

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 50
5391383

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| BETWEEN | HEATHER SMITH Applicant | |
| A N D | CRAIG'S HAIRDRESSERS LIMITED Respondent | MEN'S (2010) |

Member of Authority: David Appleton

Representatives: Garry Clarke, Counsel for Applicant
John McGlashan, Counsel for Respondent

Investigation meeting: 5 March 2013 at Timaru

Submissions Received: 5 March 2013 from Applicant and Respondent

Date of Determination: 6 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Smith claims that she was unjustifiably dismissed from her employment on 9 July 2012 and that, in breach of contract, she was not given full time work during the first and second weeks of her employment.

Brief account of events leading to dismissal

[2] Ms Smith is a hairdresser who started working for the respondent, a barber's salon, on 14 June 2012. She was given a written employment agreement on or around the start of her employment, but Ms Smith declined to sign it because it contained some errors, which happen to be pertinent to the issues under determination.

[3] Pertinent terms of the unsigned agreement are as follows:

3.2 *Probation*

A probation period would apply for the first 90 Days of employment to assess and confirm suitability for the position. The employer will provide guidance, feedback and any necessary support to the employee. Both parties will promptly discuss any difficulties that arise, and the employer will, if appropriate, warn the employee if he or she is contemplating termination. Any termination must comply with the termination clause in this agreement. The probation period does not limit the legal rights and obligations of the employer or the employee, and both parties must deal with each other in good faith.

3.3 Trial Period

A trial period would apply for a period of EXCEEDING 90 CALENDAR DAYS [sic] employment to assess and confirm suitability of the position.

6.1 Full Time Hours

*The parties agree that the Employee is being employed to perform duties on a Full time basis. The hours and days in which the Employee shall work are as follows: **As per Weekly Roster.***

7.1 Hourly Rate

The Employee shall be paid according to an hourly rate which shall be \$14 per hour. The Employee's pay shall be paid weekly on Thursday into the bank account nominated by the Employee.

13.1 Termination of Trial Period

The employer may terminate the trial period by providing 1 weeks notice to the employee within the trial period.

General Termination

The Employer may terminate this agreement for cause, by providing weeksnotice [sic] in writing to the Employee. Likewise the Employee is required to give weeksnotice [sic] of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

[4] There were no restraints of trade in place restricting Ms Smith from working for a competitor after she finished working for the respondent for any reason.

[5] Around one week after Ms Smith had started working for the respondent she received a telephone call from Mr. Murray Gibson, the owner of another barber shop (apparently, the respondent's only competitor in Timaru) and was told that she could earn \$18 per hour instead of the \$14 an hour she was receiving from the respondent. It is common ground that Ms Smith mentioned this to the owner of the respondent (Ms Scott) who said words to the effect *we're lucky we got you first.*

[6] Ms Scott was due to have a serious knee operation in early July and, from that date, was absent from the salon. The former owner of the respondent salon, Mr Taylor, worked in the salon for three days a week, Monday to Wednesday, and Ms Smith would have been in sole charge of the salon on Thursday and Friday until Ms Scott would have been fit to resume work. Ms Scott's mother, Judith Scott, was asked by Ms Scott to keep an eye on things during Ms Scott's absence, although she did not go into the salon every day.

[7] It is the evidence of Ms Smith that she anticipated that Ms Scott would be incapacitated for around 6-8 weeks and that her position would probably be redundant after Ms Scott returned from her operation. Accordingly, she says, she gave written notice of her resignation on 9 July by way of a letter which she handed to Ms Scott's mother. The text of the letter was as follows:

July 9 – 12

Notice of Resignation

This is to inform you that I wish to resign from Craigs Barber Shop.

I will not as previously stated let you down whilst recovering from your operation and there for [sic] will continue to work for you until 24 August, or sooner if your recovery is earlier.

This is in no way any reflection on you as your business and yourself, I have been honored to of been a part of it. I will continue to do my upmost best, and look after the shop for you, continuing to do my very best for you and your clients.

Heather Smith

[8] During her oral evidence to the Authority, Ms Smith said that she thought she would be better off receiving benefit rather than working the hours she had been given at \$14 per hour. She said that it had not been her intention to look for better paid work immediately she gave her letter of resignation, but to wait until Ms Scott had recovered.

[9] It was the evidence of Judith Scott that Ms Smith gave her the resignation letter in an envelope and, when Judith Scott read the letter, she said to Ms Smith words to the effect *so you are going to work for Murray?* (meaning the rival barber). Judith Scott said that Ms Smith replied, *yes, because I have to look after myself and he is offering me so much more money.*

[10] The evidence of Ms Scott and Judith Scott was that Judith Scott then told Ms Scott about Ms Smith's resignation and the reason for it, and that they decided that they could not afford to risk leaving Ms Smith alone in the salon during Ms Scott's absence recuperating, given that Ms Smith was going to work for a rival business. Accordingly, they decided that they needed to terminate the employment of Ms Smith immediately.

[11] Accordingly, Judith Scott drove Ms Scott to the salon towards the end of the same day and it is the evidence of both Ms Scott and her mother that Ms Scott told Ms Smith that, as Ms Smith was going to a rival business, she would have to leave. She promised, however, to pay Ms Smith two weeks pay in lieu of notice. (Ms Smith agreed that this sum had been paid to her).

[12] Ms Scott gave evidence that Ms Smith did not deny that she was going to work for a rival salon and that she simply said nothing.

[13] Evidence was also heard from Mr Taylor that Ms Smith had told him on the day of her resignation, but before Ms Smith gave Judith Scott the resignation letter, that Ms Smith was going to work for Mr. Gibson. Mr Taylor also gave evidence that, a few days later, he received a telephone call from Mr. Gibson to ask him for a reference with respect to Ms Smith. Mr. Gibson told Mr. Taylor that he had asked Ms Smith to do a trial hair cut, but that he had not offered her a job at that stage.

[14] It is Ms Smith's evidence that she did not tell Ms Scott, Judith Scott or Mr Taylor that she had been offered a job by Mr. Gibson and that, when she resigned, she did so without having a job to go to.

The Issues

[15] The following are the issues that need to be decided by the Authority:

- (i) whether Ms Smith was unjustifiably dismissed by the respondent;
- (ii) if so, what remedies she is entitled to;
- (iii) whether the respondent breached the contract of employment by failing to allow Ms Smith to work 40 hours a week throughout her employment.

Was Ms Smith unjustifiably dismissed?

[16] There was a conflict of evidence as between Ms Smith on one hand and the respondent's witnesses on the other, as to whether or not Ms Smith had said that she was going to work for Mr. Gibson. On balance, I believe that Ms Smith did tell them this, or led them to believe that she had had an offer of work from Mr. Gibson. However, this fact is, in my view, immaterial because, even if Ms Smith had said this, dismissing Ms Smith for that reason without any investigation and without giving Ms Smith the opportunity to explain herself and her intentions was not the action that a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[17] Section 103A of the Employment Relations Act 2000 states as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *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.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (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 considers 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.*

[18] Whilst I have some sympathy for the concerns expressed by Ms Scott and her mother of the risk that was presented by Ms Smith working for them once she had decided to join a direct competitor, especially given that Ms Scott was incapacitated at home and could not keep an eye on her business, there were minimal procedures that Ms Scott should have followed to ensure fairness. As a minimum, Ms Scott should have done the following before deciding to dismiss Ms Smith:

- (a) Given Ms Smith prior notice that she wished to discuss her concerns with her;
- (b) advised Ms Smith in advance that she had the right to be accompanied by a support person of her choice at the meeting;
- (c) explain to Ms Smith her concerns in full; and
- (d) considered Ms Smith's responses in good faith and in particular, considered whether there were any steps short of dismissal that Ms Scott could have taken which could have protected the business.

[19] Therefore, in summary, because of the complete lack of any process that was followed by Ms Scott in dismissing Ms Smith I am bound to find that the dismissal was unjustified in accordance with the Employment Relations Act 2000.

What remedies are due to Ms Smith?

[20] It was the evidence of the respondent, and the submissions of the respondent's counsel that Ms Smith was actually only entitled to pay in lieu of one week's notice, which she had been paid in any event. I believe that, contractually, Ms Smith's employment could be lawfully terminated on one week's notice. I reach this conclusion mainly on the basis that Ms Smith was paid weekly and that one week's notice of termination by either party, is, I understand, common in the hairdressing

industry. (Unfortunately, because of the defective drafting of clauses 3.3 and 13.2, the employment agreement does not assist in deciding what notice should have been given by the respondent in terminating the agreement).

[21] However, although I have found that the respondent was not obliged to give more than one week's notice of termination, this does not mean that any remedies due to Ms Smith are limited to one week's pay. This is because the statutory scheme for remedies set out at s.123 of the Act, as qualified by ss.124 and 128, contemplate remedies based on, amongst other things, loss of remuneration arising out of the unjustified dismissal. Therefore, the right to remedies following a finding of unjustified dismissal goes beyond what the employee would otherwise have been entitled to under his or her contract of employment.

[22] Accordingly, in accordance with s.123(1)(b) of the Act, the Authority may award to Ms Smith reimbursement of a sum equal to the whole or any part of the wages or other money lost by her as a result of her grievance.

[23] Ms Smith's letter of resignation makes clear that she was prepared to work until 24 August 2012, or sooner, if Ms Scott's recovery were earlier. Ms Scott's evidence was that she did not return to work until October 2012 and so I believe that it is appropriate to award Ms Smith a sum equivalent to the wages she would have earned between 9 July and 24 August 2012, less the two weeks' pay in lieu of notice already paid to her.

[24] The evidence of the respondent was that the two weeks' pay in lieu of notice was paid assuming that Ms Smith would work 40 hours per week. I believe that this is an appropriate basis upon which to work out wages owed to Ms Smith arising out of her unjustified dismissal. Accordingly, five weeks' gross pay at \$14 per hour and 40 hours per week equates to a gross sum of \$2,800.

[25] I must also consider how much compensation is due to Ms Smith, if any, pursuant to s.123(1)(c)(i) in relation to humiliation, loss of dignity and injury to her feelings. Ms Smith asked, via her counsel, for compensation in the sum of \$5,000. However, whilst there was evidence to suggest that Ms Scott's mother swore at Ms Smith when she discovered that Ms Smith was resigning, which may or may not have upset Ms Smith, almost no evidence has been adduced by Ms Smith as to the effect of her dismissal on her. I must bear in mind the fact that Ms Smith was leaving the

employer's employment in any event and, by 24 August, in accordance with her letter of resignation, would have no longer been employed by the respondent in any event. Ms Smith said that she felt that she would be better off on a benefit than working for the respondent.

[26] Therefore, I cannot find that the loss of her employment seven weeks earlier than she had initially contemplated had a significant effect on her in terms of s.123(1)(c)(i). In my view, a much more modest sum would be appropriate and I fix that sum at \$750.

[27] I must now consider whether it is appropriate to reduce the remedies set out above pursuant to s.124 of the Act. This requires me to consider the extent to which Ms Smith's actions contributed towards the situation that gave rise to her personal grievance and, if those actions so require, reduce remedies that would otherwise have been awarded accordingly.

[28] Counsel for the respondent submitted that Ms Smith was the author of her own misfortune by declaring that she was going to work for a rival business. Of course, subject to any enforceable post termination restraint of trade provisions preventing an employee from working for a competitor for a limited period, Ms Smith had a perfect right to give notice of her resignation and to work for whom ever she wished. As noted above, there was no such enforceable restraint of trade provision in Ms Smith's employment agreement.

[29] In order to justify reducing remedies under s.124 of the Act, the employee must have contributed towards the situation giving rise to the personal grievance in a blameworthy way. Counsel for the respondent suggested that Ms Smith was attempting to blackmail the respondent into paying her more money, knowing that Ms Scott was unable to work for several weeks, by saying that she had been offered more money by the rival barber and that she was leaving.

[30] Whilst this speculation as to Ms Smith's motives in resigning is not beyond the bounds of possibility, on balance I do not believe that this was the case as, if it were, Ms Smith would not have promised to stay employed by the respondent until Ms Scott returned from her recuperation. The blackmail, as the respondent's counsel put it, would only have been effective if Ms Smith had threaten to walk out then and there, effectively leaving Ms Scott without any cover. This was specifically what Ms

Smith did not do, and was the reason why she gave seven weeks' notice of her resignation.

[31] Therefore, I do not accept that Ms Smith was attempting to blackmail the respondent and, accordingly, that does not justify reducing Ms Smith's remedies. I can see no other blameworthy action by Ms Smith giving rise to her personal grievance, and so I decline to reduce Ms Smith's remedies pursuant to s.124 of the Act.

Was Ms Smith underpaid in respect of her first two weeks of work?

[32] Ms Smith argues that she had agreed with Ms Scott that she would work full time for the respondent. She said she understood *full time work* to mean 40 hours per week. Ms Scott's evidence was that she did agree that Ms Smith would work for her full time, but that this meant 30 hours a week.

[33] I note that the unsigned employment agreement states that the hours and days on which the employee shall work would be *as per weekly roster*. Ms Smith gave evidence that she knew which days and hours to work because of the roster that Ms Scott prepared.

[34] On balance, I do not believe that there was any binding agreement between the parties that Ms Smith would receive no less than 40 hours a week work. In my view, the agreement was that Ms Smith would work no less than 30 hours per complete week and this is, in effect, the hours that Ms Smith did work until Ms Scott had her operation, when Ms Smith's hours increased significantly as she was covering Ms Scott's shifts.

[35] Accordingly, I decline to find that the respondent breached the employment agreement between the parties by failing to give Ms Smith work totalling 40 hours or more per week. In light of this, I therefore also decline to impose any penalty on the respondent for breach of the employment agreement, as sought by Ms Smith.

Orders

[36] The respondent shall pay to Ms Smith the following sums:

- (a) the gross sum of \$2,800 in respect of lost wages arising out of her unjustified dismissal; and

- (b) the sum of \$750 in respect of compensation payable under s.124(1)(c)(i) of the Act.

Costs

[37] The parties should seek to agree how costs are to be dealt with between them. In the absence of such agreement within 28 days of the date of this determination, Ms Smith's counsel may serve and lodge a memorandum setting out any contribution to costs sought from the respondent and the respondent may serve and lodge a memorandum in reply no later than 14 days thereafter.

David Appleton
Member of the Employment Relations Authority