failure to pay Mr Au's full weekly wages also affected its calculations of his paid sick leave and annual holiday pay. I therefore find he was underpaid for these entitlements as well as being underpaid for his contractual hours of work.

[62] Style Hairdressing says it paid Mr Au his full Holidays Act 2003 (HA03) entitlements including all of his holiday pay upon termination. However that could not be confirmed because it has still failed to disclose to Mr Au or the Authority what annual holiday he was paid upon termination or how that was calculated.

[63] I therefore accept Mr Au's evidence that he was owed accrued but unused annual holiday plus annual holiday pay from

his last annual holiday anniversary date. I also accept Mr Au's evidence that he had one day's annual holiday deducted from his leave balance for Good Friday in 2015, which was a public holiday. That error needs to be corrected.

[64] It also appears from Mr Au's information that he took approved annual leave on 12 April 2015 which was treated as unpaid leave when he actually had an accrued but unused annual holiday entitlement. That should have been paid annual holiday so

Mr Au's annual holiday entitlement must be adjusted to account for that extra day on

which he did not receive paid annual holiday.

Calculation of wage arrears

[65] The parties have 7 days within which to attempt to agree on the amounts Mr Au is owed in wage arrears. If agreement is not reached Mr Au has 10 working days from the date of this determination to apply to the Authority to fix the amount he is owed. Style Hairdressing then has 5 working dates from the date of that application to file its response.

[66] Mr Au's annual holiday entitlement is to be calculated using a leave anniversary date of 18 November.

[67] The parties are first required to identify the number of days' accrued leave that Mr Au had as at the date of termination after allowing for the adjustments I have identified need to be made as per my findings above. This is annual holidays which Mr Au had already become entitled to but which he had not used by the time his employment ended on 07 June 2016.

[68] The parties must then calculate 8% of Mr Au's total gross earnings from his leave anniversary date of 18 November 2015 until his employment ended on 07 June

2016. Mr Au's total gross earnings over this period must be calculated in accordance

with his contractual minimum hours and rate of pay as per my findings above.

Should Mr Au be awarded interest on his wage arrears?

[69] I find that Style Hairdressing has effectively had the use of money which it should have paid Mr Au either while he was employed or at the very latest upon termination.

[70] I consider this is an appropriate matter in which to exercise the Authority's discretion to award Mr Au interest on the money he should have been paid but has still not received.

[71] Style Hairdressing is ordered in accordance with the Judicature Act 1908 to pay Mr Au interest at the current prescribed rate of 5% on the total amounts he was owed in wage arrears which is to include any unpaid KiwiSaver entitlements and

Holidays Act 2003 entitlements from 07 June 2016 until these amounts have been paid in full.

[72] The parties are encouraged to agree this amount within 7 days but if agreement is not reached then Mr Au has 10 days from the date of this determination to apply to the Authority to fix that amount. Style Hairdressing then has 7 days within which to respond to Mr Au's application to fix the amount of interest payable.

Should a penalty be imposed on Style Hairdressing?

[73] I find that Style Hairdressing engaged in multiple breaches of Mr Au's employment agreement and of minimum code statutory protections. Each breach potentially attracts a penalty of up to $20,000 per breach.

[74] I find that Style Hairdressing breached Mr Au's employment agreement each time it failed to pay him according to his contracted hours or in accordance with the agreed variation that allowed him to collect his daughter from school.

[75] Style Hairdressing also breached the notice provisions by not paying Mr Au notice or allowing him to work out a notice period. The manner in which it dealt with the proposed restructuring also breached the specific clauses in Mr Au's employment agreement relating to restructuring.

[76] In addition Style Hairdressing breached s.130 of the Act by failing to keep proper wage and time records and by failing to produce such records on request.

[77] Style Hairdressing also breached the Wages Protection Act 1983 (WPA) by making unauthorised deductions from Mr Au's wages that he had not agreed to. Each time it deducted his wages after it sent him home that amounted to a breach of the WPA.

