New Zealand Employment Relations Authority Decisions

McNair v Beauty Sense Limited (Christchurch) [2011] NZERA 486; [2011] NZERA Christchurch 108 (27 July 2011)

Last Updated: 23 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 108
5328975

BETWEEN LISA MCNAIR

Applicant

AND BEAUTY SENSE LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Further Information:

Philip Cheyne

Penny Shaw, Counsel for Applicant Raewyn Gibson, Advocate for Respondent

12 July 2011 at Christchurch

15 & 20 July 2011 from the Respondent
20 July 2011 from the Applicant

Determination:

27 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lisa McNair worked for Beauty Sense Limited as an account manager from 16 February 2009 until her employment was terminated in July 2010 for redundancy. Ms McNair says that this redundancy was a sham, nor was she consulted before the decision to dismiss her was announced. In addition, Ms McNair says that she was not paid commissions that it was agreed would be payable, she was not paid the whole of an agreed salary increase and Beauty Sense reduced its KiwiSaver contribution without her agreement.

[2] Denis Barker is the sole shareholder and director of Beauty Sense Limited. The company disputes all Ms McNair's claims.

[3] For the most part the determination of these problems turns on resolving disputed issues of fact. I will explain more fully what happened and resolve those factual disputes before applying the law about justification for the dismissal.

Employment arrangements

[4] In January 2009 Mr Barker interviewed Ms McNair and another person in Hamilton for Christchurch based employment with the company. His evidence is that he gave both interviewees a copy of a draft employment agreement at that time. Ms McNair says that she was not given a copy of any employment agreement until after she was offered the position. I will

return to this dispute shortly. Only Mr Barker and Ms McNair were present for her interview and no-one took any notes. Both agree that there was some mention about whether remuneration would include commissions on on-going sales. Mr Barker's evidence is that he said that the company only paid a commission on opening sales. Ms McNair says that Mr Barker indicated that he would look into it. I prefer Ms McNair's evidence on this point.

[5] It is common ground that Mr Barker rang Ms McNair sometime after the interview and offered her the position. No-one else heard their discussion. Ms McNair's evidence is that she told him that she would only accept the position if she was paid between 3% and 5% commission on ongoing sales in addition to the salary package of $45,000 per annum with a car and mobile phone including private use. She says that Mr Barker told her it would not be a problem and he would sort it out when she got to Christchurch. Mr Barker's evidence is that he said they did not pay ongoing commissions to any staff. On balance I do not think that this exchange was as definitive as both Ms McNair and Mr Barker now assert. Ms McNair probably asked about ongoing commissions again and Mr Barker probably said he would look at that when she got to Christchurch. I do not accept that the discussion got to the point of any agreement to pay ongoing commissions.

[6] Ms McNair's evidence is that she was sent a proposed employment agreement before she came to Christchurch but she cannot recall whether this was before or after the phone conversation. Accordingly, either during the interview or sometime afterwards but before her arrival in Christchurch, Ms McNair was proffered a proposed written employment agreement. That agreement made no provision for ongoing commissions. Ms McNair's evidence, which I accept, is that she thought she would be given a personalised agreement to sign when she got to Christchurch. It is common ground that Ms McNair made no further mention of ongoing commissions until sometime after the employment commenced. As noted Ms McNair started work on 16 February 2009.

[7] With the statement of problem Ms McNair lodged a copy of a document which was identified as the employment agreement. It is not signed and includes printed dates of *January 2009* and *30 January 2009.* While it does not name Ms McNair it does include some references that indicate it had been amended to reflect the position she was being appointed to. In evidence Ms McNair told me that this document was printed off the company computer system by her some while into the employment since she had misplaced the document sent to her before the employment commenced. Mr Barker's evidence is that Ms McNair would have needed his password to access this document from the computer but he accepted that the password was known to others in the office.

[8] The statement in reply included a document identified as *the full individual employment agreement and attached schedules...* It is not signed and includes printed dates of *16th February 2009* and *30 January 2009.* It does name Ms McNair but it also includes a page that is not relevant to Ms McNair's employment.

[9] In evidence Mr Barker told me that there was an employment agreement signed by him and Ms McNair on 16 February 2009 and that he gave her a copy and retained a copy in his filing system. Mr Barker's evidence is that there was nothing in the filing system when he went to get a copy of this signed agreement the day before the investigation meeting. He could not explain the absence of the signed agreement. Ms McNair's evidence is that she never signed an employment agreement and she was never presented with any proposed agreement for signing other than the document sent to her before she came to Christchurch.

[10] An employment agreement signed on or about 16 February 2009 would have been a substantial answer to part of Ms McNair's claim so if it existed one would expect it to have been included in the statement in reply. Instead, the Authority was given an unsigned document now said to be a duplicate of what was signed but which includes a page that is irrelevant to Ms McNair's position. However, if Ms McNair's evidence about when she printed off her duplicate is correct, the statement in reply duplicate must have been amended and printed sometime later. This is all deeply unsatisfactory. On balance I think the best explanation for the absence in evidence of a signed employment agreement is that one was never signed. Accordingly I accept that part of Ms McNair's evidence.

[11] That leaves me with a proffered draft of an employment agreement which does not provide for ongoing commissions, my finding that there was an inconclusive discussion between Ms McNair and Mr Barker during either or both the interview and subsequent phone discussion and no discussion about these commissions when the employment commenced. This state of affairs leads me to conclude that there was no contractually agreed term that Ms McNair would receive commissions for ongoing sales of Pier Auge products. That aspect of her claim must fail.

KiwiSaver

[12] It is common ground that there was some discussion between Mr Barker and Ms McNair about KiwiSaver on or about her commencement date. Ms McNair's evidence is that Mr Barker said that employers now only had to pay 2% KiwiSaver but he was generous and supported the concept of KiwiSaver so he would pay a 4% contribution. Ms McNair joined KiwiSaver and also set her contribution at 4%. None of that evidence was disputed by Mr Barker and I accept it as substantially accurate.

[13] Mr Barker's evidence is that shortly before Christmas 2009 during a staff meeting he told staff of his intention to reduce the employer's KiwiSaver contribution from 4% to 2% because the company was no longer getting the Government tax credit.

His evidence is that he did not consider he had any obligation to continue contributing at 4% so when the legislation changed so that the company no longer received the tax credit he adjusted the company's contribution. His evidence is that no-one (including Ms McNair) objected to this announcement. Ms McNair's evidence is that no such announcement was made to her. The change showed up in her payslip for the period ending 31 January 2010. While she noticed it she did not say anything because she did not want to *rock the boat.* For the following reason it is not necessary to resolve the dispute about whether Mr Barker announced the change to KiwiSaver.

[14] Mr Barker offered to contribute to KiwiSaver at 4% and Ms McNair accepted that offer and joined KiwiSaver. I find that it was part of the contractual bargain that the company would make a 4% contribution to Ms McNair's KiwiSaver account. It was not open to Mr Barker to reduce the company's level of contribution without Ms McNair's agreement. There is no evidence that she agreed to the reduction, even if I was to accept Mr Barker's evidence about communicating his decision to staff at the pre-Christmas meeting. The company will have to make good the arrears.

[15] I should also note the timing difficulty with Mr Barker's evidence on this issue. The employer's tax credit was removed effective from 1 April 2009 by s.53 of the Taxation (Urgent Measures and Annual Rates) Act 2008. I do not accept that Mr Barker was unaware of that change until about December 2009.

Salary Increase

[16] It is common ground that the agreed salary at the start was $45,000.00 per annum. Ms McNair was Pier Auge account manager for the South Island and the lower part of the North Island. There was another account manager based in Auckland who covered most of the North Island. They also covered other lines distributed by Beauty Sense.

[17] Sales of Pier Auge diminished due to market conditions. In about November 2009 Mr Barker travelled to Auckland and made the Auckland employee redundant. I have been provided with a letter dated 24 November 2009 which Mr Barker says is when notice was given to the Auckland based employee. There is information apparently from the Auckland based employee via Ms McNair to the effect that she did not receive any written notice. Ms McNair also takes issue with other aspects of Mr Barker's evidence. It is not necessary to resolve the evidential disputes about the redundancy of the Auckland based account manager.

