

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 129
5349891

BETWEEN SANDRA JOY BOWEN
Applicant

A N D TRUDY GUTHRIE T/A YOU
HAIR SALON
Respondent

5349877

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Respondent

Member of Authority: Helen Doyle

Representatives: Sandra Bowen in person
Shayne Boyce, Advocate for Trudy Guthrie

Investigation Meeting 12 August 2011 in Nelson

Further information
received from Sandra
Bowen 15 August 2011

Date of Determination: 30 August 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] It was agreed with Ms Bowen and Ms Boyce that both of these employment relationship problems would be investigated together as they arose out of the employment relationship between Ms Bowen and Ms Guthrie. The Authority assigned a priority investigation date because of the claim in file number 5349877 by

Ms Guthrie against Ms Bowen and the allegation that there was continuing damage to her business as a result of the actions of Ms Bowen after her employment with Ms Guthrie ended.

[2] The parties attended mediation and at the Authority investigation Ms Bowen, whose claim was for unpaid wages and holiday pay, advised that the amounts due and owing to her had been paid and therefore her claim against Trudy Guthrie under file number 5349891 has been resolved.

[3] The Authority at the investigation meeting investigated the employment relationship problem lodged by Ms Guthrie who is the owner and manager of YOU Hair Salon in Nelson.

[4] Ms Bowen was duly employed on 24 March 2011 by Ms Guthrie as a senior hair stylist. She had previously operated her own hair dressing business in Wanaka and asked Ms Guthrie if she could work at her hair dressing salon as a *rent a chair operator* which is other than in an employment relationship. Ms Guthrie explained to Ms Bowen that that type of arrangement was not the position that she was offering.

[5] Ms Bowen was employed to work from Tuesday to Saturday and her hourly rate was \$16.50. Ms Guthrie in her written evidence describes her observation of Ms Bowen's hair dressing skills in the following terms – *I observed the respondent to be a fantastic hair stylist who was particularly skilled with colouring.* Ms Guthrie said that she trusted Ms Bowen and believed their relationship was successful in that Ms Bowen was an asset to the salon.

[6] There was no written employment agreement given to Ms Bowen before she commenced her employment. In May 2011 Ms Guthrie handed Ms Bowen an individual employment agreement. Ms Bowen said that at this time she wanted to leave the salon but felt obliged to stay on for reasons of loyalty to Ms Guthrie. She said that she did not really want to work in the environment at the salon and preferred to run her own business and along those lines had always made it clear she wanted a *rent a chair* arrangement. Ms Bowen said she felt a little awkward therefore when she was handed the employment agreement. She told Ms Guthrie she would have a look at it but did not, in fact, really do that.

[7] Ms Guthrie said that over the next month she asked Ms Bowen three times about the employment agreement and where things were at. At one stage she

mentioned the business's lawyers needed to have the signed employment agreement. Finally, on or about 2 June 2011 Ms Bowen advised that she would not be signing the agreement and that she was looking for work elsewhere.

[8] A discussion took place between Ms Bowen and Ms Guthrie about the appropriate notice period. Ms Bowen did not object to Ms Guthrie advertising her position and although some different finishing dates were discussed Ms Guthrie believed that she had managed to obtain a replacement staff member to start on Monday 12 June 2011. It was therefore agreed that Ms Bowen would leave the salon on Friday 10 June 2011.

[9] Ms Bowen left the hair dressing salon on 9 June 2011 at or about 11am. She handed Ms Guthrie her keys at that time. She did not return. Ms Guthrie had earlier raised concerns with Ms Bowen on that day about a conversation Ms Bowen was having with a client about the fact that she was leaving and the new salon that she was going to.

[10] Ms Bowen then went to work in a rent a chair position at another hair dressing salon in the same area as Ms Guthrie's salon.

[11] Ms Guthrie said that since 21 June 2011 she has been advised by several clients including two with unlisted telephone numbers that they had been contacted by Ms Bowen in what she says is an attempt by Ms Bowen to solicit their business to her new salon. Ms Guthrie believes that as a result of her discussions with clients, Ms Bowen has with her a list of clients of YOU Hair Salon and their telephone numbers.

[12] Ms Guthrie seeks the following remedies:

- An compliance order that Ms Bowen cease contacting any of YOU Hair Salon's clients;
- An order that all client contact details in the possession of Ms Bowen are returned to YOU Hair Salon and Ms Bowen confirms she is no longer holding any information that is the property of You Hair Salon;
- A penalty of \$10,000 to be awarded against Ms Bowen for breach of good faith and confidentiality;

- A penalty under s.134 of the Employment Relations Act of \$10,000 for breach of the confidentiality terms of the individual employment agreement;
- The sum of \$280.22 for advertising costs associated with Ms Bowen's employment with YOU Hair Salon;
- Reimbursement of hair cuts undertaken by Ms Bowen for family and friends in the combined sum of \$70.00;
- All costs associated with recovery of information and representation; and
- Reimbursement of the filing fee.

[13] Ms Bowen denies that there was ever an enforceable employment agreement and further denies that she has any confidential property belonging to Ms Guthrie. She says that she only returned calls clients of the YOU Hair Salon made to her.

The Issues

[14] The Authority has to determine the following issues:

- Are the provisions with respect to competition and confidentiality in the unsigned employment agreement enforceable?
- If so were they breached?
- Was there a breach of the duty of fidelity by Ms Bowen whilst still employed in advising a client she was leaving and where she was going to be working on 9 June 2011?
- If the provisions in the employment agreement are not enforceable, is there evidence that Ms Bowen has in her possession, in breach of her duty of confidentiality, a written list of Ms Guthrie's clients and their telephone numbers and should there be an order for such material to be provided to the Authority?
- If there is a breach of Ms Bowen's obligations then what remedies should be awarded?

- Should Ms Guthrie be reimbursed by Ms Bowen for advertising costs in the sum of \$280.22 and two hair cuts that Ms Bowen undertook for a family member and a friend in the sums of \$25 and \$45 respectively?

Are the provisions with respect to competition and confidentiality in the unsigned employment agreement enforceable?

[15] I am not satisfied that Ms Bowen agreed to the terms and conditions in the written employment agreement provided to her on or about 18 May 2011. She did not sign the employment agreement and the evidence supports she had no intention of doing so. The new agreement does not simply record the features of the existing employment in writing. For example it contains a trial period not exceeding 90 days.

[16] I do not find in conclusion that the provisions in the unsigned employment agreement are enforceable and accordingly do not find there was a breach of that agreement.

Was there a breach of the duty of fidelity by Ms Bowen whilst still employed in advising a client she was leaving and where she was going to work on 9 June 2011?

[17] On Thursday 9 June 2011 Ms Bowen attended work as usual. Her evidence, and this was supported by the evidence of Sarah Marshall, the other senior stylist at Ms Guthrie's hair salon, was that *last day* was written in the appointment book for that day to show that was Ms Bowen's last day. On reflection and as a matter of commonsense it seemed to me that the making of such an entry could have simply been a mistake entered incorrectly for 9 instead of 10 June 2011. Ms Bowen was upset by the entry because her understanding was that she was not leaving until the next day and that that had been agreed between her and Ms Guthrie. The evidence does not support that she raised her concern with Ms Guthrie.

[18] In relation to the comment to a client Ms Bowen said that she was only responding to a question from the client about her future plans. I have considered whether Ms Bowen's conduct that day breaches the duty of fidelity. In doing so I have considered a definition of the type of conduct that may indeed amount to a breach.

Any conduct by an employee which is likely to damage the employer's business, for instance by impairing its goodwill, or to undermine significantly the trust which the employer is entitled to place in the employee, could constitute a breach of duty. The breach of fidelity and

good faith carries with it a duty not to undermine the relationship of trust and confidence – Tisco Limited v. Communication & Energy Workers Union [1993] 2 ERNZ 779.

[19] I am not satisfied in this case that objectively assessed the evidence of the discussion Ms Bowen had with the client was likely to damage Ms Guthrie's business. The conversation such as it was, was relayed to, but not overheard by, Ms Guthrie. Upon hearing from a sales representative about the discussion Ms Guthrie who had been out of the salon quickly returned and asked Ms Bowen to stop telling clients about her future plans. Ms Bowen left the salon shortly thereafter and did not return. There is no evidence to support the client in question decided to leave Ms Guthrie's hair salon and go to where Ms Bowen was working as a result of the statement.

[20] I do not find a breach of the duty of fidelity by Ms Bowen on her last day of employment.

Is there evidence that Ms Bowen has in her possession in breach of her duty of confidentiality a written list of Ms Guthrie's clients and their telephone numbers and should there be an order for such material to be provided to Authority?

[21] Ms Bowen denies that she has private property belonging to Ms Guthrie including a list of her clients and their respective telephone numbers.

[22] Ms Guthrie in her evidence both written and at the Authority meeting concluded that that must be the case because on 21 June 2011 she was advised by a regular client who did not have a listed number and only had a cell phone number that the client had been telephoned by Ms Bowen. Ms Guthrie said that at that point she felt betrayed by and disappointed in Ms Bowen and decided to seek some advice from Ms Boyce.

[23] Ms Guthrie was then advised by several other clients including another one with an unlisted telephone number that Ms Bowen had made contact with them.

[24] Ms Boyce asked the Authority to make contact with five of these clients by telephone during the investigation meeting. Four of the clients provided written statements and Ms Boyce provided another telephone number for a further client. The Authority managed to make contact with two of the four clients who had made written statements and was also able to make contact with the client whose number was provided by Ms Boyce at a later stage. I shall only refer to these clients by their first names.

[25] Marion provided a written statement and confirmed on the telephone that the content of that statement was what she recalls. That was that sometime between 22 and 29 June 2011 she received a call in the morning from Ms Bowen who advised that she was no longer working for Ms Guthrie and was now working at another salon. Marion said that she was advised by Ms Bowen that the prices would be a bit cheaper at the new salon and said that her telephone number was not in the telephone book so Marion said that she assumed that Ms Bowen had got her number from the salon records. She denied that Ms Bowen was just responding to a telephone call from her. She noted in her written statement that Ms Bowen concluded the call by saying *thanks a lot Margaret when her name in fact was Marion*.

[26] I also heard from another client called Zel who did not talk directly to Ms Bowen but received a message on her answerphone that cut short before Ms Bowen did anything other than introduce herself. Zel confirmed that she had never given her telephone number to Ms Bowen.

[27] Trina said that she got a call from Ms Bowen and that she also was not in the telephone book.

[28] I asked Ms Bowen to reflect on why she would have had the unlisted telephone numbers of these two clients in particular. On the Monday after the investigation meeting Ms Bowen sent an email to the Authority advising that Trina had given Ms Bowen her telephone number as her sister was training to be a beautician and she told her that she could get some waxing done in exchange for free hair services. She said in relation to Marion that she could only think she would have been calling someone else back as she called her the wrong name.

[29] I have carefully considered the evidence. The law accepts that a former employer cannot where there are no restrictive covenants prevent a former employee from contacting or even soliciting clients or customers. What is clear however is that a departing employee may not take customer lists or deliberately memorise such confidential information for the purpose of competing – *Peninsular Real Estate Ltd v. Harris* [1992] 2 NZLR 216.

[30] The evidence in this case is of quite a limited nature. I did not hear sworn evidence from the clients. I have had particular regard though to the two clients with unlisted numbers. It seems very unlikely that Ms Bowen would accidentally

telephone Marion whilst telephoning someone else and not establish that she was talking to the right person. It also seemed very coincidental that Marion was a client of YOU Hair Salon. Trina did not agree that she gave her number to Ms Bowen although she did agree that she gave her sister's telephone number to her and the Polytechnic's number. The conversation with Ms Bowen as Trina relayed it to me did not deal with issue of a contra type business arrangement but rather whether Trina wanted to book with Ms Bowen at her new salon.

