

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 135/09  
5129220

BETWEEN                      KRYSTLE ANDERSON  
   Applicant  
  
AND                              CLIP JOINT HAIR SALON  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:            Ina Stewart, Counsel for Applicant  
   Rachel Brazil, Counsel for Respondent  
  
Investigation Meeting:      26 June 2009 at Dunedin  
  
Determination:              24 August 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Ms Anderson) alleges that she was unjustifiably dismissed from her employment by the respondent (Clip Joint). Clip Joint denies dismissing Ms Anderson.

[2]     In early 2008, Ms Anderson applied for a position as a senior hairstylist with Clip Joint. An individual employment contract was provided and signed by the parties on 13 February 2008.

[3]     As part of the application process, Clip Joint says that it emphasised to Ms Anderson the importance of her own appearance and demeanour in the salon and the condition of Ms Anderson's own hair.

[4]     At the end of Ms Anderson's first day's employment on 4 March 2008, the proprietors of Clip Joint requested a meeting with her because they were discouraged

about her demeanour and attitude to work. They found her quiet and somewhat humourless and there was a particular complaint about Ms Anderson's scraping her feet when she walked.

[5] Despite thAT meeting at which these matters were raised on Ms Anderson's first day of employment Clip Joint says there was no visible improvement and on 20 March 2008, Clip Joint sent Ms Anderson a letter requesting that she attend a disciplinary meeting. The meeting took place on 26 March 2008 and Ms Anderson had her mother present at the meeting as a support person. Clip Joint had an HR adviser present to assist it as well.

[6] The meeting was not successful. There were attempts to work through the issues but Clip Joint's perception was that Ms Anderson did not accept there was any issue to be resolved. Ms Anderson became tearful when Clip Joint indicated it would give her a warning and the meeting broke up in disarray with Ms Anderson being led away by her mother.

[7] Ms Anderson never returned to the workplace and her case is based on the contention that Clip Joint constructively dismissed her by its behaviour at the meeting on 26 March 2008 and subsequently. Clip Joint says that it behaved properly and that it was entitled to conduct the disciplinary meeting the way it did, because it had concerns about the quality of Ms Anderson's performance. It says Ms Anderson was unable to accept the constructive criticism it offered and simply walked off the job.

[8] Clip Joint made numerous unsuccessful attempts to contact Ms Anderson after the collapse of the 26 March meeting. Ms Anderson did not respond until, on Saturday 29 March 2008, she caused a medical certificate to be put under the door of the salon the effect of which was to have her off work until 7 April 2008.

[9] Contemporaneously with the receipt of the medical certificate, Clip Join wrote a further letter to Ms Anderson dated 31 March 2008, raising further disciplinary issues and summoning Ms Anderson to another disciplinary meet on 2 April 2008. This letter makes clear that dismissal might be the outcome. Then, without further contact from Ms Anderson, Clip Joint received a letter from Ms Anderson's lawyer, dated 2 April 2008 raising a personal grievance on the grounds of constructive dismissal.

**Issues**

[10] The central question is whether Ms Anderson was, as she alleges, constructively dismissed from her employment or whether she abandoned her employment as Clip Joint maintains. A related question, although not one asked by Ms Anderson in her claim, is whether Clip Joint treated her as a good and fair employer ought.

**Was Ms Anderson constructively dismissed?**

[11] I am satisfied, on the evidence before the Authority, that Ms Anderson was not constructively dismissed from her employment and in fact that she abandoned her employment at Clip Joint.

[12] I reach this conclusion because the weight of evidence simply does not support the alternative point of view. Ms Anderson was employed for a period of barely three weeks and, in that time, she received a number of messages from Clip Joint that she was failing to meet its needs as employer. There was never any concern about her technical ability, but Clip Joint was concerned at her apparent inability to engage with clients in an appropriate fashion. Clip Joint maintained in its evidence that it was necessary for its staff to ensure that clients had an enjoyable experience in coming to the business and not just a quality haircut. It felt that while Ms Anderson was capable of the latter, her interpersonal skills were such that she failed in the former.

[13] Ms Anderson complains that she was growled at at the end of her first day in the salon and that what Clip Joint told her on that occasion was that it did not like her *personality*. Clip Joint denies that that was in fact the message, but it agrees it did ask her to smile more and engage more with the clients. It also remonstrated with her for dragging her feet as she walked around the salon. It transpired that Ms Anderson had been wearing shoes that were too big for her which necessitated her dragging her feet rather than lifting them because of the risk the shoes would fall off. Whatever the explanation, I do not think the Authority can be critical of an employer which seeks to promote a proper standard amongst employees and which determines the nature and extent of the culture in its own business.

[14] It is clear that there were a number of discussions between the parties subsequent to that discussion on the first day of employment, and Ms Anderson complains that each of these discussions was, in effect, an unfair imposition on her.

Ms Anderson's position appeared to be that there was no complaint about her technical ability and her personality would have been clear to the employer before she was engaged. Certainly it was true that there were three interviews of Ms Anderson before she was offered the position, and Ms Anderson says that it would have been clear to the employer from those three interviews that she was shy and comparatively serious. Notwithstanding that, Ms Anderson says that she was hired and it was unreasonable of the employer to expect her to fundamentally change her demeanour where it would have been clear to the employer prior to engagement just what she was like.

[15] There would be force in this argument if Clip Joint did seek to fundamentally change Ms Anderson's demeanour. But the evidence does not suggest that is the position at all. Clip Joint's witnesses told me that Ms Anderson was quite different at work from how she had been at the interviews. Further, they deny that they sought personality changes, simply that they wanted Ms Anderson to contribute positively to the salon culture, as they say they set out in the three job interviews and recorded in the employment agreement and job description. I accept that evidence as truthful.

[16] A concrete example of Clip Joint's concerns related to Ms Anderson's hair. At the point at which she was engaged, it seems common ground that Clip Joint was anxious about the condition of Ms Anderson's hair. It took the view that Ms Anderson would be an advertisement for the salon and that, as a consequence, if her hair did not look its best, that would reflect badly on the salon. It promoted with Ms Anderson the notion that she agree to allow Clip Joint to cut and colour her hair rather than have her do it herself at home, and there appears to have been some tacit agreement about this before the employment commenced. However, the extent to which this was agreed seems to have always been in issue. Ms Anderson told me that she liked to have her hair long and that she was anxious that Clip Joint wanted to shorten her hair more than she would feel comfortable with.

[17] In the result, and despite Ms Anderson agreeing to allowing Clip Joint to both colour and cut her hair in the salon, she determined to colour her hair at home and attended at work after doing that. That episode caused further difficulty. Indeed, Melissa Phillips, one of the proprietors of Clip Joint, said that after Ms Anderson had coloured her hair at home, her hair became the *major issue* and so far as Clip Joint

was concerned, Ms Anderson's decision to colour her hair at home was *a slap in the face*.

[18] At the point at which Clip Joint decided it needed to deal with matters more formally, it wrote to Ms Anderson by letter dated 20 March 2008 and summoned her to a disciplinary meeting which took place on 26 March 2008. By all accounts, this meeting was not successful but I am not satisfied that all of the fault for that fact can be sheeted home to Clip Joint. It seems clear from Ms Anderson's evidence that she struggled to address the complaints that Clip Joint made about her behaviour, and certainly it seems more rather than less likely that Ms Anderson simply could not accept that Clip Joint was entitled to have views about how she ought to behave in the salon. Ms Anderson was confident about her technical ability (and it seems rightly so), and told me in evidence that her personality and demeanour were the same at interview as they were during her work at Clip Joint. She presented as a shy and very quietly spoken young woman, so much so that, on a number of occasions when she was giving her evidence, it was necessary for me to ask her to speak up in order that her evidence could be heard by the employer and its representative seated across from her.

[19] Although the disciplinary meeting made some modest progress in relation to getting agreement about Ms Anderson's hair, there was little progress in any other direction and it appears that at the point at which Clip Joint intimated that a written warning would issue, Ms Anderson became tearful and was removed by her mother, never to return to the workplace. Indeed, by the time the meeting concluded in this rather dramatic fashion, it had spilled out onto the street outside the business premises because clients had started to arrive at the salon for appointments and it was decided that the meeting could continue outside.

[20] By letter dated 31 March 2008, Clip Joint wrote again to Ms Anderson, listed 13 issues it was unhappy with, summoned her to a further disciplinary meeting, and threatened her with dismissal. This is an extraordinary letter and I will come back to considering it further, but I note at this point that Ms Anderson seeks to rely upon it as evidence for the view that her position had become untenable and that she had no basis on which she could continue in the employment. I do not accept that evidence. The short point is that by the time Ms Anderson would have received this letter, she had already been absent from the workplace since mid-morning on 26 March.

Further, Ms Anderson had, over the period from 26 March onward, been peppered with calls from Clip Joint seeking to establish where she was and apart from one occasion where Ms Anderson's boyfriend indicated to Clip Joint that Ms Anderson was at the doctor, there was no direct contact whatever from Ms Anderson. The only other source of information Clip Joint had was the medical certificate pushed under the door of the salon, three days after the disciplinary meeting.

[21] Any employment agreement creates obligations on both parties to be *active and constructive* and to be *responsive and communicative* in their dealings with each other. Ms Anderson cannot complain about the behaviour of Clip Joint in these regards; clearly, her complaint is that Clip Joint was being too pro-active, too direct. The reality is that Clip Joint sought to engage with Ms Anderson and to tell her how she was failing to meet the needs of their business, something they have both a right and an obligation to do. By the same token, Ms Anderson has the same obligations, obligations she manifestly failed to fulfil by leaving her employer in the dark about her intentions. Indeed, absolutely the only step that Ms Anderson took after the 26 March meeting was to cause her medical certificate to be delivered to the employer's premises on the following Saturday.

[22] For Clip Joint, the receipt of that medical certificate raised as many questions as it answered; their letter of 31 March 2008 suggests they had no idea Ms Anderson was carrying an injury such as would cause her to be absent from work. Ms Anderson chose to rely on this letter as part of her justification for alleging constructive dismissal and it was just two days later that Ms Anderson's lawyer wrote to the employer raising a personal grievance on the basis of constructive dismissal.

[23] The factual position is that Ms Anderson took no steps to engage with her employer after 26 March, except to cause the medical certificate to be delivered. She did not contact Clip Joint personally, arrange for a family member to talk with them or make any other contact until, in the middle of a period of medical leave, she has her lawyer communicate that she would not be returning to the workplace at all and that she considered she had been constructively dismissed.

[24] Submissions for Ms Anderson refer to the elegant summary of the text for constructive dismissal in the Court of Appeal judgment in *Commissioner of Police v Hawkins* 12 June 2008 CA 711/07 where that Court held that the test was:

- a. *had the employer so breached its duty as to amount to a repudiation of the employment agreement;*
- b. *had the breach caused the resignation;*
- c. *had the substantial risk of resignation been reasonably foreseeable.*

[25] In the present case, do not find any of the elements of that test made out. There is, I hold, no breach of the employer's duty. Clip Joint sought to have Ms Anderson comply with their legitimate requirements, requirements I accept they made clear on engagement. That they did so assertively, even over-zealously cannot ground a finding of a breach of duty. Furthermore, even if I am mistaken in that principal finding, it is still difficult to see how an employer seeking to maintain compliance with the requirements for its business can be found to have repudiated the agreement. Of course, without a finding of breach, the issue of the causation of the resignation loses its sting and the only remaining question is whether the resignation was reasonably foreseeable. I hold that resignation was not reasonably foreseeable. A disciplinary process was in play. Ms Anderson had suddenly stopped engaging with Clip Joint and then, without waning, had herself declared unfit for work for a short period during which she, again without warning, had her lawyer indicate she would not return to the workplace.

#### **Was Ms Anderson disadvantaged by unjustified actions of the employer?**

[26] Ms Anderson's claim is exclusively one of constructive dismissal. However, the Employment Relations Act confers on the Authority the right to not be bound ... *to treat a matter as being a matter of the type described by the parties ....* In the present case, while I have already made clear that I did not consider Ms Anderson has made out her case for having been constructively dismissed from her employment, I do think it proper for the Authority to investigate whether Ms Anderson has suffered disadvantage as a consequence of unjustified actions of the employer.

[27] By dint of the same factual matrix, it could be concluded that Ms Anderson has been somewhat overwhelmed by the assertive prosecution of the Clip Joint's requirements. Ms Anderson was 19 years old at the time these events happened and although she had been in employment since leaving school, her age and relative inexperience would perhaps justify a rather less doctrinaire approach than seems to have been achieved in the present case.

[28] Ms Melissa Phillips, one of the proprietors of Clip Joint, was the employer's representative who dealt principally with Ms Anderson. On the first three days of the employment, Ms Phillips spoke to Ms Anderson each day. Ms Phillips described those discussions as *pep talks* but in another point in her evidence referred to one conversation anyway as *a compassionate conversation*.

[29] Ms Anderson clearly did not regard the process as *compassionate*. She told me that she was *upset by Ms Phillips but did not want to tell Ms Phillips that she had made me upset*.

[30] Ms Aitken, who was the other partner in the business, confirmed to me that she had little to do with the continuing discussions with Ms Anderson, although she was at work most of the time when the discussions took place. She made a revealing observation when she said in her evidence *we can't both* (she means her and Ms Phillips) *be going at a staff member and I did leave it* (she means the discussions with Ms Anderson) *to Melissa* (Ms Phillips).

[31] It is clear from the evidence of Ms Monkhouse, who is Ms Phillips's sister, but is employed in human resources, that Clip Joint had real difficulty in engaging with Ms Anderson. They sought to have her address the various issues they raised with her, principally around her demeanour and latterly her hair, but the various *pep talks* administered by Ms Phillips were not achieving the desired result. It was for that reason that Clip Joint decided to take Ms Monkhouse's advice and escalate the discussions to a more formal level with the meeting of 26 March 2008. Of course that meeting was not successful and resulted in Ms Anderson leaving the workplace never to return.

[32] Rather than attempting to engage with Ms Anderson in a less draconian fashion, Clip Joint decided to again escalate matters by writing the 31 March letter, which I described earlier as *extraordinary*. It is an extraordinary letter because it lists 13 matters that Clip Joint finds fault with in Ms Anderson, some of which seem to have been dealt with at the 26 March meeting, some of which are completely new and some of which revolve around the way that Ms Anderson dealt with the medical issue. What I find particularly remarkable about the letter is its intimation that dismissal is an option at the meeting proposed to consider this new list of complaints, and particularly that the date and time for the proposed meeting was within the period that Ms Anderson was away from the workplace on a medical certificate. It is clear from

the letter itself that Clip Joint had Ms Anderson's medical certificate when their 31 March letter was drafted.

[33] No doubt there will be circumstances in which it is appropriate for an employer to insist that an employee attend at the workplace to deal with a disciplinary issue while on sick leave. But in the present case, I think it reasonable to say that a fair and just employer, acting in accordance with the good faith obligations of the statute, would neither have written such a letter nor have insisted that the meeting to discuss it should take place while the employee was unfit for work. It is difficult to escape the conclusion that, having failed to get Ms Anderson to address its entirely legitimate concerns relating to her demeanour in the workplace and her advertising of the business particularly through her own hairstyle, that failure then spiralled quickly out of control by an unreasonable escalation of pressure on this young woman to meet the requirements of her employer.

[34] In the end, my considered view is that this employer placed unreasonable demands on Ms Anderson in the short time that she was in the employment, and that Clip Joint's behaviour with its regular *pep talks* for Ms Anderson and its escalation of the disciplinary process, particularly when Clip Joint knew full well that Ms Anderson was on mandated medical leave certificated by her doctor, was not the behaviour one would expect of a fair and reasonable employer. In my opinion, Clip Joint did not behave in good faith toward Ms Anderson, and in administering the succession of *pep talks* and then on their failure, proceeding with more draconian disciplinary processes, their actions were unjustified and did cause Ms Anderson disadvantage in an emotional sense.

[35] In making this finding, I draw a distinction between the right and duty of an employer to obtain compliance from an employee with its culture and set of values, which is absolutely proper and acceptable, and the process used by Clip Joint in the particular circumstances of this case which seems to me too great an imposition on a young, shy and inexperienced employee.

### **Determination**

[36] For reasons which I have enunciated above, Ms Anderson's claim that she was constructively dismissed fails in its entirety.

[37] However, I am satisfied that Ms Anderson has an alternative personal grievance in that she has suffered disadvantage by the unjustified actions of Clip Joint in the manner in which she was treated during the short period of the employment.

[38] Because I have made such a finding, it is incumbent upon me to consider whether Ms Anderson's behaviour contributed to the personal grievance and, if required, to reduce remedies that would otherwise be awarded in consequence. It seems to me axiomatic from the factual matrix in the present case that Ms Anderson's contribution to the circumstances giving rise to the personal grievance was a significant one. After all, the principal reason that there can be any finding at all against Clip Joint is because of Ms Anderson's apparent unwillingness to see that various of her behaviours were not appropriate to the particular needs of this workplace.

[39] It follows that the compensation that I might otherwise award ought to be reduced by an appropriate amount to reflect Ms Anderson's contribution to her own misfortunes.

[40] Taking all those matters into account, I consider Ms Anderson's personal grievance can be remedied by the payment to her by Clip Joint of a sum of \$500.

### **Costs**

[41] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority