IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE

[2024] NZERA 567
3265779

	BETWEEN	REBECCA RAWLIN Applicant
	AND	ABSOLUTE BEAUTY LIMITED Respondent

Member of Authority:	Antoinette Baker
Representatives:	Paul Matthews, advocate for the Applicant Peter Maciaszek, counsel for the Respondent
Investigation Meeting:	26 June 2024
Submissions received:	On the day
Determination:	23 September 2024

DETERMINATION OF THE AUTHORITY

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[1] Ms Rawlin worked for the respondent (AB) as a 'Training Beauty Therapist' from 27 October 2022 to 23 March 2023. The sole director of AB is Ms Anna Robb. Ms Rawlin's role involved delivery of beauty treatments including massages. She was in training which included her completing some courses at an external training provider. Her individual employment agreement recorded 'your normal hours shall not be less than 10.0 per week.' At some busy times she worked hours in excess of this.

[2] On 22 March 2023 Ms Rawlin explained to the director of AB, Ms Anna Robb, that she had been to her doctor and had an adverse skin reaction on her fingers potentially from the massage oil used in her employment. She also mentioned wrist discomfort. She provided Ms Robb with a medical certificate to support her having a break from massage therapies while further diagnosis could be undertaken. Ms Rawlin says Ms Robb wrongly interpreted in that conversation that she had offered her

resignation. The next day Ms Robb communicated that she accepted the resignation offered, had reallocated all appointments for Ms Rawlin to others and ended the employment based on Ms Rawlin not being able to fulfil the role (she identified most upcoming appointments included the use of the oil) and because it would suit Ms Rawlin's previous request (which Ms Robb had declined) to work less hours to accommodate her ability to complete training. Mr Rawlin then communicated she was confused and asked for clarification from Ms Robb. Ms Robb reconfirmed the end of the employment. Ms Rawlin returned her salon key and the employment ended.

[3] Ms Rawlin raised a personal grievance through her representative. Matters unresolved, Ms Rawlin claims here that she was unjustifiably dismissed and seeks compensation, lost wages, costs and the filing fee.

[4] AB says that the employment came to an end by 'mutual agreement as to termination' in a discussion had when Ms Rawlin gave Ms Robb the medical certificate, or that Ms Rawlin 'offered to resign' in that discussion. Alternatively, AB submits that if the termination is found to be unjustified, any remedies should be 'heavily reduce[d]' because it says that after the employment ended it discovered that Ms Rawlin had been operating her own clients during her employment with AB and this was a breach of her individual contractual terms with AB.

The Authority's Investigation

[5] Parties lodged and served briefs of evidence and documents. I then held an investigation meeting over a day. I heard evidence from Ms Rawlin, her partner Mr Brough and student friend, Ms Thorman. For AB I heard from Ms Robb. Both representatives had the opportunity to question witnesses and then present submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

Issues

[7] The issues to determine are:

a. Did Ms Rawlin resign?
b. If Ms Rawlin did not resign was AB justified to dismiss her?
c. If not what if any remedies are to be awarded for compensation and lost earnings?
d. Are any remedies to be reduced by virtue of s 24 of the Act on the basis of AB's post termination allegations that she had operated her own nail business during her employment?
e. What if any costs are to be awarded one to the other party?

Did Ms Rawlin resign?

[8] At the heart of this matter is a dispute as to what was said and meant in a discussion between Ms Rawlin and Ms Robb on 22 March 2023.

Ms Rawlin's hand issues

[9] Ms Rawlin says that around the middle of March 2023 she had first noticed 'a few fingers' had begun to blister and peel from under the nail. Her partner, Mr Brough's evidence is that on or about 10 March 2023 she asked him to pick up some small gloves so she could wash her hair because her fingers had peeled. He recalls that her fingers were also sensitive to hot water causing pain and that he had to assist her washing her hair. He also recalls her calling free online health advice and that she sought a doctor's appointment after this. This is consistent with Ms Rawlin's evidence. I found Mr Brough's evidence about Ms Rawlin's hands plausible and straight forward. I accept as likely that Ms Rawlin's skin on her hands was reacting to something at around mid-March 2023 and she sought medical advice and attention.

Medical certificate 22 March 2023

[10] Ms Rawlin obtained a medical certificate from her doctor dated 22 March 2023 consistent with her and Mr Brough's evidence that she went to the doctor that day about

her fingers peeling. The certificate included confirmation that the doctor had been seeing Ms Rawlin about '2 health issues.' I take it from the certificate and Ms Rawlin's evidence that this was pain in her wrist for which she was getting an ultrasound as well as the state of her fingers referred to above. The doctor's certificate included that Ms Rawlin 'is getting an allergic reaction to what she thinks is the massage oil used in her workplace- causing her skin to blister and become reddened and irritated.' The doctor then includes that there was also left wrist discomfort and that Ms Rawlin was awaiting further investigations and in the meantime asks that she be excused from 'massage work.'

[11] Ms Rawlin confirms she had already seen her doctor about the pain in her wrists. Her oral evidence included that she was waiting to see how it would be for her. I accept she likely had an ongoing issue at that point that was being explored. Either way I have no reason to doubt the doctor's observations that Ms Rawlin's fingers were blistered, peeling and reddened. While Ms Rawlin says the doctor said this was caused by massage oil in her workplace the certificate confirms this is what Ms Rawlin's thinks it was. I read the certificate as saying that the doctor observed symptoms. Ms Rawlin's evidence is that the oil was the only thing she could think of that may be causing the effect on her fingers. I find that at the very least the fingers had a form of reaction showing on the skin, the doctor appeared concerned, and the cause was not exactly known.

22 March 2023 discussion with Ms Rawlin

[12] Ms Rawlin having been to the doctor sought out Ms Robb to present the medical certificate to her. Ms Rawlin and Ms Robb have a different recall about what was understood when they met on 22 March 2023 in relation to whether Ms Rawlin offered to resign in this meeting.

[13] The discussion happened in a salon client room in between Ms Robb seeing clients on what she explained to me was a very busy day for her. I accept Ms Robb had not expected to have the discussion and Ms Rawlin sought her out, waiting until she was free. This all leans towards a rushed conversation. I accept the discussion was only about 5 to 10 minutes.

[14] I accept Ms Rawlin was nervous. Mr Brough confirms she said as much to him prior to going to talk with Ms Robb. I find some likelihood of Ms Rawlin's nervousness given Ms Robb had previously declined her request to work less hours so she could better manage her study. My observation is also that Ms Robb is forthright and older and obviously the successful owner operator of her business. Ms Rawlin is young, was a trainee and appears less confident explaining to me that she can get anxious. These are things important for me to consider when considering the context of the brief discussion that occurred.

[15] I accept that Ms Robb was concerned about whether the oil had caused the reaction and how she would manage in relation to Ms Rawlin not doing all duties when she had to find someone to cover a parental leave situation soon to be filled. In evidence Ms Robb confirmed that this would be from the end of April 2023. In a short discussion with the likely more confident Ms Robb who I accept Ms Rawlin was nervous to approach, I find it likely that, as Ms Rawlin says, she continued to apologise in the discussion for the inconvenience to Ms Robb. I find it likely the younger Ms Rawlin was on the back foot here.

Did Ms Rawlin unequivocally offer to resign in the 22 March 2023 discussion?

[16] Ms Robb confirmed in her oral evidence that at the end of the discussion with Ms Rawlin, Ms Rawlin stood up and said she would 'stand down if you need to get someone else to do the parental leave'. This, Ms Robb explained to me was what she took to be Ms Rawlin's resignation. I do not find these words could reasonably have confirmed to an employer that an employee had clearly and unequivocally resigned. Ms Rawlin was employed to work a minimum of 10 hours per week. Her history of working included working more than this, as required. I have no evidence of a variation to say that Ms Rawlin had agreed to work specifically to cover someone else's employment from the end of April 2023. At the very least a fuller discussion was needed for the employer to have better clarified what Ms Rawlin had communicated during this short discussion between clients on a busy day. I find that Ms Robb likely jumped on Ms Rawlin's words as a resignation offer. I do not find this consistent with the employer's

duty of good faith to communicate constructively to maintain an ongoing and productive relationship.[1] I will return to this below.

Termination and communications the next day on 23 March 2023

[17] Following the 22 March 2023 discussion referred to above, I accept that the next communication was one from Ms Robb to Ms Rawlin by message at 1.34pm:

> Hi Rebecca
> Thank you for coming in yesterday. Thank you for acknowledging that I may need to get someone else to do your job as you can't do a huge part of it. I have put a lot of thought into it and looked into your future bookings and most of your appointments you will be using the oil. So, I have decided to take your offer and let you go and look for someone else for the job. I will pay you your final pays next week if there is any owing. I wish you all the best in the industry and hope you sort you[sic] hands and wrist soon. Could you please drop your key into which ever clinic suits asap. Your clients are all rescheduled to other therapists.
> Anna

[18] It is submitted for AB, in support of Ms Robb's understanding that there had been an offer to resign, that Ms Rawlin confirmed her resignation when she then spoke to Ms Rawlin the next day on the phone. From Ms Rawlin's perspective that call was because she was confused about Ms Robb's message accepting her resignation and ending the employment. That she made this call for this reason is supported by her friend Ms Thorman. Under cross examination Ms Robb confirmed that Ms Rawlin in that conversation had indicated she was 'confused.' There is no evidence then that Ms Robb did anything to clarify what this was about. Her oral evidence supports that she saw no need to do this. She said she simply did not know what Ms Rawlin was confused about. Again, I find this is not meeting the obligation to have acted in good faith by having communication that maintains an ongoing and constructive relationship.

[19] It is also submitted for AB that part of the decision to 'accept the resignation' was because Ms Rawlins had also wanted to reduce her hours for study purposes

[1] Employment Relations Act 2000, s 4(1A)(b).

(requested and declined by Ms Robb on 15 March 2023). However, I do not accept the 22 March 2023 discussion involved anything about this. Ms Rawlin refers to Ms Robb saying as much to her when she called her on 23 March to clarify the situation after receiving the text ending her employment. Again, that this call occurred is confirmed in the straightforward evidence of Ms Thorman who was alongside Ms Rawlin at their education institute at the time. At the very least she confirmed she heard Ms Rawlin ask Ms Robb to clarify that she had been fired in the text. Ms Thorman gave evidence that her friend was distressed and had (before the call) sought to clarify with their tutor about what the text meant. This supports that Ms Rawlin had not in fact either offered to or had resigned. If she had then I accept the submission for Ms Rawlin that it would not be logical for her to seek clarification.

[20] Standing back from the above I find that Ms Rawlin did not resign on 22 March 2023, nor do I accept that she somehow confirmed a resignation the following day. By then the decision was made by Ms Robb and communicated having been performed by reallocating all Ms Rawlin's appointments and ending the employment immediately. I do not find this is a situation where, as submitted for AB, Ms Rawlin 'unambiguously resigned' and can only retract the resignation if the employer agrees.[2] The Employment Court[3] more recently said that:

> Resignation is a unilateral act and does not involve the employer's agreement or disagreement. An employer cannot, for example, decline to accept a resignation and require the employee to continue to work for them. It follows that the key question is whether the employee resigned. This is an objective assessment and will likely be informed by the relevant circumstances.

[21] I find that based on what is before me I do not assess Ms Rawlins unequivocally resigned. It follows then that cases submitted for AB that consider retraction of resignations in the 'heat of the moment' or situations where there was a 'mutual agreement' to a resignation.

[22] I will now consider whether AB was justified to unilaterally end Ms Rawlin's employment, in other words to dismiss her.

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[2] *Boobyer v Good Health Wanganui Ltd* EmpC Wellington WEC 3-94, 24 February 1994.
[3] *Mikes Transport Warehouse Ltd v Vermeulen* [2021] ERNZ 1129 at [37].

If Ms Rawlin did not resign was AB justified to dismiss her?

[23] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the decision and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[24] I am satisfied that AB was not justified to dismiss Ms Rawlin from her permanent employment.

[25] It is submitted for Ms Rawlin that Ms Robb seized on Ms Rawlin's words of indicating she would be prepared to 'stand down' in order to end Ms Rawlin's employment. I am persuaded that this is a likely explanation because reasons given by Ms Robb for ending the employment could not have justified uni-lateral termination by the employer. Firstly, that Ms Rawlin could not do the tasks of the job and so was terminated because of this. That 'incapacity' related to the issue with her hands. AB conducted no fair inquiry or consultation about how it could accommodate this situation which had yet to be fully considered as to cause or treatment[4]. Secondly, I am not satisfied that anything was discussed about Ms Rawlin wanting more time for her study commitments at the 22 March 2023 discussion. This had earlier been denied when Ms Rawlin asked about it. It could not reasonably have formed a reason to unilaterally end the employment.

[26] Based on the above I find that AB breached its duty of good faith by not constructively engaging with Ms Rawlins about the potential end of her employment[5] and instead took an opportunity to latch onto words that could not reasonably be construed as an unequivocal resignation offer to end the employment. I accept Ms Robb's evidence that she prides herself on being a good employer having been in successful business for some time. However, in this situation I find AB has fallen short

[4] *Ark v Aviation Limited v Newton* [2002] 2 NZLR 145.
[5]

of acting as a fair and reasonable employer could have done in all the circumstances at the time. I find the dismissal unjustified.

Remedies

Compensation

[27] Compensation under s 123(1)(c)(i) of the Act is awarded for 'humiliation, loss of dignity, and injury to feelings' as a result of the grievance. It is submitted for Ms Rawlin that I should award $20,000.00 in compensation.

[28] Ms Rawlins gave evidence that after the dismissal she felt a lack of motivation and retreated to her bed, not eating properly. She says she had loved her job and her choice to be in the beauty industry. She felt that the dismissal made her question her worth because she felt she had failed. She was concerned she had by then spent considerable money training and now may not be up to working in the beauty industry. Mr Brough gave evidence that Ms Rawlin was crying a lot when the dismissal first happened, and it was for weeks after that he observed her as withdrawn. He explained that he worried about her and would call or text her during his long shift hours of work reminding her to eat and drink water. He refers to taking her out with him to get her out of the house. He referred to feeling helpless during this time.

[29] It is submitted for AB that the period of employment was short, and the hours limited as well. However, this is not on its own something that works against compensation for the things listed in s123(1)(i)(c)of the Act. I also consider here that Ms Rawlin is a young employee starting out in her career, still in training and I find her explanations of how the dismissal impacted on her, albeit I find contributed to how she considered matters were plausible.

[30] It is further submitted for AB that Ms Rawlin could not have been 'blindsided' by the dismissal. This is because it noted that she had asked to reduce her hours only a short time prior because with work and study she acknowledged that she said 'something had to give'. AB 's position is also that Ms Rawlin did discuss what might have occurred if tests came back that confirmed she may not be able to work. Her oral evidence to me included that she may have considered eventually resigning but on her own terms. I consider this reduces to some extent my acceptance of the full effect of the dismissal in terms of compensation.

[31] I also have considered the submission for AB that Ms Rawlin did not eventually leave the beauty industry and has eventually secured a job as a assistance manager in a beauty company. However, this was not immediate, and I find some likelihood that the effects she suffered after the dismissal at least for some weeks could be characterised as a loss of dignity and hurt feelings and were likely in part caused by the effect of the dismissal on her.

[32] I find an appropriate award to be $12,000.00.

Lost earnings

[33] It is submitted for Ms Rawlin that five weeks lost earnings should be considered for the time after the dismissal that she was without work. At the minimum wage rate then of $21.20 gross this would be a total of $212.00 gross per week which by 5 is $1,060.00 gross. However, I find some likelihood that Ms Rawlin may through her social media posting after her employment ended have also obtained some further earnings during this time and reduce this to 4 weeks which is a total of $848.00 gross.

[34] It is further submitted that the loss should be extended to up to the three months (s 128 of the Act) less the earnings for the following 8 weeks taking in a differential of $100 gross less per week comparing her earnings within the employment. Across those 8 weeks Ms Rawlin worked a total of $1,362.30 gross. Had she worked this period of 8 weeks for AB at the minimum of 10 hours per week this would have been $1,696.00 gross. The difference is $333.70 gross.

[35] Accordingly, I find a fair reimbursement for lost wages is the combination of the above: $848.00 + 333.70 which is $1,181.70 gross for lost wages under s 123(1)(b) and s 128 of the Act.

If not what if any remedies are to be awarded for compensation and lost earnings? Are any remedies to be reduced by virtue of s 24 of the Act particularly on the basis of AB's post termination allegations that she had operated her own nail business during her employment?

[36] There has been much put forward in AB's evidence about Ms Rawlin providing nail services during her employment in breach of condition not to do so in her individual employment agreement.[6] AB submits I should consider a case where an employee's post-employment conduct was considered to reduce remedies. That case related to discovery of serious breaches discovered in relation to a senior employee. It is not applicable here. The evidence is scant here and denied by Ms Rawlin. She answered my questions about this by explaining she had performed services for family and friends for free and simply called them her 'loving clients'. Even if I am wrong about this, s 124 of the Act is clear that any reduction in remedies for a grievance relates to 'actions of the employee contributed towards the situation that gave rise to the personal grievance'.[7] The grievance here was an unjustified dismissal. I cannot see that this has a connection that invokes my discretion under s 124 of the Act.

[37] I do not find that remedies should be reduced under s 124 of the Act.

Summary of outcome

[38] Absolute Beauty Limited is to pay Rebecca Rawlin the following within 28 days from the date of this determination:

a. Compensation of $12,000.00 under s 123(1)(c)(i) of the Act.
b. Lost wages of $1,181.70 gross under s 123(1)(b) and s 128 of the Act

Costs

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[40] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Rawlin may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum AB will then have 14 days to lodge any reply. On request by either party,

[6] Clause 17.
[7] Employment Relations Act 2000, s 124 (a).

an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[41] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[8]

Antoinette Baker
Member of the Employment Relations Authority

[8] www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1