

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 122/08
5112268**

BETWEEN MAYBELLE PEREIRA
 Applicant

AND JOHANN STEHLIN (2006) LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Aqela Rakai-Bower for Respondent

Investigation Meeting: 31 March 2008

Determination: 1 April 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Maybelle Pereira (“Ms Pereira”) claims she was unjustifiably dismissed from her employment as a barber with Johann Stehlin (2006) Limited (“Johann Stehlin”). Johann Stehlin says Ms Pereira took liberties and while it concedes her dismissal was not procedurally ideal, it says by her own conduct she disqualifies herself from any remedies.

[2] Johann Stehlin did not lodge its statement in reply within the time prescribed for it to do so. As a result I directed the matter be set down for investigation meeting on 31 March 2008. Subsequently, Johanna Stehlin by its counsel sought and was granted leave to defend the matter and I further enlarged the time for it to lodge its statement in reply. I declined to adjourn the investigation meeting set down on 31 March 2008.

[3] I considered that mediation would not contribute constructively to resolving the differences between the parties.

The facts

[4] Ms Pereira commenced employment as a sole charge barber with Johann Stehlin in or about January 2007. At the time of her dismissal she was paid \$10.25 per hour¹ and worked from 9.00am to 6.00pm on Monday, Tuesday and Friday each week. The terms of Ms Pereira's employment were not recorded in writing.

[5] Ms Pereira's grandmother in Samoa passed away in September 2007. Ms Pereira sought and was granted two weeks leave referred to by the parties as bereavement leave for two weeks from 3 September 2007 to 14 September 2007. She was paid one weeks wages as bereavement pay and took the other week as unpaid leave. Ms Pereira returned to work on Monday 24 September 2007 and she concedes she did not seek her employer's permission to be absent from work on 17, 18 and 21 September 2007. Johann Stehlin did not take any issue with those unauthorised absences.

[6] On the morning of Monday 1 October 2007, Ms Pereira sent a text message to Ms Raikai-Bower, a director of Johann Stehlin ("Mrs Rakai-Bower") and advised she would not attend work that day as she was ill. Mrs Rakai-Bower did not retrieve that SMS text message until mid afternoon that day.

[7] On Tuesday 2 October 2007, Ms Pereira attended work. At about lunchtime her father telephoned her at work and informed her that her grandmother's brother in Samoa had passed away and that she was booked on a flight to Samoa the following morning at 5.00am. Ms Pereira informed her colleague at work Shirley of the situation and that she would require two weeks leave. Ms Pereira then attempted to telephone Johann Stehlin's other director and Mrs Rakai-Bower's husband Mr Ron Bower ("Bower"). Ms Pereira was unable to reach Mr Bower. She then attempted to contact Mrs Rakai-Bower on her mobile and by SMS text message. When she left work that day, Ms Pereira asked Shirley to advise Mrs Rakai-Bower of her situation.

[8] Throughout that afternoon and evening Ms Pereira continued to SMS text message Mrs Rakai-Bower. She says and the Authority accepts, that she sent at least ten SMS text messages for Mrs Rakai-Bower to contact her. Late that evening Ms

¹ Johann Stehlin has remedied its failure to pay Ms Pereira the prevailing minimum wage.

Pereira sent an SMS text message to the colleague Shirley who was at Mrs Rakai-Bower's residence and enquired whether Mrs Rakai-Bower was still awake. Ms Pereira then sent a final SMS text message to Mrs Rakai-Bower at around midnight advising that she (Ms Pereira) needed to go to Samoa to represent her grandmother and she would be away for two weeks. There was no response from Mrs Rakai-Bower.

[9] Mrs Rakai-Bower says she only received one message from Ms Pereira being the text message that she would be away for two weeks in Samoa. She also gives evidence that Shirley never passed on the message of Ms Pereira's situation to her at any stage.

[10] Ms Pereira left for Samoa on the morning of 3 October 2007. She returned to New Zealand on 20 October 2007. Following Labour Day on 22 October 2007, Ms Pereira returned to work on Tuesday 23 October 2007. I prefer Ms Pereira's evidence that she did not have any contact with Mrs Rakai-Bower that day.

[11] I find that on Wednesday 24 October 2007 Mrs Rakai-Bower sent an SMS text message to Ms Pereira directing her not to attend work the following day. The next day was not a day which Ms Pereira worked and so Ms Pereira messaged Mrs Rakai-Bower accordingly. Mrs Rakai-Bower SMS text messaged back advising Ms Pereira would receive a letter and that she should read it and contact the employer.

