



# New Zealand Employment Relations Authority Decisions

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## Ashtar NZ Ltd v McKay (Auckland) [2011] NZERA 593; [2011] NZERA Auckland 385 (7 September 2011)

Last Updated: 26 October 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 385 5332087 and 5335572

BETWEEN

ASHTAR NZ LIMITED Applicant/Respondent

AND

PAULA MCKAY Respondent/Applicant

Member of Authority:

Alastair Dumbleton

No appearance for Ashtar NZ Ltd

Ian McKay, advocate for Paula McKay Investigation Meeting: 5 September 2011

Determination:

7 September 2011

### DETERMINATION OF THE AUTHORITY

#### Employment relationship problems

[1] Ashtar NZ Ltd and Ms Paula McKay executed an individual employment agreement on 9 October 2010. Under it Ms McKay was employed as a hairstylist working in Ashtar's Special EFX Hair Design salon at 52 Oteha Valley Road, Albany. Ms McKay had previously worked there up to the end of September 2010 when the business was sold to Ashtar, a company owned and managed by Ms Sharron Schanan and Mr Rafed Schanan Sabhan.

[2] On 21 December 2010 and again next day Ms McKay gave to Ms Schanan written notice of her resignation, which stated:

*I would like to inform you that I am resigning from my position as Hairstylist for Special EFX Hair Design.*

*Due to the negative environment shown toward me from management I feel my position here is no longer tenable.*

*My last day of employment will be January 04, 2011.*

[3] When Ms Schanan received the notice on 22 December she deleted words in it and changed the second and last paragraphs to read:

*Due to not performing up to the standard work terms and therefore my position here is no longer tenable by me.*

*My last day of employment will be January 15, 2011.*

[4] Two days later on 24 December 2010, while at home having a meal, Ms McKay was served with a Trespass Notice under the [Trespass Act 1980](#). It was served by an employee of Ashtar and expressly warned her to stay off the place known as "Special efx Design, 52D Oteha Valley Road, Albany". The name of the occupier of the premises was given as Ms Schanan.

[5] The Trespass Notice also warned Ms McKay that she could be punished with a fine of up to \$1,000 or imprisonment for up to three months if she entered the Special EFX Hair Design Salon within the space of two years from service of the notice.

[6] Consequently Ms McKay could not lawfully return to her place of employment and complete the period of notice, as she had been required to do by Ms Schanan in the altered resignation letter. Ms McKay looked for another job and found one in mid February as a hairstylist at the Reflectionz Salon in Browns Bay, some 10km away from her former place of work where she had been ordered not to go to.

[7] On 14 January 2011 Ashtar lodged in the Authority an application against Ms McKay. Ashtar alleged that Ms McKay had breached her employment agreement with regard to its restraint of trade, use of company property and notice of termination provisions. Monetary remedies were sought to resolve the claim.

[8] In a statement in reply lodged in February 2011, Ms McKay rejected all of Ashtar's claims made against her.

[9] On 21 February 2011 Ms McKay lodged an application to the Authority against Ashtar. She claimed compensation for hurt and humiliation and "forced termination" of employment, recovery of unpaid wages and holiday pay. She amended her claim in March 2011 before, on 18 March, Ashtar lodged a statement in reply to it. Ashtar denied the existence of any valid personal grievance claim and presented its view that:

*The respondent acted fairly, reasonably, lawfully in its treatment of the applicant, including in respect of her resignation.*

[10] The Schanans on behalf of Ashtar and Ms McKay attended mediation to try and resolve the claim and counterclaim but were not successful. They were consulted by the Authority and took part in a telephone conference that led to a timetable for the parties to provide written statements of evidence and to the fixing of a date for an investigation meeting. Witness statements that were subsequently provided included those of Sharron and Rafed Schanan and Ms McKay.

[11] In the weekend before the investigation meeting was due to commence on 5 September, Mr Rafed Schanan on behalf of Ashtar emailed the Authority to advise that the company was being put into liquidation. He advised that it did not want to unnecessarily waste the time of the Authority and Ms McKay "so it would formally like to withdraw from these proceedings and thus will not be making any further appearances with regard to this matter." He advised that if Ms McKay was successful with any counterclaim she would have to stand in line with other unsecured creditors of the company.

[12] On 5 September, as expected following the advice given two days earlier, there was no appearance at the investigation meeting by or on behalf of Ashtar.

[13] The matter proceeded in the absence of Astar as the company had been warned it could under the Employment Relations Authority Regulations where a party to an investigation does not attend a meeting and has not been given leave to be absent.

[14] The Authority took evidence from Ms McKay. I am satisfied from it that she has a personal grievance against Ashtar NZ Ltd for which she is entitled to remedies.

[15] Ashtar's claim against Ms McKay is now determined to have been abandoned or discontinued and no findings or orders are required to be made against Ms McKay.

[16] I find that there was unreasonable conduct by Ms Sharron Schanan in particular toward Ms McKay during the employment, leading Ms McKay to resign. That conduct included preventing her from doing basic work as a hairstylist without there being any sort of performance management or improvement process. Ms Schanan had a habit of giving instructions and then immediately changing her requirements when they were being met. Ms McKay was undoubtedly disadvantaged by this unreasonable behaviour and gave her resignation to escape from it, although she remained, I find, ready to work for the two week period of notice required under the employment agreement.

[17] However when Ms Schanan served a Trespass Notice on Ms McKay, because of its purpose and legal effect she brought about the dismissal of an employee during a notice period. I find the dismissal was unjustified. Ms McKay was not told until mediation that the reason for the Trespass Notice was theft Ms Schanan had suspected her of committing. Ms McKay denies that allegation and there is no evidence at all to support it.

[18] I therefore find that Ms McKay was unjustifiably dismissed on 24 December 2010 when she had intended to work out the notice period that had been set or agreed to with Ms Schanan. The employer unreasonably and unjustifiably prevented her from doing so.

[19] As remedies, compensation is claimed of \$8,000 for humiliation, hurt feelings and distress. Ms McKay also claims to recover the wages in lieu of the notice period that she was not allowed to work as well as holiday pay based on her earnings during the employment. The total of the two amounts is \$1,828.52.

[20] I consider that Ms McKay was badly treated in the circumstances and was humiliated by the conduct towards her of Ms Schanan, a much younger woman. As well as that there were allegations of dishonesty made without foundation and the

issue of a Trespass Notice against her preventing her from being at the place of employment. In February 2011 she found her name was still being used by Ashtar in an on-line advertisement, which referred to her as an employee of Special EFX Hair Design.

[21] I consider that compensation of \$6,000 is appropriate in the circumstances.

[22] I also find that Ms McKay has established her claim to recover lost wages of \$1,828.52, including holiday pay. She was not paid for the week she had worked up to her dismissal or for the two weeks of the notice period which she was prevented from working out.

### **Determination**

[23] For the above reasons Ashtar NZ Ltd is ordered to pay Ms Paula McKay \$6,000 compensation pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) and \$1,828.52 as arrears of wages and holiday pay.

[24] Ashtar NZ Ltd shall pay interest at 5% per annum on the arrears of wages and holiday pay, from the date Ms McKay's claim was lodged in the Authority, 21 February 2011, until the principal sum has been fully paid to her.

A Dumbleton

**Member of the Employment Relations Authority**

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