

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 132
5368439

BETWEEN	DONNA MARIE ANGELL Applicant
A N D	LEANNE HAWLEY First Respondent
A N D	HAIR FOCUS Second Respondent
A N D	2L LIMITED Third Respondent

Member of Authority: James Crichton

Representatives: Catherine Murray, Advocate for Applicant
No appearance for Respondent

Investigation meeting: 13 April 2012 at Auckland

Date of Determination: 16 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Angell) alleges that she has suffered a personal grievance by way of unjustified dismissal and/or unjustified action causing disadvantage. Ms Angell says that she was offered employment, accepted that offer and in reliance on it resigned her existing long term employment only to be told immediately prior to commencing the employment that the business had been sold and that there was no work available.

[2] Ms Angell dealt throughout with the first respondent (Ms Hawley). The premises in which the applicant was to work were called Hair Focus (the second

respondent) and the third respondent (2L Limited) has or had its registered office at the business premises formerly occupied by Hair Focus.

[3] Ms Hawley has made various attempts to distance herself from these proceedings, including advising the Authority that the business (however titled) had been sold and that there was no money available. In addition, Ms Hawley made it absolutely plain that she would not attend the Authority's investigation meeting.

[4] Ms Angell was employed in a hair salon where she had worked for four years. She sought a fresh challenge and in particular wanted to move to a salon where there were fewer stylists working. She saw an electronic advertisement for the vacancy that is the subject of this proceeding and made application to Ms Hawley. Her first contact with Ms Hawley was in August 2011 and she was offered employment by Ms Hawley after that initial contact. The fact of the employment is not denied by Ms Hawley.

[5] As a consequence of the offer of employment on a basis which suited Ms Angell, she resigned her longstanding position with another hair salon (Styles Ahead) with the intention of commencing with Ms Hawley on 4 October 2011. Ms Angell's expectation was that an employment agreement confirming the understandings between the parties would be made available for consideration on that start date.

[6] Ms Angell was telephoned on 3 October 2011 at about 4.15pm by Ms Hawley in which the latter told Ms Angell that there was no job because the salon had been sold.

[7] Ms Angell told the Authority how traumatic that advice was. She said she was in the supermarket at the time she got the call and as a consequence of the receipt of the news, dropped and smashed a bottle of juice and immediately suffered a panic attack, including dry retching.

[8] Notwithstanding that advice, Ms Hawley indicated that Ms Angell was to attend at work the following day to deal with the clients that Ms Angell had already had booked in. Ms Hawley told Ms Angell that she would be paid for her work and she has subsequently been paid for four hours' work. Ms Angell disputes that that amount is enough; she says that she effectively worked a whole day with the

combination of some hours in the morning and a more extensive period of work in the evening.

[9] Notwithstanding that dispute, there was an acknowledgment by Ms Hawley that an employment relationship had been entered into. First, Ms Hawley paid four hours pay for the work that Ms Angell did on 4 October 2011 and second she sent an email to Ms Angell at 2.13pm on that same date in the following terms:

To whom it does confirm [sic] I had a verbel [sic] agreement for employment with Donna Angell. I was going to be employing Donna Angell as from today October 4th as a full time stylist at Hair Focus, but I'm now in negatiations [sic] for the sale of this business. The new owner does not wont [sic] to take on the new staff. Donnas [sic] position is now ended. Any further questions phone

Leanne Hawley

[10] Ms Angell then entered into an email exchange with Ms Hawley trying first to get payment for the work she had done and for which there was a verbal undertaking to pay and then to seek some compensation for the loss of the position while she found alternative employment.

[11] This email exchange culminated in an email from Ms Hawley dated 30 October 2011 referring to Ms Angell's communications as "*threats harassment bullying and extortion*". In particular, Ms Hawley maintained in this email (and in subsequent email correspondence to the Authority) that Ms Angell knew the salon was for sale when she applied for the job, a position Ms Angell steadfastly denies. The email concludes with a threat to "*take this serious matter ... further*".

[12] A personal grievance was promptly raised immediately after receipt of this communication.

Issues

[13] The only two issues the Authority needs to consider in the present case are the identity of the employer and whether Ms Angell has been done any wrong by that employer.

Who is the employer?

[14] The Authority is satisfied on the evidence it heard that the employer is Ms Hawley personally. The only payment made to Ms Angell for the very short

period of the employment was from Ms Hawley personally. Ms Angell's bank statement shows the payment from L.R. HAWLEY T/A HAIR. The only other documentary evidence of the employment relationship is an email from Ms Hawley herself which refers in the body of the email only to the trading name of "Hair Focus". There is no reference to the limited liability company, 2L Limited, whose registered office is the same address as the Hair Focus salon and accordingly, Ms Angell cannot be expected to have realised that she was engaging with a limited liability company.

[15] Nothing that Ms Hawley did during the various engagements that the two women had suggested in any way that the employment was through a limited liability company. The only reason that the limited liability company name is known is because the employer caused the following message to be sent to Ms Murray via her agent:

I wish to advise that 2L Limited trading as Hair Focus has sold its business and there will be no surplus funds. The company will be wound up and I am leaving New Zealand permanently in the very near future and I have no plans to return.

[16] Notwithstanding that advice, the law is clear that a party seeking to rely on the protection of limited liability must be explicit in informing parties it contracts with that they are contracting with a limited liability company. There is no evidence before the Authority to suggest that Ms Angell had any reasonable way of establishing that she was employed or to be employed by a limited liability company.

[17] It follows that the Authority is satisfied, on the balance of probabilities, that Ms Angell was employed by Ms Hawley and thus liability, if any, rests with Ms Hawley personally.

Is personal grievance established?

[18] The Authority is satisfied that Ms Angell has proved her claim that she has suffered a personal grievance. It is apparent on the evidence that she was offered and accepted a new position, resigning her old position in consequence. Then, before she had commenced her duties in the new position, she was told the business had been sold and she got a day's work out of this situation but nothing more.

[19] It is common ground that there was an employment relationship. Ms Hawley acknowledges that in her email and by paying Ms Angell for part of the work that she performed. By so doing, she acts in conformity with the belief that an employment relationship existed. The dispute concerns its terms.

[20] The contention Ms Hawley makes, that Ms Angell knew that the business was for sale, is frankly fanciful. First, Ms Angell gave evidence before the Authority on oath and flatly denied that she had any such knowledge. Secondly, Ms Angell did not strike the Authority as a foolish young woman and it would be a foolish person indeed who gave up a permanent full time position, in which she had been employed for four years, in order to take a new position in a business that was for sale. Ms Angell accepted that she knew that another business operated by Ms Hawley was for sale. She knew that because it had been advertised as being on the market for months, but it was not the business that Ms Angell was recruited to work at that was for sale, but Ms Hawley's other business. Ironically, Ms Angell maintains that Ms Hawley is still working at the alternative business and so her threat to be intent upon leaving the country would seem to be an empty one.

[21] The Authority is satisfied that the elements of an employment relationship exist. There was, the Authority is satisfied, an electronic advertisement which attracted Ms Angell's attention for the position with Ms Hawley. As a consequence of an engagement between the two women, the Authority is satisfied that Ms Hawley offered Ms Angell a position and that Ms Angell accepted that position. In testament to that decision, Ms Angell resigned her longstanding employment and expected to commence employment on 4 October 2011 with Ms Hawley, only to be told the day before that the business was sold and that there was no permanent work. While Ms Angell was actually employed on 4 October 2011, her claim relies on her satisfying the Authority that there was an intention that the employment relationship continued beyond that date. The Authority is satisfied there was such an intention. Section 6 of the Employment Relations Act 2000 (the Act) defines an employee as, amongst other things, a person intending to work, and it follows that employment, as a relationship, may be constituted by future expectation rather than present reality. This was such a case.

[22] The Authority is satisfied that Ms Angell entered into the commitment to work for Ms Hawley on the understanding that the relationship would continue beyond

4 October 2011. It seems to the Authority inconceivable that any sensible person would resign a longstanding position of four years' duration in order to take one day's work in a new position and then be left jobless or potentially so. That is the logical consequence of what Ms Hawley is suggesting by her contention that Ms Angell knew that the business had been sold and that there was no guarantee of future employment. The Authority much prefers the alternative view advanced by Ms Angell that she had no idea the business had been sold (although she knew that another business belonging to Ms Hawley was for sale).

Determination

[23] The Authority is satisfied that Ms Angell has made her case that she has suffered a personal grievance by reason of having suffered a disadvantage as a consequence of unjustified actions of her employer. She is entitled to the consideration of remedies. However, before remedies are considered, the Authority needs to consider whether Ms Angell has done anything to contribute to the circumstances giving rise to her personal grievance. The facts do not disclose any such contribution.

[24] To remedy Ms Angell's personal grievance, the Authority directs that Ms Hawley is to pay to Ms Angell the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$3,000;
- (b) A contribution to lost wages in the sum of \$3500 gross;
- (c) Reimbursement of the filing fee of \$71.56.

[25] The Authority is satisfied that the evidence of hurt, humiliation and injury to feelings in Ms Angell's case is plain on the evidence; the blow to her self-esteem when Ms Hawley communicated to her that the business was gone was vividly described by Ms Angell in her evidence to the Authority. Her subsequent physiological responses to the loss of the position listed a catalogue of stress-related symptoms, all of which the Authority thinks likely to have been contributed to by the unjustified action of Ms Hawley in arbitrarily bringing the employment relationship to a premature end.

[26] Similarly, the lost wages are calculated by the difference between the position which Ms Angell expected to be in, having commenced new employment with Ms Hawley, set against the position which she is now in where she works only 27 hours a week as against an expected 40 hours a week and, in consequence, earns about two thirds of what she would otherwise have earned. That computation, together with the week that she was out of work altogether, have been factored into the lost wages calculation.

Costs

[27] In the unusual circumstances of this case, the Authority has decided to determine costs. Ms Hawley made it very clear that she would not attend the Authority's investigation meeting and accordingly the Authority is not persuaded that she is entitled to be heard on costs. She chose not to be heard at all in respect of the claim against her and the matter needs to be disposed of promptly.

[28] The Authority directs that Ms Hawley is to pay \$1,000 to Ms Angell as a contribution to her costs. That amount is established by considering the customary daily tariff which the Authority applies to costs setting and starts from the base that the Authority has recently determined of \$3,500 as the daily rate. This was a matter dealt with very promptly in the Authority at significantly less than a day, but the advocate for Ms Angell is entitled to charge for further attendances because of the difficulty she was put to in serving the proceedings on Ms Hawley. The fact that she was successful in this regard is confirmed by Ms Hawley's various emails to the Authority indicating her position and refusing to participate in the Authority's process.

James Crichton
Member of the Employment Relations Authority