New Zealand Employment Relations Authority Decisions

Court v Loose Ends Limited [2011] NZERA 41; [2011] NZERA Christchurch 13 (26 January 2011)

Last Updated: 11 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 13
5294911

BETWEEN LAURA ANNE COURT

Applicant

AND LOOSE ENDS LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

M B Loftus

Dale Lloyd, Counsel for Applicant Peter Zwart, Advocate for Respondent

28 July 2010 at Queenstown

4 August and 16 August from Applicant 6 August 2010 from Respondent

Determination:

26 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Laura Court, claims that she was unjustifiably dismissed, albeit constructively, from her employ with the respondent, Loose Ends Limited.

[2] Ms Court claims that she was compelled to resign given the conduct of her employer. She claims:

- A unilateral reduction to her rate of pay;
- Unwarranted criticism; and
- The unilateral variation of some terms in her contract of employment.

[3] The respondent denies the allegation and asserts that Ms Court resigned of her own volition.

Background

[4] Ms Court is a qualified hairdresser and having applied for a position as a senior stylist with Loose Ends, was interviewed by Ms Sheryn Stone, the Manager and a part owner, on 21 March 2009. Ms Stone states that she was looking for an experienced senior who had excellent cutting and colouring skills and was able to work independently. She says that Ms Court *was very clear about the fact that she had all the necessary skills to work at the level I required.*

[5] The two discussed hours of work and pay at the interview and agree that an offer of employment was made. There is, however, some disagreement over the terms. Ms Court says she understood she was to be paid $18 per hour and work forty hours, Tuesday to Saturday, each week. Ms Stone concurs on the issue of pay ($18 per hour) but disagrees that 40 hours per week was agreed. She says she advised that while the salon is open six days a week, staff work Tuesday to Saturday while she worked alone on Mondays. She explained the core opening hours and the fact that this meant that staff normally worked 36 hours per week, though this could increase during the busy tourist seasons.

[6] Ms Court says she was given an employment agreement to take and peruse and that she read it after she returned home some 190 or so kilometres from Queenstown. She says she noticed that it recorded the hours as being no less than thirty per week, Monday to Friday and decided to raise this when she returned. Ms Stone denies she gave Ms Court the agreement at the interview and says that occurred on 20 April.

[7] 20 April was the day Ms Court went in to the salon to collect keys and a

uniform. She says that whilst there she asked Ms Stone about the hours of work and:

She [Ms Stone] stated that if I wanted to work 40 hours then I would have to work Monday. This differed to what was discussed earlier and I was surprised that she would want me to work six days, after she stated at the interview her belief that staff should have two full days' break [8] Ms Stone does not comment on whether or not the hours of work were discussed on the 20th and when asked during the investigation meeting as to why the agreement said 30 hours when she expected 36, she advised that it was because staff would be paid no less than 30 hours if the company found itself unable to offer that amount of work though this was never explained to Ms Court. She also believes that the keys were not handed to Ms Court that day.

[9] Irrespective of whose recollection is correct, there is no doubt that Ms Court commenced, as agreed, on 21 April and was to work approximately 36 hours per week over five days - Tuesday to Saturday unless seasonal pressure required an increase. As events transpired she actually averaged 33 hours per week during her tenure and the agreement remained unsigned. Ms Court comments:

I was criticised from my first day on the job ... she questioned my colour decisions and commented about my abilities in front of customers. She stated that I "must have been sitting on the shelf" in my last job. Ms Stone constantly intervened when I was cutting hair and made comments to clients. [This] *continued throughout my employment with Ms Stone. I felt my work was never good enough for Ms Stone even though the clients were happy with my work*

[10] Ms Stone agrees that there were difficulties. She says:

It became apparent to me on her first day of work that Laura was not performing at the level that she had talked about at her interview or referred to in her CV

[11] Ms Stone then cites various examples of Ms Court's alleged inadequacies before accepting she made the "shelf comment. She believes she did so on the Friday amidst a conversation over her concerns about Ms Court's performance and the appropriateness of the pay rate.

