

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA AUCKLAND 23
5552055**

BETWEEN MARAKIA HANN
 Applicant

AND PHOENIX 66 LTD t/a SYNERGY
 HAIR MANUKAU
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Rowland Samuels, Advocate for Applicant
 Val Raggett, Advocate for the Respondent

Investigation Meeting: 18 January 2016

Submissions received: 18 January 2016 from Applicant and from Respondent

Date of Oral Determination: 19 January 2016

Date of written Determination 20 January 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Marikia Hann, claims that she was unjustifiably dismissed by the Respondent, Phoenix 66 Ltd t/a Synergy Hair Manukau (Phoenix 66), on 5 March 2015.

[2] Ms Hann also claims that she was unjustifiably disadvantaged by Phoenix 66's failure to follow a fair procedure when dismissing her.

[3] Phoenix 66 claims that it did not unjustifiably disadvantage or dismiss Ms Hann, and that she was justifiably dismissed as a result of serious misconduct.

Issues

[4] The issues for determination are whether or not Ms Hann was unjustifiably:

- dismissed by Phoenix 66 as a result of serious misconduct
- disadvantaged by Phoenix 66's failure to follow a fair disciplinary procedure

Background Facts

[5] Phoenix 66 is owned and operated by Ms Michelle North. It operates Synergy Hair Manukau (the Salon) and is part of a franchise organisation.

[6] Ms North employs approximately 9 employees at the Salon, including a Salon Manager, Ms Ashleigh Lindsay, her daughter. Neither Ms North nor Ms Ashleigh are professional hairdressers. At the time Ms Hann was employed at the Salon, Ms Dee Ngutu was also a Salon Manager, she was responsible for the hairdressing operation in the Salon, and Ms Ashleigh operated as the overall Salon Manager.

[7] Ms North said she had advertised a stylist position at the Salon on Trade-Me and Ms Hann presented at the Salon for an interview which resulted in her being offered a part-time position.

[8] Ms Hann was provided with an individual employment agreement (the Employment Agreement) which stated at clause 19: “**DISCIPLINARY PROCESS**”

Where an employee’s conduct may require investigation for misconduct or Serious irregularities or misconduct, or gross negligence the employee may be suspended from their position for a maximum 3 days, while the employer conducts a full & procedural fair investigation. ...

If termination of employment or disciplinary action is required it will be implemented in accordance with Synergy Hair Operations & Procedures manual & Employment Act provisions. Personal Grievance procedures are standard as per Employment Act provisions.

[9] Ms North said the *Synergy Hair Operations & Procedures manual* (the Manual) was available in the staff room and contained full disciplinary procedures.

Synergy Hair Operations & Procedures manual

[10] The Manual has a section which is headed: “*Staff Issue/Disciplinary Action*” which states:

PROCEDURE

This is a formal procedure and consultation with either Owner/Manager is required. Further input may be required externally (Synergy Representative/Legal?)

Any meetings with staff should have clearly recorded the details and what was discussed. It may be advisable to have staff view your recordings and have them sign acceptance of the details. A copy provided to the staff member concerned.

*Upon identification of an issue or breach of responsibilities it is so important you **research details**, get/provide **the facts and do not become emotional**. Be very clear with “What is the real issue here?”. Be prepared with any documents, information, employment details, training records, video recordings or any evidence you feel necessary to assist with the process. ...*

In the event of serious breaches, disciplinary action, including the warning procedure, (Recording form to be used) is taken in compliance with the Employment Relations Act and the employee’s contract. Staff must be given the opportunity to formally reply.

[11] Ms Hann confirmed that she was aware that there was a copy of the *Synergy Hair Operations & Procedures manual* in the staff room, however she had not been given a copy of it, and did not know what her employment rights were in a disciplinary process.

[12] Ms Ashleigh said she had never read the *Synergy Hair Operations & Procedures manual* and did not know what was contained in it as regards a disciplinary procedure.

[13] Ms North said the Franchise organisation had supplied the employment agreement template but had not advised her on disciplinary procedures. She was aware that a disciplinary procedure involved warnings and formal warnings, and that an employee could be taken off the Salon floor if there was a serious issue. She was also aware that an employee had the right to give an explanation. She said the Franchise organisation had advised her that there could be serious consequences if there was a serious issue in the Salon.

[14] During the course of her employment at the Salon Ms Hann was provided with training, some of it in relation to perceived shortcomings in her practice as a stylist or to reinforce previous training, some of which was standard training provided to all the stylists.

Verbal Warnings

[15] Ms North said that she spoke to Ms Hann on several occasions during her employment providing her with a verbal warning. Ms Hann did not have a recollection of receiving any verbal warnings.

[16] Ms North confirmed at the Investigation Meeting that she had not regarded the 'verbal warnings' as part of a formal disciplinary procedure, and there had been no formal warnings provided to Ms Hann during her employment.

[17] Ms Elisabeth Roore, a Senior Stylist at the Salon, said she had worked with Ms Hann, found her to follow the instructions she had provided, and had experienced no serious performance issues with her.

Incident on 4 March 2015

[18] Ms Hann said that on 4 March 2015, Ms Charlotte Leef, a client, attended the Salon. Ms Leef was assigned to Ms Dee Ngutu, a Senior Stylist, as a client, and Ms Ngutu instructed Ms Hann to apply a colour mixture to Ms Leef's hair while she attended to another client.

[19] The colour mixture contained 30% volume of bleach, which was a high concentration of bleach. Ms Hann was instructed to apply the mixture from mid-length to the ends of Ms Leef's hair. Ms Hann said she was aware that such a mixture should never be applied to the roots of the hair, and started to apply it 5cm from the roots of Ms Leef's hair.

[20] Ms Leef said she believed Ms Hann to be applying the mixture to her roots, said she felt burning on her scalp, and attracted Ms Ngutu's attention, who had inspected Ms Hann's application of the colour mixture.

[21] Ms Ngutu had then gone to the reception area and asked Ms Ashleigh for advice. Ms Ashleigh advised that Ms Leef's hair should be washed clear of the colour mixture, so Ms Ngutu instructed Ms Hann to wash Ms Leef's hair.

[22] After washing Ms Leef's hair, Ms Hann said she dried it and reapplied the colour mixture. After she had done so, Ms Ngutu had taken over the rest of the procedure as was the standard practice in the Salon.

[23] After Ms Leef had left the Salon, Ms Ngutu and Ms Ashleigh had spoken to Ms Hann, and told her that her application of the colour mixture had been too close to the roots of Ms Leef's hair and could have caused burns of her scalp. Ms Hann said she tried to explain that she did not consider what she had done to be wrong, but that she was given no opportunity to do so.

[24] Ms North said that Ms Ashleigh had spoken to her when she arrived home that evening, and told her what had occurred with Ms Leef. She said she had also received a telephone call from Ms Ngutu about the same issue.

[25] That evening, 4 March 2015, Ms North texted Ms Hann and asked her to meet at Esquires coffee shop at 9.00 a.m. the following morning.

[26] Ms Hann said she had not been told by Ms North what the meeting was concerning, but that Ms North advised her at the commencement of the meeting: "*you know what you did with the client*". During the meeting she had not been able to provide any explanation about what had occurred with Ms Leef.

[27] Ms North denied that she had made that statement to Ms Hann, and said that during the meeting Ms Hann had denied responsibility for what had occurred with Ms Leef. She said that the potential for serious injury to Ms Leef concerned her, and the potential implications for the Salon had Ms Ngutu had not intervened.

[28] As a result, she reached the conclusion during the meeting that dismissal of Ms Hann was the appropriate outcome and advised her at the meeting that she was summarily dismissed.

[29] Following the dismissal decision, Ms North said she viewed the camera footage of the incident with Ms Leef on the previous day.

Determination

[30] Ms North dismissed Ms Hann on the grounds of serious misconduct. The Test of Justification in s103A Employment Relations Act 2000 (the Act) requires that the employer acted in a manner that was substantively and procedurally fair. The test of justification states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

- ii. *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[31] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*¹. The Employment Court stated:²

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[32] Phoenix 66 must show that it carried out a full and fair investigation into the issue of whether or not Ms Hann's actions constituted serious misconduct, taking into consideration the factors in s 103A(3), statutory good faith requirements and natural justice.

Did Phoenix 66 have substantive justification for finding that Ms Hann had committed serious misconduct?

[33] The test for serious misconduct is set out in *Northern Distribution Union v BP Oil New Zealand Ltd*³. In that case the Court of Appeal in defining what constituted conduct justifying summary dismissal stated:⁴

Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[34] In *Ministry of Maori Development v Travers-Jones*⁵ the Employment Court observed:

A personal grievance is not an appeal to the Employment Relations Authority from the employer's findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal.

¹ [2011] NZEmpC 160

² *Angus at para [23]*

³ [1992] 3 ERNZ 483

⁴ *Ibid at p.487*

⁵ [2003] 1 ERNZ 174

[35] In accordance with s 103A (3) of the Act the Authority must consider whether:

(a) ... the employer sufficiently investigated the allegations against the employee ...

[36] The Manual advised the person carrying out the disciplinary process to ‘research details’ and ‘get/provide the facts’ however Ms North, who was not present at the Salon on the day of the bleach incident with Ms Leef on 4 March 2015, carried out an investigation of the matter that consisted only of a telephone conversation with Ms Ngutu on the evening of 4 March 2015, and on Ms Ashleigh’s version of events.

[37] Although there was camera footage available which may have assisted her in the decision-making process, Ms North did not view this until after the dismissal decision had been confirmed.

[38] Ms North did not contact Ms Leef prior to the meeting with Ms Hann to obtain a witness account from her, nor is there any evidence that she spoke to any other person in the Salon to ascertain if they had any information to provide.

[39] I accept that Ms North viewed the matter as serious, and was concerned about the implications for the future of the Salon had the incident occurred as alleged by Ms Ngutu and Ms Ashleigh. However her belief must be reasonable and that means that she must have carried out a sufficiently robust investigation.

[40] Ms Hann’s evidence during the Investigation Meeting was that she had understood how to apply bleach to a client’s hair and that bleach must never be applied to the roots. At the time of her dismissal, she had been employed at the Salon for a year and there were no formal disciplinary warnings about her performance.

[41] Ms Hann had carried out procedures involving the application of the colour mixture containing a high volume of bleach, and another Senior Stylist, Ms Elizabeth Roore provided evidence that Ms Han had carried out such procedures for her without incident.

[42] In these circumstances I find that a fair and reasonable employer would have carried out a more robust investigation than that undertaken by Ms North before reaching the conclusion that Ms Hann had been guilty of misconduct so serious that it destroyed all trust and confidence in her.

Was the process carried out by Phoenix 66 procedurally fair and reasonable?

[43] The Test of Justification also requires: at S. 103A(3)

- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

4. In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

5. The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

- (a) minor; and*
- (b) did not result in the employee being treated unfairly.*

[44] Whilst I accept that the Salon was a small employer, Ms North had the benefit and support of the Franchise organisation. It had provided the Employment Agreement template and a systems and procedures manual. The Manual contained instructions and advice on the disciplinary procedure to be followed, however Ms North did not follow this.

[45] In these circumstances I consider that there were major rather than minor flaws in the procedure adopted in terminating Ms Hann's employment which cannot be explained merely by the fact that Phoenix 66 was a smaller employer.

[46] I find that the dismissal of Ms Hann fell so far short of the requirements of procedural fairness and the concept of natural justice as to be considered as virtually no procedure at all. Specifically:

1. There was an insufficient investigation: The Manual advised the person conducting the investigation to research details and get the facts, however Ms North's investigation involved only the two conversations with Ms Ngutu and Ms Ashleigh. She did not interview the client Ms Leef, other Salon employees present at the time, or view the camera footage.

2. The Manual advised the person conducting the investigation to not become emotional, yet during the meeting with Ms Hann on 5 March 2015 Ms North said she reacted to comments made by Ms Hann in making a decision to terminate her employment summarily without full consideration.
3. Ms Hann was not advised of the disciplinary nature of the meeting held on 5 March 2015; or provided with the details of the allegations against her, or that she could have a support person with her at the meeting;
4. Ms Hann said she was not provided with an opportunity to offer any explanation, nor was she provided with an opportunity to formally reply as required by the Manual;
5. Although Ms North said her decision was made during the meeting the meeting on 5 March 2015, the speed with which the decision was made implies that Ms North had predetermined the outcome prior to the meeting taking place on 5 March 2015.

[47] I find that Phoenix 66 did not comply with either the basic tenets of natural justice or with the statutory good faith obligations. The decision by Phoenix 66 to dismiss Ms Hann was not a decision an employer acting fairly and reasonably could have made in all the circumstances. I find that Ms Hann was unjustifiably dismissed by Phoenix 66.

Remedies

[48] Ms Hann has been unjustifiably dismissed and is entitled to remedies.

Reimbursement of Lost Wages

[49] Ms Hann was able to obtain alternative employment on 17 May 2015.

[50] Ms Hann is to be reimbursed lost wages in relation to that 10 week period between her dismissal from Phoenix 66 and obtaining alternative employment pursuant to s. 128(2) of the Act.

[51] From that amount is to be deducted the two week contractual notice period entitlement and the benefit payments she received from WINZ. I anticipate that the parties will be able to resolve the amount, if not leave is granted to revert to the Authority.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[52] Ms Hann is also entitled to compensation for humiliation and distress.

[53] I order Phoenix 66 pay Ms Hann the sum of \$3,500 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[54] I have considered the matter of contribution as I am required to do under s124. Ms Hann did not contribute to the situation which gave rise to the unjustifiable dismissal. There is to be no reduction in remedies.

Costs

[55] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[56] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority