

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 145/08
5087927

BETWEEN **ROSEMARY PHILPOTT**
Applicant

AND **REFINERY LIMITED**
Respondent

Member of Authority: Dzintra King

Representatives: Carrick Courtney, Advocate for Applicant
Emma Butcher, Counsel for Respondent

Investigation Meeting: 12 November 2007, 4 February 2008

Submissions Received 17 March 2008 from Applicant
10 and 14 April 2008 from Respondent

Determination: 18 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Rosemary Philpott, was employed as a beauty therapist by the respondent, Refinery Limited, from 7 February 2007 to 22 February 2007. Ms Philpott submits that she was unjustifiably dismissed from her employment and seeks an award of \$11,000 pursuant to s.123 (1) (c) (i) of the Employment Relations Act 2000.

[2] The respondent denies dismissing Ms Philpott and says that the employment was terminated by agreement.

[3] In the alternative, if it is held that the applicant was dismissed, which is denied, the applicant's dismissal was justified. If it is held that the applicant was dismissed and the dismissal was unjustified the applicant's own actions contributed towards the

situation giving rise to the personal grievance so significantly that no remedy should be awarded.

Employment of Ms Philpott

[4] Ms Debbie Francis is the owner of Refinery Limited. She hired Ms Philpott in early 2007 to replace an experienced beauty therapist who had left to return to live overseas. Ms Philpott answered an advertisement for a fully qualified and experienced beauty therapist/nail technician. The advertisement stated that the company did waxing, manicures, pedicures and nail enhancement and that those would be part of a job description. Ms Philpott's CV and application letter stated that she had completed a certificate in body therapy and electrolysis at AUT and had been employed in a beauty clinic for over eight months. She had also completed a number of other beauty therapy courses in 2005 and 2006 and had done a nail technician course. She had been advanced from a junior therapist to intermediate therapist at her current employment.

[5] Ms Francis interviewed Ms Philpott on a Monday which was the salon manager's day off. The salon manager was Ms Nancy Broadbent. During the interview Ms Francis told Ms Philpott about the salon and about their business principles. Ms Francis agreed that Ms Philpott did indicate she had not done a great deal of nail technician work in her current role and she believed that was an area in which she felt she could improve. Ms Francis told her she would be given guidance to enhance the skills she had, but Ms Francis was of the clear understanding that Ms Philpott was qualified to do manicures and pedicures using current industry methods.

[6] She said they did try to help Ms Philpott with that after a complaint from a customer, but it was clear she did not even have the basic level skills and they did not have the ability to train her virtually from scratch.

[7] Ms Philpott had listed warm and hot waxing as a skill. The AUT course provided training in that area. Once training had been provided to the level Ms Philpott indicated it had, it was not an area in which Ms Francis would have expected that a person needed to be retaught or even supervised. She had no recollection of Ms Philpott saying during the interview that she could not do this without practice. Ms Francis said she certainly never said they would train her in waxing.

[8] Shortly after Ms Philpott started Ms Francis started receiving complaints from clients. Ms Philpott took a client in for a facial. The type of facial that Ms Philpott was doing normally took an hour and fifteen minutes. After 35-40 minutes Ms Philpott came out of the facial and the client paid and left. Ms Francis pointed at her watch and asked how long the facial had taken. After Ms Philpott replied Ms Francis said that was very quick and the client had paid for an hour and fifteen minutes. She said Ms Philpott simply shrugged and made a remark along the lines that she did everything that she was supposed to do and that was how long it took.

[9] At the end of Ms Philpott's second week, Ms Francis and Ms Broadbent had a telephone discussion about her ability to perform the role and what they should do about the situation. They agreed that she did not appear capable of performing at the standard they needed in order to keep their clients happy and coming back to the salon. They agreed that they would put the complaints they had received to Ms Philpott and express their very serious concerns about her level of ability. However, that was not what happened.

[10] Ms Francis was away at the time when Ms Broadbent discussed that with Ms Philpott. The two of them had agreed that they should not put the discussion off until Ms Francis' return as the business was at risk. Ms Broadbent told Ms Francis she would arrange a meeting for the next day.

[11] Ms Broadbent and Ms Francis briefly talked about the likelihood of Ms Philpott resigning during this meeting and agreed that if she did chose to do so, that would probably be the right outcome for everybody. It seemed to them that her taking the job and their hiring her was simply a mismatch in ability and expectation. They thought it was likely she would see it that way too and would want to move on to a role that suited her better.

Meeting 22 February

[12] Ms Broadbent and Ms Philpott were the only people present at the meeting. At the time of the investigation meeting the respondent had not been able to contact Ms Broadbent,

[13] It was necessary to adjourn the proceedings in order to issue a summons to Ms Broadbent to appear before the Authority. Ms Broadbent gave evidence that she

recalled nothing of the discussion or the meeting itself, although she does accept that there was a meeting.

[14] After the meeting Ms Broadbent described to Ms Francis what had happened. Ms Francis said Ms Broadbent seemed reasonably pleased with Ms Philpott's behaviour and attitude at the meeting. Ms Broadbent said it seemed Ms Philpott had accepted the situation and had willingly signed the letter that Ms Broadbent had prepared. Ms Francis had a look at the letter and it seemed to read as though Ms Philpott had agreed with the issues Ms Broadbent had put to her.

[15] The letter given to Ms Philpott on 22 February was pre-prepared. It reads:

This letter is to confirm that Rose Philpott was accepted and agreed to the termination of her employment with Refinery Limited due to the following reasons:

- 1. Refinery Limited has received several complaints due to Rose's poor workmanship, therefore have taken action and offered compensation to clients at the company's expense.*
- 2. In accordance to the requirements at stated in the Refinery employment schedule, I and on verbal discussion on the first interview, Rose has not met the standards of work necessary in compliance to the company's policy.*

It is understood that the termination of employment is effective immediately as at today's date. In agreement between Refinery Limited and Rose Philpott any monies owed by either party shall be paid at this date by internet banking (receipt given) therefore seeking all employment relationship between the parties. This will include two weeks pay in advance to cover the standard two weeks notice period.

[16] The letter is dated 22 February 2008 and has been signed by Ms Broadbent as the Refinery manager and by Ms Philpott.

[17] Ms Philpott said that on 22 February Ms Broadbent asked to talk to her for a minute. She did not say what it was about. Ms Broadbent said she needed to talk about Ms Philpott's work and that there had been several complaints. Ms Philpott was surprised and said she knew about the time of the toe painting but thought that had all been sorted and was not aware of any others and asked for details. Ms Broadbent just said she had been away for a week and did not know of any.

[18] Ms Philpott said she asked if there was anything she could do to improve what had been complained about. She was told to sign the termination letter and that that

was the only option. Ms Philpott said there was no discussion about it and no willingness to discuss it. She was very upset and had never experienced anything like that before.

[19] The termination of Ms Philpott's employment took place within 30 minutes of her arriving for work.

[20] On 24 April 2007 Ms Broadbent prepared notes of her recollection of the meeting for counsel for the purposes of answering Ms Philpott's claim. At the investigation meeting Ms Broadbent accepted that the notes were probably written by her and probably set out her perception of events at that meeting. Ms Broadbent's notes record that the meeting proceeded as follows. She raised the subject of the complaints with Ms Philpott. Ms Philpott asked for details and the general topics of the complaints were discussed. Ms Broadbent asked Ms Philpott what could be done about this to which Ms Philpott replied she could keep practising. Ms Broadbent said they had discussed one complaint previously. Ms Broadbent referred to the advertisement placed by Refinery and the apparent mis-match, which Ms Philpott agreed with. Ms Broadbent asked Ms Philpott what she would do in her situation and Ms Philpott said she would leave. Ms Broadbent then presented the letter and asked Ms Philpott to read and only sign if she agreed with the contents and outcome. Ms Philpott said she understood and signed.

[21] Ms Francis said in evidence before the Authority that while Ms Broadbent did not go into detail after the meeting, she did say that Ms Philpott had agreed she should leave.

[22] Ms Broadbent now says that she cannot clearly recall what happened at the meeting. I therefore have to weigh Ms Philpott's recollection, which is very clear, against Ms Broadbent's recollection, which is quite vague and uncertain. Ms Broadbent could not say with any degree of certainty that the notes prepared in April were an accurate reflection of what took place on 22 February 2007. Consequently, I prefer Ms Philpott's evidence about what happened at that meeting.

Decision

[23] Although Ms Philpott signed the termination letter, it is very clear that the circumstances in which that termination letter was signed render this a constructive dismissal which was unjustified. The meeting was set up with the intention of Ms

Philpott's employment being terminated. A letter to that effect was prepared and given to Ms Philpott who was told that was the only option available to her. Fairness required that Ms Philpott be given notice of the purpose of the meeting and be offered the opportunity to have a representative. Ms Philpott was not told what the complaints were and so had no opportunity to address them.

[24] This was a very short period of employment. While Ms Francis said that the company did not have the resources to train anybody, there are nonetheless certain obligations upon an employer, one of which is to ensure that a new employee is given the appropriate assistance to enable her to settle into a new position.

[25] Ms Philpott is to be paid the sum of \$4,000 pursuant to s.123 (1) (c) (i) Employment Relations Act 2000.

Contribution

[26] I do not accept that there was any contribution by Ms Philpott towards her dismissal. While Ms Philpott may have made the occasional error she was in a new job and the employer had not discussed the complaints with her. There will be no reduction of remedies on the basis of contribution.

Costs

[27] If the parties are unable to settle the matter of costs, leave is reserved for the applicant to file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority