

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 176/10
5294876

BETWEEN

ANA HETEM-HARRIS
Applicant

A N D

BEAUTY MANAGEMENT
RICCARTON LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Andrew McCormack and Anna Lloyd, Counsel for Applicant
Craig Mundy-Smith, Counsel for Respondent

Investigation Meeting: 14 July 2010 at Christchurch

Determination: 2 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Hetem-Harris) alleges that she was unjustifiably dismissed from her employment with the respondent (Beauty Management). Beauty Management resists Ms Hetem-Harris's claim alleging that Ms Hetem-Harris abandoned her employment.

[2] Ms Hetem-Harris sought employment with Beauty Management as a beauty therapist and was employed in June 2009. Subsequently she was asked to manage a store for Beauty Management and her evidence is that, during this period, her hours of work were significantly higher than she had been promised. In particular, she claims that she worked from 26 August 2009 to 13 September 2009 consecutively without a break, a total working span of 19 days.

[3] Ms Hetem-Harris' evidence refers to various exchanges with persons associated with Beauty Management who she understood to be, in effect, her employers. In particular, Ms Hetem-Harris refers to various directions given to her by

an Elizabeth Jungwirth. Ms Hetem-Harris said in her evidence that Ms Jungwirth told her that she owned the store that Ms Hetem-Harris worked in (and the one next door), and she proceeded to give directions in respect of Ms Hetem-Harris' duties including reducing Ms Hetem-Harris' hourly rate of pay.

[4] Beauty Management denied that Ms Jungwirth had any management authority over Ms Hetem-Harris and explained that Ms Jungwirth was in fact Beauty Management's client, in effect, as Beauty Management simply provided the labour to enable beauty salons (such as those owned and operated by Ms Jungwirth) to run successfully. Beauty Management apparently had no business premises of its own and simply existed to provide and manage labour in beauty salons.

[5] Despite this explanation, Ms Hetem-Harris' evidence was that she had no idea that that was the structure of her employer and, based on the exchanges with individuals such as Ms Jungwirth, she formed the reasonable belief that she was to follow the instructions of Ms Jungwirth because Ms Jungwirth represented her employer.

[6] Matters came to a head on 10 December 2009 when, prior to commencing her duties for the day, Ms Hetem-Harris was rung by Ms Jungwirth and told that she could not *do this any more* and that Ms Hetem-Harris was to have one week's notice of dismissal. Later that same day, Ms Hetem-Harris attended at the workplace to hand in her uniform and key and was told by another individual (Joseph Brooks) not to *make any decisions* until Mr Brooks had been in touch with her again the following morning. No such contact took place and Mr Brooks did not contact Ms Hetem-Harris until a week later, in which he asked Ms Hetem-Harris to return to work. She refused.

[7] The matter came to the Authority in the usual way after an unsuccessful mediation failed to resolve the employment relationship problem.

Issues

[8] The only issue here is whether Ms Hetem-Harris was, in truth, unjustifiably dismissed or not. I made clear to the parties during the course of the investigation meeting that I was absolutely satisfied on the evidence I heard that Ms Hetem-Harris was unjustifiably dismissed and that the only issue of substance to be disposed of was

the question of remedies. However, for the avoidance of doubt, it is appropriate for the Authority to set out its reasoning in reaching that conclusion.

Was Ms Hetem-Harris unjustifiably dismissed?

[9] As I noted in the previous section, I concluded during the course of the investigation meeting that there was little doubt that Ms Hetem-Harris had been unjustifiably dismissed from her employment. The evidence of Ms Hetem-Harris was very clear that she had no knowledge or understanding of the nature of the structure of her employer and, more particularly, had no information which would enable her to differentiate between the people who gave her directions who were her employer, and the people who gave her directions who were not. Clearly, on the facts, it transpired that Ms Jungwirth was not a representative of the employer and was therefore not able to give Ms Hetem-Harris directions at all, at least insofar as those directions were directions of the sort that an employer would give an employee. Clearly there was a contractual relationship between Ms Jungwirth and Beauty Management, but I am satisfied on the evidence that Ms Hetem-Harris did not understand the nature of that relationship and thought that Ms Jungwirth was in fact a representative of her employer, Beauty Management.

[10] It follows from the foregoing that when Ms Jungwirth purported to dismiss Ms Hetem-Harris by telephone on 10 December 2009, Ms Hetem-Harris believed on reasonable grounds that she had in fact been dismissed by her employer. Indeed, it is difficult to see what other construction could be put on the words attributed to Ms Jungwirth. She told Ms Hetem-Harris that Ms Hetem-Harris was dismissed, that Ms Hetem-Harris had a week's notice and in those circumstances, whatever the relationship between Ms Jungwirth and Beauty Management, it seems difficult to conceive of what else those words would mean other than the meaning which Ms Hetem-Harris ascribed to them, namely that she had lost her position.

[11] Beauty Management encouraged me to look at the context of this discussion, and in particular submitted that it sought to repair the damage done by Ms Jungwirth's 10 December telephone call. Certainly, if, on the facts, Beauty Management had satisfied me that it had repaired the earlier default, then I would have been able to be persuaded that there was no dismissal. Clearly the law allows such latitude of the employer.

[12] However, that was not the position. When Ms Hetem-Harris attended at the workplace immediately after being dismissed over the telephone by Ms Jungwirth, Mr Brooks told her not to do anything, in effect, and promised to ring her the following day. He did not. He rang a week later and said that she was not dismissed. I am absolutely satisfied that that is simply not good enough. If, as Beauty Management alleges, Ms Jungwirth exceeded whatever her authority was, then it was incumbent upon it to act swiftly to remedy the default. The law requires that and, in the factual circumstances of the present case, there was no prompt reaction from the employer. Mr Brooks for the employer simply said, in effect, that Ms Hetem-Harris was not to do anything and then he failed to fulfil his promise that he would ring her the following day, and in fact did not ring her for fully a week. If Mr Brooks had rung the following day and said that there had been a misunderstanding or that Ms Jungwirth had exceeded her authority, then the matter clearly might have been able to be dealt with on the basis that the employer party had remedied its earlier default. But a delay of a week with the dismissed employee simply cooling her heels is not, I hold, the action of a fair and reasonable employer. It follows that the dismissal by telephone in a peremptory manner is entirely without either process or justification. It is an unjustified dismissal.

[13] I note for the sake of completeness that I observed during the course of the investigation meeting that Beauty Management had hardly helped itself by the evidence it offered in response to the allegation brought by Ms Hetem-Harris. It offered up one witness who while involved in the direction and management of Beauty Management, was not involved other than in a peripheral sense in Ms Hetem-Harris' dismissal and the parties who were involved in the dismissal were not available for the Authority to investigate.

Determination

[14] Ms Hetem-Harris has satisfied the Authority that she has suffered an unjustified dismissal. To remedy that dismissal, I propose to award her remedies but I must consider first whether, by her conduct, Ms Hetem-Harris contributed in any way to the circumstances giving rise to her personal grievance. On the facts before the Authority, I am satisfied that Ms Hetem-Harris did not contribute in any way to the circumstances giving rise to her grievance.

[15] Both parties filed helpful submissions essentially on quantum and remedies, the Authority having already determined the outcome orally at the investigation meeting. Counsel for Beauty Management submits that reimbursement of lost wages should be limited to the minimum amount of 3 months and at a figure of 40 hours per week. Ms Hetem-Harris claimed 31 weeks at 50 hours per week. Without reciting the line of argument here, it suffices to say I accept both submissions.

[16] The remedies to which Ms Hetem-Harris is entitled are as follows:

- (a) A compensatory payment under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$5,000;
- (b) Outstanding holiday pay which remained unpaid after the dismissal in the sum of \$1,653;
- (c) Public holiday pay also unpaid at the date of dismissal in the sum of \$306;
- (d) A contribution to lost wages in the sum of \$9360.00 gross.

Costs

[17] Although counsel for the respondent has provided some brief submissions, I prefer to let the parties endeavour to resolve costs themselves. If that process is unsuccessful, then costs are reserved.

James Crichton
Member of the Employment Relations Authority