[78] Style Hairdressing also breached the Holidays Act 2003 (HA03) because it failed to pay Mr Au correctly for his paid annual holidays while employed, it deducted annual holiday for one public holiday and it failed to pay him his HA03 entitlements upon termination. In addition Style Hairdressing failed to keep accurate holiday and leave records and failed to

produce such records upon request.

[79] I consider the nature and extent of the breaches and the fact that Style

Hairdressing has still not yet remedied these breaches more than a year after Mr Au's

employment ended makes it appropriate to impose penalties. I consider that penalties are necessary to punish Style Hairdressing for it behaviour and to signal strong disapproval of its non-compliant conduct.

[80] I find that Style Hairdressing breached the minimum code legislation by breaching its obligations under the Act (one continuing breach regarding wage and time records), the HA03 (three continuing breaches regarding incorrect payments/deduction of annual leave, non payment of annual holiday upon termination and holiday and leave record breaches) and continuing breaches of the WPA regarding unlawful deductions from wages.

[81] I treat the duplicate breaches under the employment agreement and HA03 and under the employment agreement and WPA as one breach each when assessing penalties to avoid the risk of imposing a duplicate penalty under different minimum code legislation for what is essentially the same set of facts.

[82] Section 133A of the Act sets out the matters the Authority must have regard to when determining penalties. I do not set these out in order to save space but confirm the exercise of my discretion is in accordance with these factors. I further note that each of the minimum code statutes give the Authority a discretion to impose penalties for the breaches that I have found to have been proven on the balance of probabilities.

[83] The full Employment Court decision in *Borsboom v Preet1* provides guidance to the Authority the methodology it should follow when considering penalties. This advocates a four-step process which I adopt below.

Step 1 – identify nature and number of breaches

[84] I am satisfied that there are at least 8 breaches which each involve a deliberate course of conduct which give rise to potential penalties being imposed on Style Hairdressing. These involve at least four breaches of the employment agreement and at least four breaches of different minimum code statutes such as the Act, the HA03 and the WPA.

[85] The maximum penalty available in respect of each breach is $20,000 in accordance with s.135(2)(a) of the Act, s.75(1)(b) of HA03, and s.13(1)(b) of WPA. The total maximum possible 8 discrete breaches (some of which were continuing

and/or duplicate breaches which have been treated as only one breach) is therefore

$160,000.

Step 2 – Severity of the breach

[86] Assessing the severity of the breach in each case establishes a provisional starting point for each potential penalty. The Authority can then assess whether the notional starting point should be adjusted to reflect aggravating conduct or mitigating factors in respect of each breach.

[87] Factors to be considered include whether or not the breaches were committed knowingly and/or calculatedly, the duration of the breaches, the number of persons adversely affected by the breaches, the extent of any departure from the statutory requirements and the history of any previous breaches.

[88] I am prepared to give Style Hairdressing the benefit of the doubt about the breaches that occurred during Mr Au's employment so accept their evidence that any breaches were not deliberate.

[89] However I do not consider that applies to the breach involving failure to pay Mr Au his HA03 entitlements upon termination because it was in receipt of legal advice so should have been clear about its obligations. The fact that more than 12 months after Mr Au's employment ended he has still not been paid holiday pay suggests that breach is a deliberate one. It is also an on-going breach.

[90] I consider it an aggravating factor that the breaches continued for the duration of the employment and have continued through to the present date because Mr Au has still not received his legal entitlements, either under his employment agreement or under the minimum code legislation.

[91] In terms of the number of employees affected by these breaches this was a small workplace and Mr Au is the only employee who has brought these proceedings to the Authority.

[92] I am not satisfied that there are any mitigating circumstances in this case. Although it was open to Style Hairdressing to have addressed its failures to comply

with minimum code legislation and with Mr Au's employment agreement, it failed to

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do so. Instead it has litigated every aspect of his claim, it has either not provided information or has been very slow to do so or has provide unclear information that has required considerable time and effort by Mr Au's representative to understand it.

Step 3 – Ability to pay

[93] Style Hairdressing did not provide any evidence regarding its ability to pay and counsel did not address this in submissions.

Step 4 – Proportionality or totality test

[94] The Authority is required to assess whether the proportionality or totality test has resulted in an acceptable level of penalty being imposed relative to the amount of money unlawfully withheld from Mr Au. The purpose of this fourth step is to act as a cross-check to ensure that the level of penalty to be imposed is just in all of the circumstances.

[95] An assessment of other relevant cases ensures that there is sufficient consistency with others or if there is a significant inconsistency then that needs to be explained. I acknowledge that the level of penalties imposed for breaches of the type involved in this matter range from a low of $500 up to a high of $10,000. There is a considerable range given that penalties are discretionary.

[96] When assessing the level of penalty to be imposed, I consider that this case is serious because it involves on-going and repeated multiple breaches of an employment agreement and of minimum code legislation.

[97] The penalties imposed must be sufficiently high to act as a deterrent on Style Hairdressing and on any other employers who may be attracted to taking a casual or non-compliant approach to their legal responsibilities.

[98] I order Style Hairdressing to pay a total overall penalty of $16,000 which is

10% of the total maximum globalised penalties. I consider a penalty at this level is required to punish Style Hairdressing for its wrongdoing and to signal the Authority's strong disapproval of its unlawful actions.

[99] I consider it appropriate that $10,000 of this penalty be paid directly to Mr Au within 28 days of the date of this determination to reflect the harm, stress and distress

he has suffered as a result of these serious breaches. The remaining $6,000 is to be paid to the Crown bank account within 28 days of the date of this determination.

Was Mr Au dismissed?

[100] Mr Au says he was presented with two letters by Mr Khadka on the evening of

07 June 2016 and told to sign them. One of the letters was a resignation letter

addressed to "*The Manager*" of Style Hairdressing.

[101] Ms KC was the manager of Style Hairdressing and she was named in the employment agreement as Mr Au's manager who he was to report to. Ms KC was also the person who Mr Au applied to about any employment matters such as leave and variation of his contractual hours.

[102] I accept Mr Au's evidence that if he was going to resign he would have done so in writing to Ms KC during work hours because they worked alongside each other every day. Mr Au says he would not have paid Mr Khadka a personal visit at their home in order to resign.

[103] The resignation letter consisted of two lines - *"I Au Tai Cheng (Steve) would like to resign from my position effective from today. Please organise my final pay including one-week extra payment (28 hours) as discussed."*

[104] Mr Au was required to give one month's notice of resignation or forfeit wages equal to the amount of any short notice. Mr Khadka and Ms KC both agreed that there were no discussions about notice. I find that odd if Mr Au had in fact genuinely resigned but it makes more sense if the initiative for the resignation came from Style Hairdressing.

[105] I consider it very unlikely that Mr Au would have put himself at risk of having wages deducted from him by not giving the required contractual notice if it had been his intention to resign. I also consider it unlikely that Mr Au would have agreed to Style Hairdressing reducing his contractual notice because Mr Au told the Authority he needed all of his income to live on. There was no good reason for Mr Au to elect to forgo income.

[106] The second letter Mr Au was asked to sign was given to him by Style

Hairdressing's accountant who was also at Mr Khadka's home on the evening of 07

June 2016. It seems odd that if Mr Au was genuinely resigning that Style Hairdressing would call its accountant to the house Mr Khadka and Ms KC shared to prepare documents for Mr Au. This also suggests that Style Hairdressing was behind the preparation of the two letters Mr Au was asked to sign.

[107] The second letter deal with final pay and it was also addressed to "*the Manager*" (who was Ms KC) and was drafted as if Mr Au had prepared it. The second letter stated:

"I have received my final payslips and I have no concern or disagreement on this payment.

I have agreed to receive an extra payment for 38 hours on top of final pay for full and final settlement of wages.

It was nice working with you."

[108] I accept Mr Au's evidence that he did not prepare this document nor did he ask anyone to prepare it on his behalf. Mr Au says that there was no discussion about him being paid 38 hours pay. Mr Au was told to sign both letters or he would not be paid at all. Mr Au told the Authority he desperately needed his wages to live on so felt he had no option but to sign the letters.

[109] Mr Au bears the onus of proving on the balance of probabilities that his employment ended because he was dismissed. I find that he has discharged that burden of proof. I am satisfied Mr Au's employment ended at his employer's initiative.

