

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 154  
5280534

BETWEEN NICOLE MAREE LOPER  
Applicant

AND JOE-ANNE PASCOE t/a  
ANGELS CUTIX NAIL &  
BEAUTY  
Respondent

Member of Authority: K J Anderson  
Representatives: D Andrews, Counsel for Applicant  
No Appearance for Respondent  
Investigation Meeting: 4 February 2011 at Rotorua  
Further Evidence Received: 21 March 2011  
Determination: 14 April 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Ms Loper, claims that she was unjustifiably dismissed, most probably in the form of a constructive dismissal, or possibly she was summarily dismissed. Ms Loper asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of wages for two months and compensation of \$5000.

[2] The *Statement of Problem* was presumed to have been served on the respondent on 3<sup>rd</sup> May 2010 but the Authority did not receive a statement in reply within the required 14 days. On 8<sup>th</sup> June 2010 a further copy of the *Statement of Problem* was served on the respondent with a reminder pertaining to Regulation 8 of the Employment Relations Authority Regulations 2000, in regard to the requirement

to file a statement in reply within 14 days. A file note dated 24<sup>th</sup> June 2010, records that the respondent did not wish to file a statement in reply as such. However, the Authority did receive a transcript of a series of text messages sent on behalf of the respondent (to Ms Loper and other staff), during the period 30<sup>th</sup> November 2009 to 17<sup>th</sup> December 2009. Apparently, this constitutes the respondent's only response to Ms Loper's claims. Nonetheless, the Authority sought to involve the respondent in a conference call; without success. A *Notice of Meeting* was duly served on the respondent. On 23<sup>rd</sup> December 2010 the Authority was notified by the respondent that she could not attend the investigation meeting because she was unable to afford the airfare to travel from Christchurch (where she now resides) to Rotorua. Consequently, pursuant to clause 12 of Schedule 2 to the Employment Relations Act 2000 (the Act), in the absence of the respondent, the Authority has conducted the proceedings as if the respondent had duly attended or been represented.

### **Background facts and evidence**

[3] Ms Loper is currently a full-time student at the University of Waikato having commenced her studies there at the beginning of the 2009 university year. Ms Loper had previously worked for another business in Rotorua for some years while she was at high school. This business was next door to Angels Cutix Nails & Beauty (Cutix). The evidence of Ms Loper is that some time prior to 12<sup>th</sup> November 2009 she was approached by Mrs Joe-Anne Pascoe and asked if she wanted to work for her "team." Ms Loper agreed and the terms and conditions of her employment are encompassed in an agreement that the parties signed on 12<sup>th</sup> November 2009.

[4] Of particular relevance to this dispute is that it was agreed that the normal hours of work for Ms Loper would be 39 per week. There is a probation period of one month during which the pay rate is \$12 per hour; then when the probation period is successfully completed, the pay rate will be "no less than" \$14 per hour. Ms Loper commenced her employment with Mrs Pascoe on 14<sup>th</sup> November 2009. Ms Loper says that she was pleased to have full-time employment for a period before attending university, as in her previous job; there was no certainty about the hours of work.

[5] However, on 3<sup>rd</sup> December 2009, along with another employee, she was informed by Mrs and Mr Pascoe that her contracted hours were to be reduced to 32.5

per week, that she would be required to work on Sundays, that the pay rate would remain at \$12 per hour, and would not increase after the probation period was completed. There was also some mention of a payment of commission based on performance where it could be possible to earn up to \$16 per hour. Ms Loper says that she mentioned during the discussion that she preferred a base rate of \$14 per hour and that she would prefer some certainty of income and regularity of working hours. Ms Loper says that she was given an “altered” agreement which apparently had the relevant provisions of her current agreement “twinked” out and the new hours and pay rate written in, which she was asked to sign. Ms Loper indicated that she would “rather not” sign the amended agreement until her parents had an opportunity to look at it.

[6] On Monday 8<sup>th</sup> December 2009, Ms Loper arrived at work and was asked by Mrs Pascoe why she was there. Apparently, a text had been sent by Mrs Pascoe informing Ms Loper that she was not required to work that day as she had worked on the day before (Sunday). The evidence of Ms Loper is that in the presence of another staff member and a client, Mrs Pascoe said to her “in a loud voice” that if Ms Loper could not work on Sundays then she was unsuitable for the job. Ms Loper says that she was then told to go home and come back tomorrow. Ms Loper says that she felt “humiliated, intimidated and embarrassed” to be spoken to this way and she left the shop crying. She then rang her father.

[7] The evidence of Mr Loper is that upon receiving his daughter’s call he subsequently found her in a distressed condition. He then went to Cutix and had some discussion about Ms Loper’s hours of work and whether she was required to work on Sundays. Following a later conversation with Mr Pascoe, it was agreed that there would be a meeting at 4:00p.m. Present at this meeting were: Ms Loper, Mr and Mrs Loper and Mr and Mrs Pascoe. It appears that the meeting was less than constructive with some aggravation between Mrs Loper and Mrs Pascoe. The evidence of Ms Loper is that she was informed by Mrs Pascoe that: [“... because the issue had not been resolved” Ms Loper should not come into work the following day or until it had been resolved. The “issue” apparently being the hours and days of work for Ms Loper and the pay rate following the probation period.

[8] In a letter to Mrs Pascoe dated 9<sup>th</sup> December 2009, Ms Loper summarised the happenings of the day before and then recorded that:

As you advised, *“that the matters had not been resolved and that you (Nicole should not come in tomorrow,”* I wish to formally advise you as a courtesy, that until this matter has been resolved (as advised by yourself) I will not be returning to work.

[9] Mr Loper and Mr Pascoe met on 9<sup>th</sup> December 2008. The evidence of Mr Loper is that Mr Pascoe told him that he (Mr Pascoe) thought that “a small incident” had escalated and that emotions had “got out of hand” at the meeting the day before. Mr Loper says that because Mr Pascoe made a reference to Mr Loper’s occupation as a police officer, he subsequently thought it prudent not to have any further involvement with the Pascoes and the employment matters pertaining to his daughter. Legal assistance was sought and via letter dated 17<sup>th</sup> December 2008 a personal grievance was raised. The following extract of the letter (as much as anything), probably sets out the position of Ms Loper then, as well as her claims before the Authority:

In all the circumstances, and in particular given our client’s age and inexperience with these matters she does not feel she could return to a work environment where she has been bullied and had her integrity questioned. The behaviour arose simply because she firstly, sought the advice and assistance of her parents and secondly queried amendments to the contract which sought to reduce her hours of work considerably and pay rate considerably.

It appears that the Pascoes did not respond to this letter. The record shows that some attempts were made on behalf of Ms Loper to have the issues dealt with via mediation with the Department of Labour but this did not occur. The Authority understands that the Pascoes subsequently closed up their business and left Rotorua to live in Christchurch.

### **Analysis and Conclusions**

[10] Unfortunately, there is no defence from the respondent before the Authority regarding Ms Loper’s claims. Hence, there is only her evidence and that of Mr Loper for consideration. Nonetheless, given the overall circumstances pertaining to the departure of Ms Loper from her employment at Cutix, the substantive issue for the Authority to determine is:

**Was Ms Loper dismissed, constructively (or otherwise) and if so, was the dismissal unjustified?**

[11] On the evidence before the Authority it is not difficult to conclude that the Pascoe's business was probably facing some difficulties in the economic climate that prevailed. Nonetheless, I must also conclude that while Ms Loper had high expectations of her first full-time employment with reasonable earnings before embarking on her university studies, she was badly let down by the Pascoes. While one can have some empathy for them in regard to the difficulty of running a small business in difficult times, their treatment of Ms Loper was most unreasonable. The evidence is that having attracted Ms Loper away from her part-time employment at a neighbouring business with the assurance of 39 hours work each week and a pay rate of \$14 per hour after a one month probation period; after two weeks, Ms Loper was informed that there would be less hours and less pay than she had contracted for. Ms Loper, not unreasonably, given her age and lack of full-time work experience, sought the advice and assistance of her parents. However, one would have to question why Mr and Mrs Loper felt it was necessary for both of them to confront the Pascoes on behalf of their daughter and it is little wonder that matters escalated to the point that personalities and emotions appear to have dominated rather than the best interests of Ms Loper.

[12] But that aside, given that Ms Loper was informed by her employer that she was to remain away from the workplace until the matters regarding her conditions of employment were resolved, the onus was on the Pascoes to take reasonable steps to resolve matters with her. There is no evidence that they made any attempt to do this even after receiving notification of a personal grievance. Indeed, the transcript of the texts sent to Ms Loper,<sup>1</sup> from 10<sup>th</sup> December 2008, largely imply that Ms Loper was at fault and that firstly, she was absent without authority and then; she could be taken to have abandoned her employment.

[13] While one has to be somewhat cautious when presented with only one version of events when determining matters in circumstances such as this, I have no hesitation in finding that Ms Loper was constructively dismissed; in that on 8<sup>th</sup> December 2008,

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<sup>1</sup> Mr Pascoe provided these to the Authority.

she was “sent away” (without pay) from her place of employment until matters were resolved. It is well established that:

As Judge Williamson said in *Wellington Taranaki and Marlborough Clerical Workers Union v Greenwich* (1983) ERNZ Sel Cas 95; [1983]ACJ 965, 973, dismissal is a word of wide meaning; literally it is or includes a sending away.<sup>2</sup>

From that point (8<sup>th</sup> December 2008), there is no evidence that the Pascoes made any attempt at all to resolve matters with Ms Loper, or her lawyer, after the personal grievance was raised. In summary, I find that the actions of the Pascoes were not those of a fair and reasonable employer in the circumstances<sup>3</sup> and that Ms Loper was constructively dismissed. The dismissal was unjustified; hence she has a personal grievance.

## Remedies

[14] Having found that Ms Loper has a personal grievance, pursuant to s 123(1) of the Act:

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for 1 or more of the following remedies.

Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then at s 128(2) of the Act, if the Authority determines that an employee has a personal grievance, and there has been lost remuneration because of the grievance, the Authority:

[... must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months’ ordinary time remuneration.

### (a) Reimbursement of wages

[15] It appears that the last paid day of employment for Ms Loper was on or about 7<sup>th</sup> or 8<sup>th</sup> December 2008. But this is by no means certain as there are no wage records available. Ms Loper seeks reimbursement of wages for two months being the gross sum of \$5,460. While it appears that it was agreed that Ms Loper was to be paid \$14 per hour, after a satisfactory probation period of one month; unfortunately, due to the circumstances, Ms Loper did not have the opportunity to complete even one month of employment. But there is nothing to suggest that she would not have successfully

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<sup>2</sup> *Actors Variety etc IUOW v Auckland Theatre Trust Incorporated* (1989) Sel Cas 247, 251.

<sup>3</sup> Section 103A, Employment Relations Act 2000.

completed the probation period and then she would have been paid \$14 per hour; as provided in the employment agreement.<sup>4</sup> It is accepted that Ms Loper would have had at least a further two months of employment available to her before leaving to attend university. Therefore, I conclude that the fairest way to calculate the loss of wages that Ms Loper incurred is as follows:  $\$468 (\$12 \times 39) \times 4 \text{ weeks} = \$1,872$  and  $\$546 (\$14 \times 39) \times 4 \text{ weeks} = \$2,184$ . Hence the total loss of wages is \$4,056. Ms Loper was fortunate in that she was able to return to her previous part-time work where her earnings for the relevant period came to a total gross sum of \$2,961.96. Therefore, her actual loss of earnings is \$1,094.04.

(b) Compensation

[16] In regard to compensation under s 123(1)(c)(i) of the Act, Ms Loper seeks the sum of \$5,000. The evidence of the affect upon Ms Loper of the loss of her employment and the manner in which it occurred is that she was upset and felt bullied and humiliated. I also must take into account that Ms Loper was only employed for a very short time and that the expectation was that she would only be employed until leaving for her university studies. It also seems that the business was struggling to remain trading. In all the circumstances, I conclude that an award of compensation in the sum of \$1,500 is appropriate.

**Determination**

[17] For the reasons set out above, I find that:

- (1) Ms Loper was constructively dismissed and the dismissal was unjustified.
  
- (2) Under the provisions of sections 123(1)(b) and 128 of the Act, Joe-Anne Pascoe is ordered to pay to Ms Loper, the gross sum of \$1,094.04 for loss of wages; and under the provisions of section 123(1)(c)(i) of the Act, the sum of \$1,500 as compensation.

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<sup>4</sup> Notwithstanding the changes proposed by the Pascoes.

**Costs:** As Ms Loper was successful with her claims she is entitled to a contribution to her costs. The investigation meeting was of a short duration and limited preparation was required by counsel for Ms Loper. Joe-Anne Pascoe is ordered to pay to Ms Loper the sum of \$1,000 as a contribution to her costs; and a further \$70 for the application fee paid to the Authority.

**K J Anderson**  
**Member of the Employment Relations Authority**