[12] Ms Stone says:

I also explained on that Friday (23 April 2009) that I felt that because of her lack of experience the $18.00 offered to her was too much and suggested instead that we pay her $16.00 per hour moving to $17.00 over the next few weeks as her work improved, and then to $18.00 when she was working at the appropriate level. She was disappointed but I thought that she reluctantly accepted this. I asked her if she was comfortable with it and she said "I guess so".

[13] Ms Court simply says that when she arrived at work on her third day Ms Stone advised that her pay was being reduced to $16 per hour and that she needed *to get up to speed.* Ms Court says she was stunned by this and did not know how to answer.

[14] Ms Court says they again discussed her pay rate the following week and Ms Stone replied by advising that she would increase the rate to $17 per hour. Ms Court says she did not agree but felt there was little she could do. Ms Stone claims that the increase was agreed and that it occurred during a discussion during which she advised that she felt Ms Court's work had improved slightly though serious concerns remained.

[15] The employment agreement remained unsigned throughout. Ms Stone says:

During the first few weeks I asked Laura a few times to sign and bring her contract in. I explained that we had to have a signed agreement. I asked her if there were any issues with it and suggested that she should get it checked out. In June the employment agreement was audited by the Labour Department with regards holiday pay. I sought advice on the employment agreement and decided that the old agreement was not suitable. I therefore got a new agreement drawn up and prepared so that it would be ready when the new stylist [then being sought to replace another who had resigned in early June] *started. Because Laura had not signed her original agreement I decided to put the new one to her. I rang her on her day off on Monday 29 June 2009 and*

explained that I wanted to change the employment agreement and asked her to bring the old contract into work the next day.

[16] Ms Court agrees Ms Stone called that day and says she was asked her to bring the employment agreement with her and told she would be getting new one. Ms Court says she become nervous, sought her mothers' advice and was told to copy the original. She did.

[17] Ms Court goes on to say:

I took the agreement to work on Tuesday 30 June 2009 and Ms Stone spoke to me after work. She asked for the agreement. I handed it to her. In front of me Ms Stone proceeded to tear up the agreement I had been given at the interview, and gave me a new agreement. She told me that if I did not sign the new agreement in a couple of days and show some improvement by the end of the week she would have to "let me go" and that I would have "no trouble finding work in Queenstown".

[18] Ms Stone agrees the conversation occurred after work. She says

I explained that the old contract needed to be changed and that because she had not signed it, it was no longer available. She gave it to me and I ripped it up and threw it away. I asked her to take the new agreement away and have a look at it . I explained that it was mostly the same but that there were some changes. I pointed out the fact that it had some changes including a trial period. This agreement had been drafted to be a common agreement for all new employees. The document I gave her was a blank document. I expected that we would need to talk about its terms before agreeing it. I didn't expect or ask her to sign it without talking to me about it.

[19] Ms Stone says they went on to discuss the fact that she still had concerns about
Ms Court's skill level and that the discussion concluded with Ms Court saying

. something like "Are you basically telling me that I have to get my shit together". I replied that I wouldn't say it like that, but, "yes".

[20] Ms Court says she was simply told that there was a trial period clause inserted in the new agreement and that it would apply to her. Given the comments about her ability, she felt somewhat nervous. She subsequently concluded that the contractual changes, along with the treatment to which she had been subjected, meant continuing was not tenable. On 1 July she sent a text to Ms Stone advising she could not take any more and would not be back (or words to that effect).

[21] That was effectively the end of the employment relationship but not the last meeting of the two. Later that day (1 July) Ms Court, accompanied by her mother, came to the salon to return the employment agreement, key and uniform and pick up her tools. There is some disagreement over exactly what was returned when and when, exactly, Ms Court collected her tools but there is no debate that there was an acrimonious, and public, discussion when Ms Court left the salon.

Determination

[22] Before continuing, I must comment on the fact that there were significant factual differences. Some have been commented on above but a number of others were also aired, especially concerning Ms Court's competence and Ms Stone's reaction. As a result, both partiers suggest I resort to findings of credibility. I think not. Both Ms Court and Ms Stone contradicted themselves at various times but I do not believe this resulted from any desire to mislead. The passage of time must have had an obvious effect on recollections and, perhaps more importantly, many events which may now be significant would have appeared inconsequential at the time. In any event, I can reach a conclusion on the basis of uncontested evidence and without recourse to findings of credibility.

[23] Ms Court is claiming that she was constructively dismissed.

[24] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

i. An employer gives an employee a choice between resigning or being dismissed.
ii. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
iii. A breach of duty by the employer causes an employee to resign.

[25] Ms Court contends a combination of (ii) and (iii) above. She claims that the two attempts to amend her employment agreement amount to breeches sufficient to cause her to resign and, when combined with the criticism, amounted to a course of conduct designed to obtain her resignation.

[26] That a unilateral and substantial variation to an employee's terms and conditions of employment is a breach that can render a subsequent resignation a constructive dismissal is well established. That a reduction in pay can constitute such a breach is also well established (see, for example, *Gorrie Fuel (SI) v Gittoes* EmpC Christchurch CC21/07, 8 November 2007).

[27] There is no dispute that Ms Court's pay was reduced from $18 to $16 per hour on her third day. That the resulting

reduction, some 12%, is significant goes without saying in my view. The only question is whether or not the reduction was imposed unilaterally. Ms Court says it was; Ms Stone says no.

[28] Notwithstanding Ms Stone's view that she thought Ms Court had agreed, I conclude the answer is yes - the change was unilaterally imposed. In reaching this conclusion I rely on answers Ms Stone gave when being questioned by Ms Court's counsel. Having conceded that she had significant concerns, Ms Stone was asked whether her reaction was simply to drop the pay. Her response was that *it wasn't quite like that* - Ms Court was lacking skills and she (Stone) was concerned. She had a chat and felt she had to act. There was no suggestion that Ms Court had actually agreed. Ms Stone was given a second chance to suggest Ms Court had agreed when being questioned about the 'shelf comment and again failed to take it.

[29] There is then the issue of the trial period and the insertion of a clause permitting dismissal at will during that period. In her evidence in chief Ms Stone appears to be implying that the agreement and its content remained negotiable and that if Ms Court had concerns about the clause, she should raise it for discussion. The implication that the trial period provision may subsequently be removed did not, however, survive subsequent questioning. In answer to a question from Ms Court's representative Ms Stone agreed that she intended imposing the change on Ms Court and that the provision would apply.

[30] That this was a disadvantageous change is obvious. It would have placed Ms Court in a position that had not applied previously, namely that she could be dismissed at will. Given Ms Stone's negative view of her abilities, this would obviously place Ms Court in a disadvantageous position by significantly increasing the possibility of termination.

[31] That leaves the issue of Ms Court's skills (or alleged lack thereof) and Ms Stone's various reactions. The fact there are a number of disagreements over details is, in my view, insignificant. Ms Stone made it clear that she was dissatisfied and that she applied pressure on Ms Court to perform at what she considered an acceptable standard. In doing so, she probably committed yet another contractual breach.

[32] The original agreement contained a detailed performance management provision which required formal meetings at which areas of dissatisfaction would be outlined and discussed with outcomes recorded in writing. None of this occurred with Ms Stone instead resorting to other approaches including the unilateral variation of terms and conditions. That is inappropriate in the circumstances.

[33] Ms Stone's suggestion that the provision did not apply due to Ms Court's failure to sign is, in my view, irrelevant. It was in the proffered agreement and notwithstanding the failure to sign the parties conduct consummated the agreement. Ms Court commenced work and Ms Stone allowed her to do so. In any event, the provision in question remained in the new agreement confirming an intention, at least from Ms Stone's perspective, that it apply.

[34] Both contractual changes are significant. Both were imposed and both are, in my view, serious enough to allow Ms Court to claim the existence of a breach sufficient to cause her to resign. Added to this is the criticism of Ms Court's work. Ms Stone emphasised a view that she considered this serious yet failed to address it the manner required by the agreement thus constituting a third probable breach. When considering these occurrences holistically, I have no doubt that Ms Court was, as claimed, constructively dismissed. She therefore has a personal grievance.

[35] The conclusion that Ms Court has a personal grievance means I must consider whether or not she contributed to the situation in which she found herself. In this case there is the obvious issue of skill and ability but I dismiss that as a factor and conclude there was no contribution. I take this approach for three reasons.

[36] First, I am not satisfied that Ms Court's performance was as poor as suggested. On one hand I have Ms Stone who readily accepted that while she had many years experience in the industry she gained professional currency from suppliers and had not attended any recent training. On the other hand, Ms Court had recently qualified. She had gained a number of awards in so doing and the evidence of her previous employer, who is also a Board Member of the industry training organisation, suggested an extremely competent employee.

[37] Second, and even if I am wrong about Ms Court's ability, Ms Stone brought the situation upon herself. She took Ms Court's curriculum vitae at face value and failed to perform any reference checks.

[38] Lastly, and assuming Ms Stone's concerns are well founded, her failure to address them in accordance with the required procedure means that I am deprived of contemporaneous empirical evidence upon which I can base a finding of contribution.

Remedies

[39] Ms Court seeks lost wages in the amount of $1,541 and compensation for humiliation (s.123(1)(c)(i)).

[40] The wage claim represents a net loss from the time of resignation through to the attainment of a permanent position in which Ms Court is still employed. It is the amount she would have earned at Loose Ends minus the amount actually earned through a combination of the unemployment benefit and another job she had in the interim at an establishment known as Henry's.

[41] Ms Court's evidence about the amount of loss and her attempts to mitigate went unchallenged, though the same could not be said about the circumstances in which she lost the job at Henry's and in that tale lies a problem.

[42] Ms Court was offered a permanent job at Henry's but the offer was subsequently withdrawn. Ms Court contends Ms Stone played a part in that withdrawal. Ms Stone denies the claim and is supported in her denial by the employer in question. I must conclude that there is insufficient evidence to support Ms Court's claims in this regard so her wage claim ends when she got the job at Henry's some three weeks after resignation. Three weeks earnings at the contractually agreed rate ($18) amounts to $1782. That exceeds the amount sought and raises the question of whether or not I should reduce the amount by the benefit received.

[43] The answer is no - Loose ends should pay the full loss of $1782. The taxpayer should not be asked shield an employer from the damages that would otherwise flow from its unjustified actions. The employer should incur the full loss and then M s Court should address the issue with the Ministry of Social Development and reimburse the benefit previously paid.

[44] Ms Court seeks $10,000 under s.123(1)(c)(i). She offered little direct evidence in support of the claim, though supporting witnesses did. It is clear she suffered serious angst, and there was uncontested evidence that the hurt was such that she has now shunned the career for which she trained. In the circumstances I consider an award of $8,000 appropriate.

Counter claim

[45] The respondent, in its statement in reply, lodged a counter claim. It contends that Ms Court mislead it as to her skills; that such conduct was deceptive and constituted a breach warranting the imposition of a penalty.

[46] The fact Ms Court has been successful tends to undermine the claim but, in any event, my conclusions in respect to Ms Court's abilities (see 36 above) means the respondent has failed to make its case. The respondent's penalty application is dismissed.

Orders

[47] For the reasons given the following orders are made:

> (i) The respondent, Loose Ends Limited, is to pay to the applicant Ms Laura Court, the sum of $1,782.00 (one thousand, seven hundred and eighty two dollars) as reimbursement of wages lost as a result of Ms Court's unjustified dismissal; and
> (ii) The respondent is to pay to the applicant a further $8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[48] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Ms Court wishes to seek costs, she is required to file her application within 28 days of this determination. A copy shall be served on the respondent who is to file any response within 14 days of the application.

Mike Loftus

Member of the Employment Relations Authority