[31] I do take into account the evidence about, and what I myself observed, of Ms Bowen's personality. Ms Marshall agreed that Ms Bowen did establish a rapport with her clients at YOU Hair Salon and would probably have had friendships with some of her clients outside of the salon. Ms Bowen presented to me as having a genuine interest in people and an ability to establish connections with them. The evidence supported that she was good at her job. Some of the clients of YOU Hair Salon may have followed her to new salon as a result of the advertisements she placed when she was working at the new salon and/or because she had formed a friendship with clients from YOU Hair Salon.

[32] That however does not satisfactorily explain how Ms Bowen obtained the unlisted telephone numbers of two clients who clearly had no intention or desire to follow Ms Bowen to her new salon and have remained clients of YOU Hair Salon. I think it is more likely than not that Ms Bowen did take a note of at least these two client's numbers and took the numbers with her. That amounts to a breach of confidentiality.

[33] I then turn to how to best deal with resolving the employment relationship problem between the two parties. In doing that I have had regard to s.157 of the Employment Relations Act 2000 that sets out the role of the Authority in establishing the facts of the case and determining a matter according to the substantial merits of the case without regard to technicalities.

[34] I am not persuaded that this is a case where penalties should be awarded. The evidence did not reach the threshold required of s4A (a) of the Employment Relations Act 2000 and I have not found that the provisions of the employment agreement are enforceable. There is no evidence before me that established the breach caused any loss of clients so as to be the basis of a claim of damages. The clients I heard from stayed with YOU Hair Salon. Ms Guthrie's main concern is that

Ms Bowen uses the list to contact clients and any client loss will not be known until the client cycle generally around six weeks.

[35] At this stage I consider the most sensible way to deal with this employment relationship problem is to make the following orders:

- Ms Bowen is to deliver up to the Authority by 4pm Tuesday 6 September 2011 any written client list or client information that she has in her possession that is the property of YOU Hair Salon;

OR

- Ms Bowen is to formally advise the Authority by 4pm 6 September 2011 in writing that she does not have in her possession any client list or client information that is the property of YOU Hair Salon.
- Ms Bowen is not to use the information from any client list or client information that is the property of YOU Hair Salon for her own business.

[36] The Authority will provide the information received to Ms Boyce and will also reserve its decision on any further orders that it may make at the expiry of the period at 4pm on 6 September 2011.

Advertising costs

[37] Ms Guthrie supported by Ms Marshall said that Ms Bowen on becoming employed by YOU Hair Salon agreed that she would pay for advertisements. Ms Bowen denies that she agreed that she would pay half of the advertisements and said in response to a question from the Authority *why would I have agreed?*

[38] I found Ms Marshall a straightforward witness. I am however concerned that if there had been such an agreement for Ms Bowen to make such a payment, such payment had never been requested from her at an earlier stage. For example the invoices provided in support of this claim make it clear that the due date for \$124.20 of payment of that advertising, being half of the sum for advertising, was due on 20 May 2011. Had Ms Bowen agreed to pay such advertising then I would have expected such a request to have been made for her to pay half of that account prior to that date and also to make payment for the later invoice related to advertising on 3 and

17 May due for payment on 20 June 2011. There was no reference to payment of the advertising costs in the proposed employment agreement handed to Ms Bowen.

[39] In all the circumstances I am not satisfied that Ms Bowen agreed to pay the advertising costs. I make no such award in terms of that.

Hair cuts

[40] Ms Bowen did not deny that she undertook two haircuts for a family member and a friend. Ms Guthrie said and I accept that the policy was for the staff member to pay for such haircuts. I am satisfied that reimbursement should be made for those hair cuts. I order Ms Bowen to pay to Trudy Guthrie the sum of \$70.00 being reimbursement for those hair cuts.

Costs

[41] I reserve the issue of costs. Ms Boyce is to provide submissions as to costs by 20 September 2011 and Ms Bowen is to have an opportunity to respond to those submissions by 18 October 2011.

Helen Doyle
Member of the Employment Relations Authority