[110] I find that Style Hairdressing summarily dismissed Mr Au on 07 June 2016 because it was likely angry that his failure to sign the potential purchaser's proposed employment agreement resulted in the purchaser pulling out of the proposed purchase of the business.

[111] Style Hairdresser was advised by the potential purchaser that it would not be proceeding with the purchase the weekend before Mr Au was dismissed. Mr Au's dismissal occurred on the first working day Mr Au had after his employer had been told the purchaser had pulled out of the proposed purchase of its business.

[112] I did not find Style Hairdressing's evidence about the circumstances in which Mr Au's employment ended to be credible. Ms KC's evidence was that Mr Au suddenly told her he did not want to work for her or for a new purchaser but did not explain why and she did not ask why. That evidence was at odds with Mr Au's evidence about his precarious financial situation which meant he was highly reliant on his wages.

[113] I am satisfied that it is more likely than not that Mr Khadka phoned Mr Au at work on 07 June 2016 and told him (Mr Au) that was to be his (Mr Au's) last day of work and that Mr Au had to come to his house after work that day. At which time Mr Au was presented with two letters and asked to sign them.

[114] I do not accept Style Hairdressing's evidence that Mr Au freely or voluntarily provided his resignation. The evidence did not support that.

[115] Mr Au had no reason for wanting to resign. He was not subject to any disciplinary proceedings. There were no employment issues from his perspective (he did not know at that point that he was entitled to wage arrears).

[116] Mr Au was in a precarious financial situation so relied on his income to support himself and his daughter. Mr Au had no other income to live on, he had no- one who could financially support him and he had not made any attempts to secure alternative employment.

[117] I do not accept Ms KC's evidence that she called Mr Au at home on Queen's Birthday in 2016 and that during their phone conversation Mr Au suddenly told Ms KC he wanted to resign but did not give any reason or explanation for his decision. Ms KC did not appear to have any reason for calling Mr Au on a public holiday as she would have seen him at work as normal the next day.

[118] Also it would have been unusual for Mr Au to have asked Ms KC to write a resignation letter for him to sign especially where it resulted in his employment ending immediately. Ms KC could not provide any reason for that to have occurred. Nor could she explain why, if he had resigned immediately and unexpectedly, she had not told him he had to give a month's notice or forfeit a month's wages.

[119] Ms KC says that around 8am on Tuesday 07 June 2016 she asked Style

Hairdressing's accountant to draft up a resignation letter for Mr Au. Ms KC says she

told the accountant what to put in the resignation letter. It did not refer to their alleged phone conversation the previous day.

[120] Not only did Ms KC's account of Mr Au's immediate resignation during an unexpected phone call she had made to him on a public holiday seem unlikely but Ms KC apparently did not share that information with her husband Mr Khadka because

he did not refer to it in his evidence.

[121] I consider Ms KC's failure to raise this critical alleged phone resignation prior to the investigation meeting fundamentally undermines the credibility of this information. This was the first time anyone had heard of that. Style Hairdressing failed to provide this information in response to Mr Au's personal grievance letter which clearly raised an allegation of unjustified dismissal.

[122] I consider it significant that although Style Hairdressing was legally represented by counsel from August 2016 no mention was made about Mr Au's critical alleged telephone conversation. It was not referred to in the Statement in Reply which simply states that Mr Au *"handed the Employer his resignation to be effective immediately."*

[123] Neither Mr Khadka nor Ms KC referred to the resignation Mr Au allegedly gave Ms KC during an alleged phone call on 06 June 2016 in their witness statements. Mr Khadka did not refer to it in his evidence which he gave while his wife was outside the investigation meeting room.

[124] A dismissal occurs when the ending of the employment occurs at the initiative of the employer. I find that is the case here.

[125] I consider it more likely than not that Mr Au was dismissed by Mr Khadka during a telephone call on the afternoon 07 June 2016. Mr Au was subsequently told to sign a resignation letter to make it look like he had resigned or he would not be paid.

Was dismissal justified?

[126] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether Style

Hairdressing's actions and how it acted were what a fair and reasonable employer

could have done in all the circumstances at the time Mr Au was dismissed2.

[127] A fair and reasonable employer is expected to comply with its statutory obligations which include its good faith obligations under s.4(1A) of the Act and each of the four procedural fairness tests in s.103A(3) of the Act. Failure to do so may fundamentally undermine an employer's ability to justify a dismissal (or action).

[128] I find that Style Hairdressing breached its good faith obligations under s.4(1A) of the Act because it failed to provide Mr Au with all relevant information or an opportunity to respond to that information before he was dismissed.

[129] I also find that Style Hairdressing failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act. These failures are serious and resulted in considerable unfairness to Mr Au so I find that s.103A(5) of the Act does not preclude the Authority from determining that Mr Au's dismissal was unjustified.

[130] I find the complete absence of good faith and of procedural fairness have fundamentally undermined Style Hairdressing's ability to substantively justify Mr Au's dismissal.

[131] I find that Mr Au's dismissal was substantively and procedurally unjustified.

What if any remedies should be awarded?

Mitigation

[132] I am satisfied that Mr Au has appropriately mitigated his loss because he was only out of work for four weeks.

Lost remuneration

[133] I am satisfied that Mr Au has lost remuneration as a result of his unjustified dismissal and that he is entitled to be compensated for his loss.

[134] Style Hairdressing is ordered to pay Mr Au $2,220 under s.128(2) of the Act to compensate him for his lost remuneration.

KiwiSaver

2 Section 103A(2) of the Act.

[135] Because Mr Au is a KiwiSaver member Style Hairdressing is required to pay him 3% of his wages as the employer's compulsory KiwiSaver contribution. It is also required to deduct 3% from his wages and pay it to Inland Revenue Department as Mr Au's compulsory employee KiwiSaver contribution.

[136] The compulsory KiwiSaver contributions must be made on all of Mr Au's earnings including his holiday pay, wage arrears and award of lost remuneration. From the evidence currently before the Authority it does not appear that the compulsory KiwiSaver contributions have been paid correctly.

[137] The parties have 7 days within which to attempt to agree on the amount of any compulsory KiwiSaver arrears or payments to be made in accordance with the substantive findings in this determination.

[138] If agreement is not reached then Mr Au has 10 working days from the date of this determination to apply to the Authority to fix the amount of unpaid KiwiSaver contributions he is owed. Style Hairdressing then has 5 working dates from the date of Mr Au's application to file its response.

Distress compensation

[139] I accept Mr Au's evidence that he suffered considerable humiliation, loss of

dignity and injury to feelings as a result of his unjustified dismissal.

[140] Mr Au was obviously very distressed during the investigation meeting. He was very emotional and was reduced to tears when speaking about how he lost the care of his daughter because of his dismissal because he did not have sufficient savings to be able to cover basic living expenses for both of them after he lost his job.

[141] This dismissal had come out of the blue for Mr Au. He had less than $200 to his name when he suddenly and unexpectedly lost his income. It placed him under severe financial pressure to the extent that he says he was *"reduced to begging for help"* from others to cover living costs.

[142] Style Hairdressing is ordered to pay Mr Au $10,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his unjustified dismissal.

What if any costs should be awarded?

[143] Mr Au as the successful party is entitled to contribution towards his actual costs. However, I am not satisfied that he has actually incurred any legal costs.

[144] During the investigation meeting I asked Mr Westwood if Mr Au had incurred any actual legal costs and Mr Westwood told me that a decision had not been made about whether or not Mr Au would be billed.

[145] I am therefore not satisfied that Mr Au has actually incurred any legal costs so decline to make an award of costs in his favour.

[146] Mr Westwood represented himself to the Authority as a friend of Mr Au's who was providing friendly assistance rather than as someone who was engaged in providing professional advocacy services to litigants.

[147] I therefore consider it is not appropriate to award Mr Au legal costs but he is entitled to be reimbursed for his filing fee. Style Hairdressing is ordered to pay Mr Au

$71.56 to reimburse his filing fee. This amount is to be paid within 28 days of the date of this determination.

Rachel Larmer

Member of the Employment Relations Authority