[12] Ms Pereira SMS text messaged Mrs Rakai-Bower as to whether she would be paid. Mrs Rakai-Bower SMS text messaged her back advising they would meet at the salon on Friday 26 October at 10.00am.

[13] Ms Pereira attended the salon to meet Mrs Rakai-Bower on Friday 26 October at about 10.05am. Mrs Rakai-Bower was not there but Ms Pereira's wages had been left for her. Ms Pereira telephoned Mr Bower as she was desirous of clarity in respect of her continuing employment. Mr Bower repeated that she would receive a letter. Ms Pereira was understandably agitated by this stage and demanded to know what was in the letter. I find that Mr Bower then advised Ms Pereira "we have decided to let you go". He told her the shop was not making money while she had been there.

Ms Pereira remained agitated and declared to Mr Bower she would await the letter and he would hear from her lawyer.

[14] When Ms Pereira returned home, she found this letter in her post:-

15th October 2007

Ms Maybelle Pereira

RE: TERMINATION OF CONTRACT

Due to your past frequent absenteeism for your personal reasons, we regret that we have no other choice but to terminate your contract as of today.

We thank you for your past services rendered, your honesty and integrity and an utmost skill as a hairdresser.

We wish you happiness and prosperity for the future.

With thanks,

[signed]

Angie Rakai-Bower

[signed]

Ron Bower

The merits

[15] In determining whether the decision to terminate Ms Pereira's employment is unjustifiable, the Authority applies the test of justification set out at section 103A of the *Employment Relations Act 2000*.

[16] I am satisfied that a fair and reasonable employer would not have dismissed Ms Pereira in the manner Johann Stehlin did. I find that Johann Stehlin was content to simply permit Ms Pereira to learn of her termination when she retrieved her mail. That was callous. It was only because she demanded to know, that Mr Bower actually informed her of the decision that had already been taken.

[17] The decision to terminate had been made on 15 October 2007. That was two weeks after Ms Pereira had departed for Samoa. I am satisfied Johann Stehlin intended Ms Pereira return back to work before it told her she had already been dismissed.

[18] It was unfair not to have permitted Ms Pereira an opportunity to avoid her demise. The statutory duty of good faith required that Johann Stehlin dealt fairly and reasonably with Ms Pereira. That duty obliged it to permit her an opportunity to be heard in her defence before it made a decision to terminate. It did not do that. A fair and reasonable employer would have.

[19] I am equally unimpressed with the substantive explanation for Ms Pereira's termination. I accept Ms Pereira's evidence that Mr Bower justified "letting her go" because "the shop was not making money while she had been there". That is in addition to the stated justification in the termination letter of 15 October 2007 expressed as being by reason of Ms Pereira's "past frequent absenteeism". I regard it very suspicious indeed that Johann Stehlin cites two very different justificatory explanations.

[20] I remain unpersuaded of both. If Johann Stehlin considered that Ms Pereira was not making money for the salon it did not counsel her to improve her performance, nor did it warn or put her on notice that her employment was liable for termination. If Mr Bower meant that her position was redundant, it not had conducted any kind of consultation directed at permitting her input into the decision making process before the decision was taken and nor had it provided her with any information that it was in possession of suggesting such a course.

[21] In relation to the allegation of frequent absenteeism, I find that criticism was never put to Ms Pereira for her to respond to. There was never any investigation of Ms Pereira's absences and she was never put on notice that her employment was in jeopardy because of her poor attendance if there was such.

[22] I accept that the dismissal did result in large part because of Ms Pereira's travel to Samoa on 3 October 2007. It is odd that Shirley never informed Mrs Rakai-Bower of Ms Pereira's situation as Mrs Rakai-Bower gives evidence. I accept that it was not his primary responsibility to convey such advice, but it remains true that Ms Pereira did through him and by persistent SMS text message, attempt to make contact with Mrs Rakai-Bower to discuss the situation with her.

[23] I accept Ms Pereira's evidence of the steps she took to both inform her employer of her bereavement but also to elicit its consent for her absence and to permit it an opportunity to make appropriate arrangements. I must also then infer that Mrs Rakai-Bower elected not to respond to Ms Pereira. There are all sorts of reasons why SMS text messages are not responded to at the time they are sent. But in this case, Mrs Rakai-Bower says she never received the SMS text messages at all.

