

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZWERA Wellington 119
5366349

BETWEEN FLORA ABDULINA
Applicant

AND VICTORIA LIVINGSTONE
T/A RAUMATI BEAUTY
STUDIO
Respondent

Member of Authority: P R Stapp

Representatives: Graeme Ogilvie, Advocate for the Applicant
Victoria Livingstone (in person) and Linda Carre
(support person/mother) for Respondent

Investigation Meeting: 14 August 2012 at Wellington

Submissions received: 14 August 2012

Further information 15, 16 and 21 August (from Linda Carre and Mr
Ogilvie)

Date of Determination: 1 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem about whether or not Ms Abdulina was dismissed.

[2] Virginia Livingstone trading as Raumati Beauty Studio genuinely believed that on 18 May 2011 her employee Flora Abdulina resigned when Ms Abdulina left work with her husband. Ms Abdulina returned to work the next day and the events of what happened at work are in dispute.

[3] After this Ms Abdulina did not return to work, and by letter dated 24 May 2011 Ms Livingstone confirmed that Ms Abdulina's employment had ceased.

[4] Ms Abdulina claims that she has been unjustifiably dismissed, and is seeking lost wages, compensation for hurt and humiliation, compensation for the lost opportunity of receiving paid maternity leave, and costs. Ms Livingstone denies all the claims.

The issues

[5] The primary issue in this matter is whether or not Ms Abdulina resigned from her employment, and/or was dismissed.

The business and employment

[6] Ms Abdulina was employed as a beauty therapist by Victoria Livingstone. There was no written employment agreement signed between the parties. Ms Abdulina's rate of pay was \$15 per hour. It had been agreed that she would work Monday to Friday, 9:00am until 4:00pm, and Saturdays from 9:00am until 2:00pm. Although there have been work/performance targets raised in the course of these proceedings there was no written employment agreement and/or any documentation at the time that highlighted any such targets to apply at the time. During her employment Ms Abdulina worked 57 weeks (a total of 1,655.25 hours). Her average hours were 29 hours per week.

[7] The business Raumati Business Studio is owned by Ms Livingstone. Ms Abdulina was the only employee. The business was run from Ms Livingstone's mother's premises.

[8] Ms Livingstone's mother also injected funds to keep the business going. Ms Livingstone had concerns about Ms Abdulina's attendance at work during her employment. Ms Livingstone and her mother Linda Carre drafted a letter (dated 17 May) with the purpose of conveying to Ms Abdulina their wish to condense her hours of work. Ms Livingstone says this letter represented the start of a process to change the hours by agreement with Ms Abdulina. Ms Abdulina was given the letter at a meeting around lunchtime on 18 May 2011. Ms Abdulina's husband arrived during the meeting to take Ms Abdulina to lunch because she had discovered that she was pregnant that morning. Ms Livingstone says that Ms Abdulina and her husband

Michael Sutton planned his arrival deliberately to intimidate her, and she believes that Ms Abdulina knew before the Wednesday that she was pregnant. She now accepts Ms Abdulina found out she was pregnant. I hold it was more likely than not that Ms Abdulina and Mr Sutton had arranged to go to lunch and when he arrived it coincided with Ms Abdulina's and Ms Livingstone's meeting. Ms Livingstone has not proved her claim and has not been able to shake Ms Abdulina's and Mr Sutton's evidence that they had pre-arranged to go to lunch. Also there has been no satisfactory reason put before me as to why he would have ambushed the meeting. Ms Abdulina and Mr Sutton left to go lunch. Ms Abdulina did not return to work that day because she believed she had been given the afternoon off, which was confirmed by Mr Sutton. Ms Livingstone denies giving Ms Abdulina the afternoon off.

[9] Ms Livingstone says that she felt intimidated by Mr Sutton's arrival. She confirmed giving Ms Abdulina the letter suggesting that Ms Abdulina's hours of work needed to be condensed. Ms Livingstone claims that Ms Abdulina informed Mr Sutton that her hours were being reduced, and she says that Mr Sutton said "*just resign you do not need this shit*". After a short time, Mr Sutton said "*come on then, are you going to get your shit or sit here and talk*". Ms Abdulina then got up, went to her room and collected her belongings, including a foot bath. Ms Livingstone denies that Ms Abdulina raised or even mentioned taking annual leave. Ms Abdulina says that she and her husband had talked about her taking annual leave earlier that day, and she says she raised it at the meeting.

[10] On 19 May 2011 Ms Abdulina returned to the workplace and handed in a letter (dated 18 May 2011) that essentially declined the offer to change the hours indicated, and that she would be taking three weeks paid leave and returning to work on 14 June 2011. She stated that she would seek further information in regard to her employment rights in the meantime. She requested all monies owing to her to be paid that included any short payments over the past year, including holiday pay.

An altercation between Ms Abdulina and Ms Livingstone and Ms Carre

[11] It is common ground that Ms Abdulina arrived at the premises on 19 May. There is considerable variation between the witnesses about what happened there. In essence, Ms Livingstone's mother, Linda Carre, arrived. Ms Carre has accepted that she got upset and angry about what she says she saw Ms Abdulina was doing. Whatever happened, Ms Abdulina subsequently went to the police and complained

that she had been assaulted by Ms Carre. Ms Carre absolutely refutes and denies that she assaulted Ms Abdulina. As a consequence Ms Abdulina did not return to work. She obtained a medical certificate on 20 May and wrote a further letter dated 24 May 2011 that said

Would you please respond to my letter dated 18.05.2011, within seven days, in respect to conditions of employment as first brought to my attention with your letter to me, dated 17.05.2011 (Even though your letter is dated 17.05.2010)

[12] At the same time Ms Livingstone sent a letter dated 24 May 2011 to Ms Abdulina. Their letters crossed in the mail. The letter outlined Ms Livingstone's understanding of the position regarding Ms Abdulina's future employment. She discussed the hours of work, the offer to condense the hours because without doing so she could no longer sustain the outgoings without Ms Abdulina bringing further income into the business from clients and working regular hours. She raised an issue about targets and referred to the incidents involving Ms Abdulina attending work and the issues of Thursday 19 May when Ms Abdulina handed her a letter. Also, although Ms Abdulina refused to leave on 19 May Ms Livingstone says that she said she would call for help and that she could not have Ms Abdulina working that day. This was at Ms Livingstone's initiative.

[13] In conclusion, Ms Livingstone believed that *there has been a breakdown of our working relationship to such a degree that I am no longer in a position to offer you any employment* (letter dated 24 May).

Comment

[14] Although Ms Livingstone genuinely believes that Ms Abdulina resigned, I am satisfied that she did not resign. It may have been referred to and/or even suggested, but there is no proof that Ms Abdulina actually resigned. I hold that it was not reasonable for Ms Livingstone to infer that Ms Abdulina resigned and for her to accept a resignation because of the circumstances involved with Ms Abdulina's departure on Wednesday, 18 May 2011. A fair and reasonable employer could be expected to have sought proper clarification of any intention that Ms Abdulina might have had in regard to her employment. This is especially so given that Ms Abdulina had obtained a medical certificate and written on 24 May 2011 to Ms Livingstone for a response to her letter. Ms Livingston unreasonably inferred that Ms Abdulina had

resigned by her actions without being able to explain exactly how Ms Abdulina resigned and did not get any confirmation. Indeed Ms Livingstone's own words in her letter dated 24 May 2011 imply that there was a continuing employment relationship at least until 24 May 2011. It is more likely than not that the employment did not end until 24 May, and it ended at the employer's initiative.

[15] Also there was the dispute about Mr Sutton's arrival at work, their plans for lunch and what Ms Abdulina's intentions were in regard to taking the afternoon off, her decision the next day to take 3 weeks leave and asking for her holiday payment. These were not enough to infer a resignation, I hold. I have noted that Ms Livingstone referred in her letter to Ms Abdulina resigning, but given all the other factors this is not conclusive of the matter I hold because Ms Livingstone made no further attempts to follow up with Ms Abdulina as to what her intentions were.

[16] Thus, I conclude that Ms Abdulina was dismissed. The dismissal has not been justified. There has been no reason advanced by Ms Livingstone to dismiss Ms Abdulina at that point. No reasons have been given to justify a dismissal and there was no investigation, no notice of any concerns, and no opportunity for the applicant to respond and no discussion on any penalty. Ms Abdulina has a personal grievance.

[17] Ms Abdulina is entitled to remedies. Her lost wages amount to \$15 per hour and her average hours were 29 hours per week (not challenged). Her employment ended on 18 May 2011, but she was not fit for work until 21 June 2011 (medical certificate). As she was pregnant she did not seek permanent work, but looked for jobs on Seek and Trade Me, but could not find any vacancies. Because of the dispute between the parties about the events around the alleged assault and the absence of any detailed medical evidence to support the medical certificates Ms Abdulina's leave remains unexplained, I hold. She says she looked for waitress or kitchen hand work but did not hear back in regard to two vacancies because she thinks she had told the people involved that she was pregnant. She had her baby in January 2012. Therefore her lost wages amount to \$11,745 (for 27 weeks from 21 June 2011 until 31 December 2011). However I have restricted this to 13 weeks (3 months) under s 123 of the Employment Relations Act because Ms Abdulina did not mitigate her loss thoroughly enough, not even getting any third party assistance. In other words she did not do enough to get any work after she had been cleared to work and before her anticipated date of delivery, I hold. This amounts to \$5,655 lost wages.

[18] Ms Abdulina claimed \$8,000 compensation for humiliation, loss of dignity and injury to feelings. This is a modest claim, but I hold Ms Abdulina has not established the claim from her evidence. I assess the impact on her of the employer's action from her own evidence and that of her partner to be \$3,000 relating to the events of 18 May and the receipt of the letter dated 24 May 20112.

[19] Both sums are not to be reduced because there was no contribution and blameworthy conduct on her part giving rise to the personal grievance. I have weighed up the employer's claims that she deliberately met with her husband to put pressure on Ms Livingstone, allegedly walked out of her employment, making an alleged false allegation, the alleged way she treated a client on the same day and that she had no desire to go back to work. The evidence was not enough to support these allegations and then to link them to blameworthy conduct and contribution (s 124 of the Act).

[20] There was a claim made for compensation for the lost benefit of paid maternity leave. However I hold that there was no established linkage to such a claim and Ms Abdulina being employed by Ms Livingstone at the time such a sum could be applied for. This is because of the time that had elapsed between the dismissal and the anticipated date of delivery and the obligation on Ms Abdulina to get alternative work during 27 weeks after her employment ended. Given the relationship and the issues in the employment such as the hours of work I am not satisfied that Ms Abdulina would have been employed when her entitlement would have arisen given the time before the anticipated date of the birth of her baby.

Orders of the Authority

[21] I order Victoria Livingstone to pay Flora Abdulina the sums of:

- a) \$5,655 lost wages; and
- b) \$3,000 compensation under s 123 (1) (c) (i) of the Act for hurt and humiliation.

Costs

[22] Ms Abdulina is entitled to costs because she has been successful, had representation and that there has been preparation and attendances involved. I hold that the daily tariff applies in this case. Therefore Victoria Livingstone is to pay Ms Abdulina her claim for \$3,000 contribution to her costs for Mr Ogilvie's involvement, and in addition, the filing fee of \$71.56.

P R Stapp
Member of the Employment Relations Authority