IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 5

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	BETWEEN	JENNIFER ANN STEWART Applicant
	AND	ASHTAR NZ LIMITED First Respondent
	AND	SHARON SCHANAN also known as SHIRIN SCHANAN Second Respondent
	AND	RAFED SCHANAN SABHAN also known as RAFED SCHANAN Third Respondent
Member of Authority:	Alastair Dumbleton	
Representatives:	Jody Foster, counsel for Jennifer Ann Stewart No appearance for Ashtar NZ Limited Danny Gelb, advocate for Sharon Schanan and Rafed Schanan	
Investigation Meeting:	27 September 2011	
Submissions Received:	30 September, and 4 & 10 October 2011	
Determination:	10 January 2012	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] An employment relationship between the applicant Ms Jennifer Stewart and the first respondent Ashtar NZ Ltd was formed at the end of September 2010, shortly after Ashtar bought the hairdressing business Ms Stewart had been working in. By

then she had been a professional hairstylist for 20 years and had worked at the Special Efx hairdressing salon for several of those before the sale of the business.

[2] Under its new ownership Special Efx Hair Design was managed by Ms Sharon Schanan and her husband Mr Rafed Schanan who was also a director of Ashtar. They described themselves to the Authority as having been "the management team" of the business. Ashtar, which was incorporated in 2006, is still in existence but no longer trades and may be liquidated soon according to the Schanans.

[3] On 23 December 2010 at the end of work, Ms Stewart handed a resignation letter to Sharon Schanan. Ms Stewart gave a weeks notice, which she intended working out. Later that day she received a message from Sharon Schanan informing her she was not required to return to work.

[4] Next day, 24 December, she was advised that a Trespass Notice had been issued forbidding her from going to the salon premises. It was issued under the Trespass Act 1980 and warned her to stay away for 2 years. Ms Stewart did not go back but started new employment as a hairdresser at another local salon on 6 January 2011.

[5] About a week later Ashtar lodged an application in the Authority. The company alleged various breaches by Ms Stewart of her employment agreement and particular terms of it, including restraint of trade, return of property and notice of termination provisions. Remedies sought included penalties under s 134 of the Employment Relations Act 2000 and orders requiring her to return property, to stop working for her new employer and to forfeit pay for failing to give adequate notice.

[6] Ms Stewart denied all of Ashtar's allegations and brought counter claims against the company and against Sharon Schanan and Rafed Schanan. She alleged Ashtar had unjustifiably dismissed her and sought remedies of reimbursement and compensation to resolve that personal grievance. She sought recovery of unpaid wages and holiday pay and a declaration that she had not breached any restraint of trade provision. She claimed her contract did not have one in it. She also sought a penalty against Ashtar for breach of s 63A of the Act in relation to bargaining for individual terms and conditions in an employment agreement.

[7] Ashtar's various breaches of her employment agreement were alleged by Ms Stewart to have been incited, aided or abetted by Sharon Schanan and Rafed Schanan and penalties were sought from both under s 134(2) of the Act.

[8] In trying to resolve these multiple problems the parties twice undertook mediation but did not achieve settlement.

[9] In September 2011, about a fortnight before the meeting for investigating all of the problems between Ashtar, Ms Stewart and the Schanans was scheduled to be held, Ashtar advised it was withdrawing its application against Ms Stewart and that it would not defend her counterclaims.

[10] The remaining problems investigated and now to be determined by the Authority are the personal grievance, recovery and penalty claims brought by Ms Stewart against her former employer, Ashtar, and penalty claims brought by her against Sharon and Rafed Schanan as secondary parties to Ashtar's alleged breaches of the employment agreement, which the company has not contested.

[11] Ms Stewart, her partner, her sister, her niece, and a former owner and employee of the salon business, Ms Sharon Wood, gave evidence to the Authority, as did both Sharon and Rafed Schanan.

[12] The evidence indicates that the employment relationship problems probably arose partly because the Schanans were unsure of their rights and obligations in relation to the sale and purchase of the Special Efx business and the provision of employment to existing staff such as Ms Stewart and Ms Wood upon transfer of the business. Also, due diligence by the Schanans in respect of the business before buying it may not have been sufficient, and there were communication difficulties because English was not the Schanans first language.

[13] It is clear that during the brief employment there remained unresolved an issue about Ms Stewart retaining a personal clientele while being an employee of the business. When she was employed by Ashtar she had wished to retain the property in a list of particular customers and a right to personally provide services to them for her own direct reward, as she had done when employed by the previous owner of the business. This issue led to a deteriorating relationship between employer and employee, although it is Ashtar which must take most of the responsibility for that as

it had the means of addressing the issue and avoiding the consequences but failed to do so when the company agreed to employ Ms Stewart.

Employment agreement between Ashtar and Ms Stewart

[14] I find that the terms and conditions of Ms Stewart's employment by Ashtar were set out in writing, a copy of which was produced to the Authority. The typewritten document includes handwritten and initialled amendments made by Ms Stewart. She signed the contract on 10 October 2010, after starting work for Ashtar on 30 September. Thereafter the contract was performed according to its terms by Ms Stewart and Ashtar until at least 23 December 2010 when Ms Stewart gave notice of termination.

[15] She reasonably believed from the Schanans behaviour that they wanted her personal clients for their business. Having agreed by subsequent conduct if not expressly by consent to Ms Stewart's terms of employment, Ashtar was bound to comply with those until she agreed to any subsequent variation. I find that a restraint of trade provision was not a term of the employment, as Ms Stewart had expressly deleted or rejected the one that had originally been printed in the agreement she signed. Ashtar and the Schanans at times I find tried to deny the existence of the contract or its terms while at the same time acquiesced in the performance of the employment by Ms Stewart to Ashtar's advantage.

[16] The difficulties in the relationship led to Ashtar, unreasonably I find, presenting Ms Stewart with a written warning on 4 December. A letter headed "Writing-Warning" outlined a number of complaints or allegations made against Ms Stewart, none of which she accepted as justified. Several of them she reasonably considered lacked sufficient detail for her to be able to understand or coherently address. When she was able to discuss the warning letter with Rafed Schanan he said it would be ripped up. I do not consider Ms Stewart gave any reasonable cause for a disciplinary warning to be issued but in any event, following Ashtar's election to withdraw from the Authority's investigation, the employer has not justified its actions in purporting to give the a warning.

[17] I find that Ms Stewart was constructively or actually dismissed by Ashtar and that the dismissal was unjustifiable according to the test at s 103A of the Act (as it

was in December 2010). The dismissal occurred at about the time Ms Stewart gave her resignation, on 23 December 2010, or the following day when Ashtar or its agents gave instructions for Ms Stewart to be served with a Trespass Notice to prevent her for two years from going to the work premises and performing her employment.

[18] Although Ms Stewart had failed to give notice of termination (in law, insufficient notice being no notice at all) a fair and reasonable employer would have given an employee an opportunity to rectify that breach by working for the 2 week period of notice expressed in the contract. This was denied to Ms Stewart as a consequence of Ashtar prohibiting her from entering the workplace for 2 years. In any event the inadequacy of termination notice was not the reason for the issue of a Trespass Notice, which two other employees and her partner and her sister, were also served with at the same time as Ms Stewart. An unpleasant discussion in which voices were raised between employee and employer was not a reasonable basis for such a disproportionate response of terminating the employment relationship. At most the Schanans might have believed Ms Stewart and not been civil or respectful towards them but they could not reasonably have concluded she had threatened or intimidated them or their business in any way.

[19] I find that Ms Stewart did not by any fault on her part contribute to the situation giving rise to her unjustifiable dismissal and no reduction in the remedies she is entitled to is made on that account.

[20] Ms Stewart is entitled to be reimbursed by Ashtar for earnings lost and unpaid including annual holiday pay as claimed. The total is $3,097.85 ($2,590.85 plus $507). Interest on that total sum is to be paid at 5% per annum from 24 February 2011, the date the statement in reply containing her claims against Ashtar was lodged.

[21] I fix compensation of $8,000 for hurt feelings and distress, to be paid by Ashtar pursuant to s 123(1)(c)(i) of the Act. I do so taking account of the award of $6,000 made to Ms Paula McKay who the Authority found – as recorded at [2011] NZERA Auckland 385 - was unjustifiably dismissed by Ashtar, also by Trespass Notice issued by Ashtar on 24 December 2010. Ms Stewart suffered considerable stress for several months as a result of having a claim brought against her by Ashtar which included allegations of dishonesty but for which there was no basis, as shown by the subsequent abandonment of that claim.

[22] I also find from the evidence that Ashtar breached s 63A(2) of the Employment Relations Act by failing to advise Ms Stewart, when bargaining with her for an individual employment agreement, that she was entitled to seek independent advice about the intended agreement and by failing to give her a reasonable opportunity to seek that advice.

[23] I assess $3,000 as the appropriate penalty under s 135 of the Act, $1,500 of which is to be paid by Ashtar to Ms Stewart and the other half to the Crown.

Costs

[24] Ashtar is to pay costs of $17,000 ($250 per hour for counsel Ms Foster x 68 hours) as a reasonable contribution to actual costs. Ashtar's claim had little if any legal merit, as confirmed by the last minute abandonment of it. Ms Stewarts case was also caught up with claims Ashtar brought against co-workers in the Special Efx salon and this complication required a significant increase in legal expenses, justifying an award of costs at a higher level than in a more usual case of this kind.

Claims for penalties against the Schanans

[25] I accept the legal position as submitted by counsel Ms Foster, that although Rafed Schanan and Sharon Schanan were not themselves the employer of Ms Stewart in principle either or both of them may be liable for a penalty under s 134(2) of the Act as a party to Ashtar's breach of the employment agreement. There is no suggestion that the Schanans acted on their own personal behalf independently of or out on a limb from Ashtar and the employment relationship the company had with Ms Stewart. The Schanans made the decision that caused Ashtar to withhold final wages and holiday pay, act in bad faith towards Ms Stewart and unjustifiably dismiss her. They admitted knowing at the time that service of a Trespass Notice would effectively prevent Ms Stewart from performing her employment agreement.

[26] As the Court of Appeal held in *Peacock v NZ Performance etc Union* [1990] 2 NZILR 257, a company may be incited, instigated, aided or abetted. Ashtar, the primary breaching party, being an incorporated company is a legal entity rather than a natural person and its animation is provided by its directors, servants or agents through their actions and intentions. The Schanans were the mind of Ashtar. While it is perfectly apt in the circumstances for the Schanans to describe themselves as "the

management team," rather than being a single entity they were two individuals acting in combination, or as a team. They aided, abetted or incited breaches of the employment agreement by Ashar, I find, and both are liable.

[27] In assessing the level of penalties it is kept in mind by the Authority that Ashtar was the employer and not the Schanans personally. The high probability that the remedies awarded against Ashtar will not be able to be enforced and recovered by Ms Stewart is not a reason for shifting the burden of the employer's liability to the Schanans. They remain personally responsible for their own debts. Ashtar as a company was the employer party in the relationship, following commonplace and long established commercial practice. The Schanans as directors and shareholders of a company were entitled to limit their personal liability by the incorporation.

[28] Under ss 134(2) and 135 the Schanans are each ordered to pay $2,500 as a penalty. I order that $1,750 of it is to be paid by both Sharon and Rafed Schanan to Ms Stewart and the balance $750 to the Crown. Ms Stewart will therefore be paid a total of $3,500 out of the penalties.

Summary of orders

[29] **Ashtar NZ Ltd** is to pay

(1) Ms Stewart

$3,097.85 lost and unpaid earnings including annual holiday pay, and

5% per annum interest on that amount from 24 February 2011, and

$8,000 compensation for hurt feelings and distress, and

$1,500 as a penalty, and

$17,000 costs including fees and disbursements.

(2) The Crown

$1,500 as a penalty.

[30] **Sharon Schanan** is to pay

(1) Ms Stewart

$1,750 as a penalty, and

(2) The Crown

$750 as a penalty.

[31] **Rafed Schanan** is to pay

(1) Ms Stewart

$1,750 as a penalty, and

(2) The Crown

$750 as penalty.

Costs

[32] Costs are reserved. If the parties cannot resolve the question themselves, any application is to be made by memorandum in the usual way within 14 days of the date of the determination. Any reply is to be made with a further 14 days.

A Dumbleton

Member of the Employment Relations Authority