[24] If this was the substantial operating reason for the summary dismissal there was absolutely no enquiry into the circumstances of it. Johann Stehlin made no attempt to discuss the matter with Ms Pereira when she returned to work and in fact let her work a full day without any comment to her whatsoever. That was wholly wrong when it had already made the decision to dismiss her on 15 October 2007. If it had permitted her to be heard in her defence she no doubt would have sought to prevail upon her employer's cultural sensitivity, the same sensitivity that had earlier permitted her to take leave when her grandmother passed. She would no doubt also have impressed upon her employer the urgency of the situation she found herself.

[25] I conclude that the dismissal was completely devoid of any kind of procedural fairness and also was not substantively justifiable.

The determination

[26] Viewing matters objectively, I find that a fair and reasonable employer would not have concluded that Ms Pereira had committed serious misconduct. I further find that a fair and reasonable employer would not have dismissed Ms Pereira. Accordingly **I determine that Ms Pereira was unjustifiably dismissed and she has a personal grievance.** She is entitled to have her personal grievance resolved by formal orders of the Authority.

The resolution

[27] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Ms Pereira's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[28] What is relevant in this exercise is the ascertainment of "blameworthy" conduct. I accept that an absence of work for two weeks is a prolonged absence. But is a prolonged absence for good reasons properly described as blameworthy?. I have no doubt it would where it is unauthorised.

[29] But Ms Pereira did not simply abandon her employment to attend her great-uncle's funeral in Samoa. It may have been that her employer would have consented

to the absence but we will never know because that conversation never took place. I think the essential task is to examine the efforts or steps Ms Pereira took to inform her employer and elicit its consent in terms of whether those steps or actions were reasonable. If they were not, I am more inclined to find blameworthiness.

[30] I have said that I accept Ms Pereira did take steps to both inform her employer of her bereavement but also to elicit its consent for her absence and to permit it an opportunity to make appropriate arrangements. She asked Shirley to advise Mrs Rakai-Bower although she did not leave the matter there. She continued to SMS text message Mrs Rakai-Bower to contact her.

[31] I am satisfied that Ms Pereira took steps to contact her employer. I find that Mrs Raka-Bower did receive those messages. But I conclude Ms Pereira ought to have done more to actually fix the employer with knowledge of the particular circumstances. I do not agree that simply sending SMS text messages is acceptably or a sufficiently active or communicative mode of correspondence in the employment relationship.

[32] The explanation for Ms Pereira's absence should not have been the very last SMS text message she sent. She ought to have sent that message much earlier and sooner. As well, she ought to have visited her employer's directors at their residence as a matter of urgency after work to inform them of the situation. For these reasons, I criticise the steps Ms Pereira took and I characterise her conduct in this regard as blameworthy and causative of the personal grievance I have found.

[33] I therefore find that Ms Pereira contributed to her personal grievance and I apportion such contributory fault in the amount of 10%.

Reimbursement

[34] Ms Pereira did not secure alternative work after her dismissal. She was granted income support by Work and Income New Zealand in the form of an unemployment benefit. She gives evidence of various applications in retail she made but all of which were unsuccessful. While I understand that Ms Pereira as a condition of her continuing entitlement for income support must actively be seeking work and declare the same, I consider I must satisfy myself of that situation.

[35] I accept that Ms Pereira did take steps to find other work. But she decided not to seek hairdressing work and instead moved into fashion retail. The other applications she made were in fashion retail. Ms Pereira has skills in hairdressing and her employment with Johann Stehlin I understand was her first employment since leaving school. In applying for fashion retail positions, Ms Pereira could not present herself as experienced. She would not have been in that position if she had applied for positions in hairdressing and would likely in my estimation, in the current market, have secured alternative employment in hairdressing. I do not consider that Johann Stehlin should be liable for Ms Pereira's decision not to use her established skills and experience to earn income. **I therefore decline to award reimbursement.**

Compensation

[36] Ms Pereira claims compensation of \$4,000.00. I am satisfied that she has suffered hurt and humiliation, loss of dignity and injury to her feelings. Having regard to her evidence, her length of service and the nature of her personal grievance, I award her the sum she claims but reduced by 10% for contribution. **I order Johann Stehlin (2006) Limited to pay to Maybelle Pereira the sum of \$3,600.00 as compensation.**

Costs

[37] In the event that costs are sought in relation to the services of professional advocate, I invite the parties to resolve the matter between them, but failing agreement, Ms Pereira is to lodge and serve a memorandum detailing her costs within 14 days of the date of this Determination. Mrs Rakai-Bower is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority