

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 88/09
5140798

BETWEEN NADINE JOY CLARKE
Applicant

AND B HAIR AND BEAUTY
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Clare Stanley and Emma Cooney for Applicant
No Appearance for Respondent

Investigation Meeting: 18 June 2009 at Wellington

Determination: 18 June 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant has applied for an investigation into her employment relationship problem that she was unjustifiably dismissed and not paid wages owing prior to her dismissal.

[2] The respondent was served with the application. There has been no reply from the respondent or any attempt to respond.

Non appearance of the respondent

[3] There has been no appearance for or by the respondent at the Authority's investigation meeting. There has been no good cause for the non appearance given attempts to contact the respondent at the time the investigation meeting was due to start. I was satisfied that the respondent had been served with the notice of the

investigation meeting. Indeed to be certain the support officer sent two notices of investigation meeting and the record shows they were both received at the address for service. I decided to proceed as if the respondent has attended or been represented under clause 12 of Schedule 2 of the Employment Relations Act 2000.

The facts

[4] Ms Clarke commenced employment as a hair stylist with B Hair and Beauty Limited (BHB) on 17 July 2008. There was no written signed employment agreement. The terms were by verbal arrangement between Ms Clark and Bianca Blake director that:

- Ms Clarke would work on the days the salon was open, weekly Tuesday to Saturday. She says that it was arranged that she could turn up before her first client, but she says she turned up early anyway.
- Ms Clarke's hours varied each day, and she often worked late.
- Ms Clarke was paid weekly by direct credit on Wednesdays for the proceeding week's wages.
- Ms Clarke's wages were calculated based on 60% of how much she earned in a week, less tax. She was entitled to 10% of any retail sales.

[5] Ms Clarke worked on Tuesday 19 and Wednesday 20 August 2008 and then took the rest of the week off for a family bereavement; Thursday, Friday and Saturday. She was not paid her wages when they fell due on 20 August for the previous week commencing 11 August. Ms Clarke says that the wages were always late.

[6] On Friday 22 August 2008 she rang to enquire where her wages were. She says she was informed the money had been deposited in the bank and so she made inquiries with the bank and found out that no money had been deposited. She says she made further telephone calls to the respondent and that these went unanswered.

[7] On 26 August she says she arrived at work ay 9.05am, and was told by the manager, Ms Blake, that she was late. She says she had no client at that time. Ms Clarke says she asked for her wages and was then informed by Ms Blake that she

needed to attend a meeting scheduled for 12.00pm "*to be dealt with*". She was required to leave the premises and told that the Police would be called.

[8] Ms Clarke says she felt that she had been dismissed. She says she has not been paid her wages for two weeks due on 13 August 2008 and 20 August 2008 for which she says she worked. She estimates her wages were an average of \$700 for the two weeks and has claimed \$300 for the next period before she was dismissed on 26 August. I have used \$700 because it has been used as the average for her grievance claim for lost wages. I accept that the wages paid were after tax.

[9] Ms Blake sent Ms Clarke two letters, one dated 27 August and the other dated 28 August 2008 requesting Ms Clarke to attend an investigation concerning her performance and behaviour and that she could take a support person, she would be given an opportunity to give an explanation and if any misconduct or serious misconduct was established what disciplinary action could follow, including dismissal. Ms Clarke sought help from a lawyer and a personal grievance was raised on her behalf and a claim made for the wages not paid (letter dated 22 September 2008). There was no reply to that letter.

[10] Attempts were made for mediation, but Ms Blake failed to attend twice when arrangements had been made by Ms Clarke's lawyers.

Determination

[11] I directed on 22 April 2009 that the respondent provide a copy of the employment agreement, wage and time records, holiday records and any other relevant documents. Despite proof of service on the Authority's file nothing has been heard from the respondent.

[12] I accept the evidence produced by the applicant, including her evidence given to me at the investigation meeting. I accept the evidence in the absence of anything being challenged by the respondent. There have been no replies and no responses from the respondent. The respondent has not complied with the directions of the Authority to produce documents. There has been no appearance or representation for the respondent at the investigation meeting.

[13] The respondent's reprehensible behaviour in failing completely to co-operate with my investigation means I have received nothing from the respondent to hear its side of the story and any defence to the claims. In addition I note that there was no written employment agreement, despite being the most basic requirement in employment law to provide a written employment agreement.

[14] I find that Ms Clarke was dismissed when she was told to leave and return later for an investigation meeting. Ms Clarke says she was told by Ms Blake that she needed to attend a meeting scheduled for 12.00pm "*to be dealt with*". She was required to leave the premises or the Police would be called. However, no other arrangements were put in place for that meeting to continue after Ms Clarke had been told to leave or the Police would be called. I conclude that Ms Blake got upset about Ms Clarke's lateness and reacted without any reasoning, until after the event, when she sent her letters dated 27 and 28 August. Ms Clarke's evidence was supported by texts. I am satisfied that the applicant would have reasonably believed that she had been dismissed because of what she was told or at the very least suspended. Ms Blake did not sufficiently follow up her request for a meeting, and in any event Ms Clarke reasonably decided not to attend another meeting that she was requested to attend from a text, set for 8 September. By this time she had not been paid any wages due. Furthermore, Ms Blake's conduct of failing to reply to Ms Clarke's lawyer's letter dated 22 September raising the grievance and pay claim, and Ms Blake's failure to attend mediation twice when it had been arranged, support my conclusion. Ms Clarke was entitled after this to consider her employment had been terminated.

[15] Ms Clarke is owed the sum of \$1,700 for work before her last day on 26 August 2008 that she says she was not paid for. The respondent, despite my direction to provide wage and time records, has not produced anything to challenge the applicant's claim, and because of the respondent's failure to comply with the direction to produce the wage and time records, I accept the applicant's claim.

Remedies for the personal grievance

[16] The applicant has a personal grievance. She was unjustifiably dismissed. She is entitled to remedies for a personal grievance.

[17] There was no contributory fault. The applicant is entitled to her claim for 3 months lost wages due to her dismissal. She has mitigated her loss by attempting to find other work. Her loss of wages amounts to \$8,820 after tax.

[18] Ms Clarke is also entitled to compensation for humiliation and loss of dignity and injury to feelings. I assess this at \$4,000 because there was evidence from Ms Clarke of an impact of the dismissal on her feelings. I accept that her feelings were affected by the manner in which the dismissal occurred and a financial impact that followed and was linked to her loss of income due to the dismissal. A case of another worker, with an entirely different employer, who received a greater award from the Authority, was submitted for comparison by Ms Clarke's representative. I have decided that whilst the two cases have some similarities there was a significant difference in the length of service. Also, each case has to be determined on their merits and any compensation must be based on the evidence of the particular circumstances. I have assessed Ms Clarke's evidence and it accords more with an award for \$4,000 compensation.

Conclusion

[19] B Hair and Beauty Limited is to pay Nadine Clarke the following:

- The sum of \$1,700 wage arrears due on 26 August 2008 under s 131 of the Act.
- The sum of \$8,820 for three months lost wages due to her dismissal under s 123 (1) (b) and s 128 (2) of the Act.
- The sum of \$4,000 compensation under s 123 (1) (c) (i) of the Act for humiliation, loss of dignity and injury to feelings.

Costs

[20] Ms Clarke is legally aided. Ms Clarke is also entitled to costs because the conduct of the respondent has put her to the unnecessary costs of the Authority's investigation. She also attended mediation where the respondent failed to turn up twice. It was more than reasonable that the applicant obtained representation for help. Costs follow the event. The costs are at the higher end of the tariff because of the

employer's failure to co-operate and for putting the applicant to unnecessary expense that could have been avoided or minimised. The respondent's failure to attend mediation has meant that costs have not been able to be saved, which is one of the purposes of going to mediation before using the Authority. I can only conclude that the employer has deliberately decided not to defend the matter on all the issues, and at least if that is so, has contributed to the saving costs for a full day as set down. However, the applicant has been required to produce evidence and her counsel had to prepare in the eventuality that the respondent did turn up. Therefore my starting point is \$3,000. Because more costs have been incurred by the applicant through the respondent failing to attend mediation, failing to reply and respond and failing to provide documents that it should have had in its possession, I am going to award this sum as a contribution to the applicant's costs. This also recognises that the applicant could not avoid the investigation meeting and the preparation for it. She is also entitled to the filing fee of \$70.

[21] I order B Hair and Beauty Limited to pay Nadine Clarke \$3,000 as a contribution to her costs, plus the \$70 filing fee.

P R Stapp
Member of the Authority