

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 91/10
5281298

BETWEEN

TESSA DYER
Applicant

A N D

BEAUTY MANAGEMENT
RICCARTON LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Jeff Goldstein, Counsel for Applicant
Joseph Brooks, Advocate for Respondent

Investigation Meeting: 12 and 18 March 2010 at Christchurch

Determination: 16 April 2010

DETERMINATION OF THE AUTHORITY

The identity of the respondent and investigation process

[1] The statement of problem in this matter was lodged against Liz Jungwirth and Joseph Brooks, trading as Riccarton Beauty Co and served at the physical address of the beauty salon at a Christchurch mall. Following service of the statement of problem, there was a voice message left on the telephone of the support officer at the Authority from Ms Jungwirth advising that the business was run by a person the support officer thought she referred to as Mr *Bournville*, who had the management contract for the business.

[2] Following receipt of that voice message, the support officer wrote to Ms Jungwirth on 24 September 2009 advising her that if she and Mr Brooks were not the employer of Ms Dyer, she would need to write to the Authority advising of this and provide documentary evidence supporting the view that Mr Bournville was the employer together with details so the Authority could contact Mr Bournville.

[3] No response was received to that letter and, on 19 November 2009, the support officer wrote to Mr Brooks and Ms Jungwirth and advised them that there would be a telephone conference with the Authority on Wednesday, 2 December 2009. I am satisfied that this letter was duly delivered in accordance with track and trace information provided by the courier.

[4] There was no response to that letter and a telephone conference with the Authority duly took place with Mr Goldstein on 3 December 2009. The Authority set the matter down for an investigation meeting on 12 March 2010 and issued a notice of direction advising of this and drawing the parties' attention to the consequences set out in the attached notice of investigation meeting of non-attendance. The Authority asked that any further documents or statements of evidence be lodged by 5 March 2010.

[5] I am satisfied that the notice of direction and notice of investigation meeting were served on both respondents and at the physical address of the beauty shop from courier information provided.

[6] On 26 January 2010, a support officer at the Authority received a telephone call from Mr Brooks who requested documents be sent to him about the matter. Mr Brooks was duly provided with a copy of the notice of direction and notice of investigation meeting.

[7] Mr Brooks attended at the investigation meeting on 12 March 2010. There was a short adjournment to allow the Authority to provide him with copies of the statement of problem lodged in this matter and other relevant documentation and give time for him to consider these. The Authority then resumed its investigation meeting and heard evidence from Ms Dyer including evidence about the identity of her employer. This was in circumstances where Mr Brooks clearly stated neither he nor Ms Jungwirth employed Ms Dyer.

[8] Ms Dyer commenced her employment on 31 May 2009 as a beauty therapist and a written employment agreement was provided to and signed by Ms Dyer about a week later. The date of signature alongside Ms Dyer's name is 9 June 2009 although Ms Dyer said that she was not provided with a copy of the employment agreement until after the relationship terminated in September 2009.

[9] The agreement is expressed to be between Ms Dyer and her employer. The name of her employer is blank in the agreement although following the space for a signature there are the words (*hereinafter referred to as "the company"*). The agreement was not signed in the space provided on the last page for a company representative to do so. Somewhat surprisingly because it is not signed someone has dated that part of the agreement 7 June 2009.

[10] Ms Dyer did have a job description. It is dated 1 June 2009 and refers to the place of work as Beauty Co Riccarton and that is signed by Mark Willenthal who is described as the General Manager. The job description refers to a company, Beauty Style Management Limited Riccarton. There is, however, no such company of that name.

[11] Ms Dyer said she was offered the role of beautician and given the employment agreement by a Mark Willenthal. She said that initially she thought he was her employer but then when he referred to the owners of the business as Mr Brooks and Ms Jungwirth she thought they were her employers. She did accept that, although they were in the salon from time to time on what appears to be a fairly regular basis, she never discussed any matters relating to her employment with them.

[12] Mr Brooks said that a management company had been set up to manage the salon and employ staff. He said that his company had the lease for the premises in which the salon operated but that that company had entered into an agreement with Mr Willenthal who had in turn formed a company to manage the salon and employ staff. The Authority asked Mr Brooks to obtain some further information about that matter and any relevant contracts that may assist in identifying the employer of Ms Dyer. There was also some discussion about the availability of Mr Willenthal. Mr Brooks said that Mr Willenthal was unavailable at the time because he was overseas but that he would be returning in a few days and would be available to talk to the Authority.

[13] A further brief meeting took place on 18 March 2010. Mr Goldstein attended as did Mr Brooks. Mr Willenthal did not attend. Mr Brooks provided a copy of an agreement between a company called Red Door Trustees Limited and Mark Willenthal. Mr Brooks advised that the company set up to manage the salon by Mr Willenthal was called Beauty Management Riccarton Limited, although at the date of the resumed investigation meeting, Mr Brooks advised at the meeting that he was

at that time the director of Beauty Management Riccarton Limited rather than Mr Willenthal.

[14] Mr Brooks said that he consented to the respondent being changed to Beauty Management Riccarton Limited because that was the company that employed Ms Dyer. Mr Goldstein advised that he would take instructions from his client. Mr Goldstein later advised the Authority that he consented to the name change of the respondent to the company Beauty Management Riccarton Limited.

[15] This company was incorporated on 4 June 2009. That was after Ms Dyer commenced her employment but before she was presented with and signed her employment agreement. I am further reassured that this is in all probability the correct identity of the respondent because it is a name not too dissimilar to the name appearing on the job description. I am also satisfied that the Mr Bournville the support officer thought was referred to by Ms Jungwirth as the manager of the business was in all probability Mr Willenthal.

[16] The name of the respondent is therefore Beauty Management Riccarton Limited.

[17] Toward the end of the meeting of 18 March, I advised Mr Brooks that because he was not a witness to any of the events leading up to the termination of Ms Dyer's employment relationship with Beauty Management Riccarton Limited, there was really no evidence that would assist me from the company. It was clear from comments made by Mr Brooks from time to time that he did not accept Ms Dyer's evidence and in particular the reason she said she had been dismissed. I advised Mr Brooks that he had until the close of business on Thursday, 25 March 2010 to inform the Authority if there was any evidence he could provide in that respect, including evidence from the manager Anna. Ms Dyer said in her evidence that it was Anna who advised her that she no longer had a job and the reason why that was so.

[18] Nothing further has been heard from Mr Brooks. Mr Willenthal although having the opportunity has not contacted the Authority although he was also not present on the day the employment relationship ended.

[19] I have therefore determined this matter on the basis of Ms Dyer's evidence and that of her mother, Helen Dyer, that I heard on 12 March 2010.

Employment relationship problem

[20] Ms Dyer says that she was unjustifiably dismissed from her employment with Beauty Management Riccarton Limited on 7 September 2009. She seeks reimbursement of lost wages from 8 September 2009 until she was able to obtain new employment on 22 September 2009 together with compensation.

[21] There is also a claim for penalties. The first claim is the failure of the company to provide an employment agreement under s.65 of the Employment Relations Act 2000 that set out the employer's name. The second claim for a penalty is in relation to a failure under s.130 of the Employment Relations Act 2000 to provide, when requested, time and wage records.

[22] Ms Dyer was employed as a beautician with Beauty Management Riccarton Limited. In her evidence, she said she had been told that she was on a three month trial but she did not agree that that was in fact the case. I have considered the employment agreement I was provided with and I note there is no reference to a trial period in it. Ms Dyer is referred to in clause 2 of the employment agreement as being considered a full time employee of the company.

[23] Ms Dyer did not consider there were any issues or concerns expressed to her about the quality of her work. She did state in her evidence that there was pressure on the beauticians in terms of meeting daily targets.

[24] On 7 September 2009, Ms Dyer undertook her duties at the salon as normal and towards the end of the day when she was undertaking cleaning she was approached by the salon manager, Anna. Ms Dyer said that Anna advised her that she [Ms Dyer] was too expensive and that the salon could not afford her. Ms Dyer said that Anna told her it was Ms Jungwirth who wanted Ms Dyer advised that the salon could not keep her on. Ms Dyer said that she was advised by Anna that she could work until Wednesday, 9 September and that she would then be paid for that week.

[25] Ms Dyer said that after the discussion with Anna she telephoned her father straightaway and he came to pick her up because she was so upset.

[26] Ms Dyer's mother, Helen Dyer, said that she recalls her daughter being so upset that she could hardly talk on the telephone and she recalled her being in tears. Helen Dyer said her daughter told her the reason for her dismissal was that she was

too expensive and that the salon could hire cheaper workers. I accept the evidence of Ms Dyer that the only reason she was given for her dismissal on 7 September 2009 was that the salon could not afford to keep her on and that, for whatever reason, she was considered to be too expensive.

[27] Ms Dyer said in her evidence that she felt very humiliated and that her work had been downgraded. She said that she was very distraught. One of the concerns for Ms Dyer was that she did not know the reasons for her dismissal. Ms Dyer was able to obtain other employment without a reduction in her pay on 22 September 2009.

Determination

Personal grievance

[28] The Authority is required to determine in this matter whether there was a dismissal, and if there was, whether it was unjustified. The Authority is required to undertake an assessment of justification in accordance with the test set out in s.103A of the Employment Relations Act 2000. It needs to determine, on an objective basis, whether what the employer did and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[29] I find that Ms Dyer was taken by surprise when she was told by Anna that the salon could not afford to keep her on. This was done in the absence of any fair and reasonable process whatsoever. I am satisfied that Ms Dyer was, on 7 September 2009, dismissed from her role as a beautician following that conversation although advised that there was work until 9 September 2009.

[30] I have considered whether there was any substantive reason to dismiss Ms Dyer. I am satisfied there was no evidence of any basis for a conclusion that the salon could not afford to keep Ms Dyer on. In conclusion the absence of any fair process leading to and the decision to dismiss Ms Dyer on grounds that the salon could not afford to keep her on were not what a fair and reasonable employer would have done in all the circumstances.

[31] I find that Ms Dyer has a personal grievance that she was unjustifiably dismissed and she is entitled to remedies.

Remedies

[32] I am not satisfied there is any issue in this case of contribution on the part of Ms Dyer and there is no reduction therefore in terms of the remedies set out below.

Lost wages

[33] Ms Dyer was dismissed on 7 September 2009. That was a Monday. Ms Dyer was advised that if she worked until Wednesday, 9 September 2009 she would be paid for that week. Ms Dyer said that her father advised her not to go back to work because she was so upset at the way she had been treated. In reaching a view as to whether the failure to work out those two days was unreasonable, I have taken into account that, under the terms of Ms Dyer's employment agreement, she was entitled to and indeed had to give four weeks' notice of termination. I do not find that failure to work out the following two days was unreasonable.

[34] I find that Ms Dyer is entitled to lost wages from 8 September 2009 until she obtained another position on 22 September 2009. That is a period of two weeks. I have calculated the loss on the basis of a 40 hour week at \$15 per hour. That is a gross sum of \$600 per week and for two weeks the lost wages are \$1,200.

[35] I order Beauty Management Riccarton Limited to pay to Tessa Dyer the sum of \$1,200 gross being lost wages under s.123(1)(b) of the Employment Relations Act 2000.

Compensation

[36] Ms Dyer gave evidence which I accept that she was upset and humiliated to simply be told that her job was at an end because she was too expensive. Helen Dyer, her mother, gave very clear evidence about the distress that was apparent to her following the exchange with Anna. Ms Dyer said she felt she had worked very hard in the role and the evidence was that she thought she would be in that role for some time. I find an exacerbating factor in this case was that reasons for the dismissal were never provided despite being requested in writing in a letter from Mr Goldstein to the salon that was hand delivered on 8 September 2009. That made Ms Dyer feel she was somewhat at fault and, I should add, there is no evidence to satisfy me that that was the case at all. I also take into account though that Ms Dyer's skills enabled her to obtain comparable employment within a short time.

[37] Considering all the circumstances, I am satisfied that a fair and reasonable award in this case would be the sum of \$5,000.

[38] I order Beauty Management Riccarton Limited to pay to Tessa Dyer the sum of \$5,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Penalties

Breach of s.65 of the Employment Relations Act 2000

[39] Mr Goldstein seeks a penalty in terms of the failure by Beauty Management Riccarton Limited to provide Ms Dyer with an individual employment agreement containing, as required, the name of her employer under s.65. I accept it is quite true there was no employer name inserted in the individual employment agreement and in this case this caused very real difficulties to Ms Dyer in terms of her personal grievance. She was not able to say with any certainty who employed her and the company name that did appear in the individual employment agreement was not the name of an incorporated company.

[40] There is no penalty provided for, however, in terms of s.65 for a failure to comply with its requirements so I make no award in this case.

Breach of s.130 of the Employment Relations Act 2000

[41] On 8 September 2009, in a letter raising a grievance that was hand delivered to the beauty salon at the mall by Helen Dyer, Mr Goldstein asked, amongst other matters, under s.130 of the Employment Relations Act 2000 and the Privacy Act 1983 for copies of Ms Dyer's time and wage records. No wage and time records were ever provided and there was no adequate explanation as to why that was. An employer who fails to comply with the requirements is liable to a penalty under s.130(4) of the Employment Relations Act 2000.

[42] The failure by Beauty Management Riccarton Limited to communicate on this matter that there were difficulties with providing the records and/or simply provide the records is of concern. The absence of records prevents Ms Dyer and her representative, and the Authority, being able to ascertain whether all payments had been made to her including holiday pay. The action for a penalty was commenced, I

am satisfied, within 12 months of the date the records were requested on 8 September 2009 in the statement of problem lodged on 23 September 2009.

[43] I find that there should be a penalty awarded in all the circumstances.

[44] I order Beauty Management Riccarton Limited to pay a penalty of \$1,000 for breaching s.130 of the Employment Relations Act 2000 by failing to provide a copy of Ms Dyer's time and wage records. Under s.136 of the Employment Relations Act 2000, \$500 of that penalty is to be paid into the Authority where it will then be paid to the Crown bank account.

[45] The remaining \$500 is to be paid to Tessa Dyer.

Holiday pay

[46] If Ms Dyer is of the view that she has not been paid her holiday pay, being 8% of her gross earnings during the term of her employment, then leave is reserved for her to return to the Authority with details of her gross earnings and the Authority will then be able to determine that matter. It would seem convenient to give Ms Dyer until the timetable I have set for a cost submission to be provided on her behalf for that advice to be forwarded to the Authority. That would enable both matters to be dealt with in the same determination.

Costs

[47] I reserve the issue of costs. Mr Goldstein has until 7 May 2010 to lodge and serve his submissions as to costs and Beauty Management Riccarton Limited has until 28 May 2010 to lodge and serve submissions in reply.

Summary of findings and orders made

- The name of the respondent by consent is Beauty Management Riccarton Limited.
- I have found that Ms Dyer was unjustifiably dismissed from her employment.
- I have ordered Beauty Management Riccarton Limited to reimburse Ms Dyer's lost wages in the sum of \$1,200 under s.123(1)(b) of the Employment Relations Act 2000.

- I have ordered Beauty Management Riccarton Limited to pay without deduction compensation to Ms Dyer in the sum of \$5,000 under s.123(1)(c)(i) of the Employment Relations Act 2000.
- I have ordered Beauty Management Riccarton Limited to pay a penalty of \$1000 for a failure to provide wage and time records under s.130 of the Employment Relations Act 2000. \$500 is to be paid to the Authority to be then paid into the Crown Bank Account and \$500 of that penalty is to be paid to Ms Dyer.
- I have reserved the issue of both costs and holiday pay and timetabled for submissions.

Helen Doyle
Member of the Employment Relations Authority