[18] The redundancy decision led Mr Barker to offer Ms McNair the position of national account manager for Pier Auge. It is common ground that there was some discussion between Ms McNair and Mr Barker about a salary increase. Mr Barker's evidence is that Ms McNair asked for a salary of $50,000.00 and he said he would look at that during the annual review in January 2010. Ms McNair's evidence is that she asked if he was going to offer a salary increase and Mr Barker told her he would increase her salary to $50,000.00 effective from the New Year. She also says that she asked about the unpaid ongoing commissions for Pier Auge sales and requested ongoing commissions for Young Blood, a new range being distributed by Beauty Sense. Mr Barker responded by saying it would cost too much to assess on-going commissions for Pier Auge but that he would find a way to pay on-going commissions for Young Blood only. It is common ground that Mr Barker refused to pay any opening commissions for Young Blood. No-one else was present for this discussion and it was not documented. I will return to the conflict shortly.

[19] Sharon Sutherland is Beauty Sense's chief executive officer. She commenced in that role in January 2010 and may take over ownership of the company in the longer term. Ms Sutherland is very familiar with the business because she worked

there from 1999 until 2005.

[20] In late January 2010 Ms McNair spoke to Mr Barker and then to Ms Sutherland about her pay rise. She indicated that she would not go away to cover the extended sales area unless she received the pay rise. On or about 10 February 2010 there was a performance appraisal meeting involving Ms McNair, Mr Barker and Ms Sutherland. Ms McNair was told that she would receive a $2,500.00 increase. That was applied from the week beginning 1 February 2010. While there was no signed written employment agreement, it is common ground that the written agreement proffered before Ms McNair started work included the following provision:

11.5 The Employer shall review your remuneration package after 6 months and then each year. Any change will become effective from 1 February. There is no obligation on the Employer to increase salary.

[21] The submission for the company is that Mr Barker's evidence that there was no agreement to increase the salary to $50,000.00 pa should be preferred because he sent an email to payroll about the increase to $47,500.00, because Ms McNair sought holiday pay calculated at the lower rate and because she took no steps to enforce the higher salary until after the employment ended. That is said to throw doubt on her evidence about the agreement in November 2009 over a salary increase.

[22] For Ms McNair it is submitted that it is more likely that an agreement was reached over the salary increase at the same time as the increased responsibilities were discussed rather than as the result of an appraisal process focused on performance in the old role.

[23] There is evidence that Ms McNair was asserting the fact of the agreed salary increase (but not to Beauty Sense) before she left the workplace. It is not unknown for an employee to defer asserting a legal right such as a claim for arrears until after the end of the employment. These points tend to answer the company's submissions. I also agree with the submission for Ms McNair mentioned above. Further, I prefer Ms McNair's evidence that Mr Barker mentioned the figure of $50,000.00 rather than Mr Barker's evidence that the figure was first mentioned by Ms McNair. As she put it in evidence, if she had been the first one to nominate a figure it would have been more than that. Accordingly I find that there was an agreement in November 2009 to increase the salary to $50,000.00 pa. However, I find that it was always intended to apply from 1 February 2010.

[24] Ms McNair also claims that it was agreed that she would receive ongoing commissions for sales of Young Blood product. While I accept that there was some discussion about this I do not accept that it got to the point of an agreement. There was not sufficient certainty for any agreement to have been formed on this point.

Termination of Ms McNair's employment

[25] Mr Barker sought to employ a chief executive officer as part of a longer term succession plan. There were discussions between him and Ms Sutherland and he drafted a letter to her dated 21 December 2009 with a briefing about the business and details of her proposed role and remuneration. Ms McNair found this letter at the printer and she read it. It included the following comments:

Lisa McNair has been covering Pier Auge for the Sth Island and lower Nth Island for the last year her role would expand to cover all of New Zealand in 2010, and while Lisa has been successful in securing several new accounts all have been relatively small in size. Her general performance especially in relating to larger accounts has disappointed.

Lisa would report directly to you for the future and I would expect a vast improvement if she is continue covers Pier Auge.

[26] Ms McNair read this as a criticism of her work performance. She spoke to Mr Barker about it the next day. Ms McNair's evidence, which I accept, is that she told him that if he was planning to get rid of her he should let her know so she could pursue nursing training, something she had intended before accepting the role with Beauty Sense. Mr Barker told her that it would not come to that. Overall Mr Barker downplayed the apparent criticism contained in the letter.

[27] Around the same time as employing Ms Sutherland Mr Barker also decided to employ another account manager to cover Youngblood Mineral Cosmetics, a range that Beauty Sense had recently started stocking. Initially Ms McNair and the Auckland based employee were given responsibility for the new range in addition to Pier Auge and they received some training in about October 2009. However, with the Auckland redundancy and the appointment of the Youngblood account manager (Nicky Blue) from January 2010, Ms McNair no longer had responsibility for Youngblood sales.

[28] The appointment of Ms Blue and Ms Sutherland resulted in Ms McNair being asked to move out of her office into another room that housed the printer and fax machine. Ms McNair says that her work was often interrupted and she felt humiliated and undervalued as a result of this but she made no complaint about it at the time.

[29] It is common ground that Ms McNair initially found Ms Sutherland good to work with. Ms Sutherland provided more organisation and support to Ms McNair. However, market conditions continued to affect sales of Pier Auge.

[30] Unbeknown to Ms McNair, from about May 2010 Mr Barker and Ms Sutherland were discussing making Ms McNair's position redundant. As Mr Barker puts it in his evidence:

In May 2010 I discussed my concerns with Sharon Sutherland who persuaded me to continue for another month because Lisa had a full trip of the North Island planned and Sharon was hopeful this would yield some new clients.

[31] On Friday 2 July 2010 at about 3.30pm Mr Barker asked Ms McNair to meet him upstairs in the boardroom in 10 minutes time but gave no indication about why.

Before the meeting Mr Barker prepared a letter for Ms McNair and consulted with Ms Sutherland about its contents. Those present at the meeting were Ms McNair, Ms Sutherland and Mr Barker. There is a dispute about precisely what was said during this meeting which needs to be resolved. I will first outline what is largely undisputed.

[32] Mr Barker started by telling Ms McNair what an amazing job she had been doing and how they appreciated her hard work. He went on to say that sales were not where they wanted them to be. Mr Barker had some sales figures which he showed to Ms McNair. Mr Barker said that the sales figures did not support the cost of an account manager and that he could no longer afford to continue to loan money to the company. Ms McNair asked how they were going to run without an account manager especially since they intended to bring on another product range and Mr Barker

responded saying that there were not going to have an account manager. Mr Barker gave Ms McNair a letter that he had with him. It reads:

2 July 2010. Lisa McNair. Dear Lisa Redundancy:

Despite the enormous efforts of our full team and especially your own personal effort and hours of committed professional endeavours.

A full review of our trading in the six months of this new year has shown we have failed to see any marked increase in the sales level of the Pier Auge and Yon-Ka product in both retail and cabin lines.

This lack of increased sales activity has forced me to look at reducing our expenditure in all areas and in particular our expense in servicing our clients and it is with great reluctance your position with Beauty Sense must be now declared redundant.

I must stress that this decision has been very difficult to make and in no way reflects upon your hard work as all reports received back from our clients have been most positive towards you.

Under our Employment contract 4 weeks notice is given with your termination date being effect 30 July 2010.

I offer you all reasonable time off work to seek another position during this notice period

Yours sincerely

Denis Barker. Director.

[33] The letter given to Ms McNair on 2 July 2010 was unsigned. Mr Barker's evidence is that when he gave Ms McNair the letter he told her that it was a summary of his position and that it was not signed because it was *not an official notice but rather a summary of our position and proposed action.* His evidence is that he told Ms McNair that before he signed the letter to make his final decision he wanted her to have the opportunity to think over what had been said and propose any alternatives. Ms Sutherland's evidence is that Mr Barker offered Ms McNair *the opportunity to come back to him with any suggestions or ideas* and told her *to go away and think about it and ...that he was happy to talk to her more about it.* Ms Sutherland says that Ms McNair's reaction (before being handed the letter) was to ask if she was being fired but Mr Barker was emphatic that she was not being dismissed. He then went on to hand her the letter.

[34] At the investigation meeting I raised with Mr Barker the unambiguous message of dismissal conveyed in the letter compared to his evidence to the effect that he was initiating a consultation with her about the possibility that she might be dismissed for redundancy. Mr Barker maintained his position that the letter was not the announcement of a decision to dismiss for redundancy but merely the summary of a proposal.

[35] I do not accept Mr Barker's evidence that he was not announcing a decision by giving Ms McNair the letter. First, there is the text of the letter itself. No-one could mistake the meaning of the letter. There is nothing conditional or provisional about it. If the intention had been to initiate some consultation with Ms McNair the words would have been different and a copy of the sales data would have been given to her. Secondly, Mr Barker told me that he had travelled to Auckland twice to deal with the redundancy of the Auckland account manager. In evidence is a copy of the dismissal letter said to have been given to that employee on a second visit. That letter reads as the announcement of a decision following an earlier consultation meeting. Assuming (rather than finding) the truth of Mr Barker's assertions about this earlier redundancy, it is difficult to understand why he did not adopt the same process with Ms McNair. Thirdly, as will be explained below, Mr Barker did not impress as a reliable witness.

[36] While Mr Barker may have told Ms McNair that she could *have a think about things over the weekend,* as indicated in an email she sent to her sister on 4 July, I find that he gave Ms McNair notice of dismissal during the meeting on 2 July 2010.

Notice period

[37] Over the weekend Ms McNair got some advice from her sister and brother-in-law who told her she should make sure she got the letter signed. On Monday 5 July Ms McNair asked Mr Barker to sign the letter, which he did. His evidence is that he asked Ms McNair if she had any alternative proposals or if she wanted to meet again but she declined. Ms Sutherland's evidence is that she was not present in the room but could overhear this exchange and she supports Mr Barker's recollection. Ms McNair's evidence is that no such thing was said to her. I prefer Ms McNair's evidence. Ms McNair also asked for a reference and if she could be paid out her notice period rather than having to work. Mr Barker agreed to provide a reference but declined the request about the notice period.

[38] The reference is dated 2 July 2010. During the investigation meeting Ms Sutherland told me that the reference had been provided to Ms McNair on Friday 2 July 2010. Mr Barker concurred. That was by way of explaining its date. After the investigation meeting I received information from Mr Barker to the effect that the reference was typed on Monday 5 July 2010. The latter time seems more likely given Ms McNair's evidence that she ask for a reference on the Monday. It indicates

that Ms Sutherland's recollection of events must be treated with some caution.

[39] On 16 July Mr Barker told Ms McNair that he would pay out the remainder of the notice period and she could finish work that day. Ms McNair asked if she could use the work car for the balance of the notice period but Mr Barker declined except to allow its use for the remainder of that day. Ms McNair's evidence is that Mr Barker told her that the lease on the car was up and it had to go back that evening. Mr Barker's evidence is that he referred to an insurance issue rather than the return of the car to the leasing company as the reason. Later, to check what (on her account) had been said to her by Mr Barker, Ms McNair actually contacted the lease company and learnt that the car had not been returned. In all probability Ms McNair would only have done this if Mr Barker had told her that the car would be returned to the lease company. Accordingly I prefer her evidence. There are also several other differences about what was said on this day between Ms Sutherland and Ms McNair that need not be resolved.

After the employment

[40] Shortly after finishing at Beauty Sense Ms McNair was interviewed for another job. Aaron Fear-Ross is the operations manager for that prospective employer. He decided to conduct a reference check on Ms McNair before employing her so he rang Mr Barker. There is a conflict between Mr Fear-Ross and Mr Barker about one aspect of their phone discussion. Mr Fear-Ross's evidence is that he asked Mr Barker if he would rehire Ms McNair but Mr Barker refused several times to answer that question and would not explain why. Mr Fear-Ross says that he took handwritten notes on a printed form during or shortly after the phone call. The printed question reads *Would you rehire (name) if the opportunity arose?* and the handwritten notes reads *.'.WOULDN'T ANSWER QUESTION!!* Mr Fear-Ross says that the response was quite an issue for them in considering whether to employ Ms McNair. Mr Barker's evidence is that he responded to the question by saying that he could not see in the immediate future that he would have a position for Ms McNair. He denies refusing to answer the question. I prefer the evidence of Mr Fear-Ross. He is disinterested compared to Mr Barker, his notes provide stark support for his evidence and the circumstances mean that it is likely that he would clearly recall the exchange. Mr Barker's response to Mr Fear-Ross's evidence on this point is a reason to treat Mr Barker's evidence generally with some caution.

[41] Some time after the exchange between Mr Fear-Ross and Mr Barker, Mr Barker received the following text message on Ms McNair's work mobile phone: *Hey Lis! How did the fake job reference go?* Mr Barker thought this indicated that Ms McNair might have falsified her CV so he began to investigate the legitimacy of her qualifications. In fact, following the difficulty experienced by Mr Fear-Ross, Ms McNair had considered getting someone to ring Mr Barker posing as a prospective employer to test what he might say about her. She spoke to a friend and her sister about this but decided against it. The text message was from someone who wrongly thought she had proceeded with the subterfuge. In correspondence replying to Ms McNair's personal grievance claim Mr Barker continued to make something of this suggesting that it pointed *to a possible fraudulent act and goes to her credibility.* It seems to have taken Mr Barker until May 2011 to satisfy himself *that despite the fact that Lisa, appeared to have received these qualifications from an obscure institution, that Lisa had not misrepresented her qualifications on her curriculum vitae* (emphasis added). That evidence is indicative of Mr Barker's attitude towards Ms McNair. He has no reason to continue to cast doubt on her qualifications as is suggested by the word *appeared* or the education provider as is suggested by calling it an *obscure institution.* Mr Barker's attitude is another reason for caution with his evidence.

Justification for the dismissal

[42] Whether the decision to dismiss Ms McNair was justifiable must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[43] The statutory duty of good faith applies when an employer is making employees redundant: see s.4(4)(e) of the Employment Relations Act 2000. S.4(1A)(b) provides that the duty of good faith requires parties to an employment relationship to be active and constructive in establishing and maintaining an employment relationship in which the parties are, amongst other things, responsive and communicative. S.4(1A)(c) of the Employment Relations Act 2000 provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment must give that employee access to relevant information and an opportunity to comment before the decision is made. To summarise, good faith includes the mandatory requirement to consult with the potentially affected employee before the decision is made.

[44] Consultation is a well understood concept in the present context. In *Cammish v*

Parliamentary Service [1996] 1 ERNZ 404 the Employment Court said:

Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation.

[45] In light of the factual findings expressed above I find that Mr Barker did not consult with Ms McNair. He simply announced a decision to dismiss her. His comment that she could think about things over the weekend made no difference to the finality of the decision that was communicated to Ms McNair both verbally and in writing. In this context I note that between Ms Sutherland and Mr Barker there had been consideration about whether to disestablish Ms McNair's position for a month or more before the decision was communicated to Ms McNair on 2 July. There was no reason not to include Ms McNair in those discussions at an early stage. The failure to consult amounts to a breach of good faith, something which no fair and reasonable employer would do.

[46] It follows that Ms McNair has a personal grievance.

[47] Ms McNair says that the redundancy was a sham and that she was dismissed for some reason other than a redundancy situation. To summarise, the argument is that Mr Barker (and then Ms Sutherland) regarded her as a poor performer and others were employed to do work that she had been doing. I am referred to the 21 December letter, Ms McNair being moved out of her office, the employment of Ms Sutherland and Ms Blue, some interaction between Ms McNair and Ms Sutherland, Mr Barker's refusal to answer the prospective employer's question during the reference check and the employment agreement which described Ms McNair as account manager for Pier Auge, Hydroco Spa equipment and other lines distributed by Beauty Sense.

[48] More needs to be said about the employment of Ms Blue to distribute the Youngblood range. Initially Mr Barker told Ms McNair and the Auckland based consultant that they would be trained in the product and he would decide if they were up for selling the Youngblood brand but was waiting on advice from the Youngblood trainer. There was a training day in October 2009. Ms McNair's evidence, which I accept, is that the trainer told her and Mr Barker that she was capable of representing Youngblood. Mr Barker's evidence is that the trainer and the Australian based principals of Youngblood were strongly of the view that Ms McNair and the Auckland based Pier Auge account manager did not have sufficient expertise as makeup artists for the distribution of Youngblood in New Zealand. In evidence, Ms McNair referred to a text message apparently from the trainer confirming that she had told Mr Barker that Ms McNair was fantastic and would do very well with

Youngblood. In response, Mr Barker changed his evidence to say that it was the Australian based principals who wanted Beauty Sense to employ a professional makeup artist rather than use Ms McNair and the Auckland consultant. In any event Mr Barker decided to employ Ms Blue who is a trained and experienced makeup artist. Ms McNair had been offered and had accepted the national role as Pier Auge consultant. At the time she was not unhappy to relinquish the Youngblood responsibilities. I do not see in these arrangements any plan to later dismiss Ms McNair. Rather, it appears to be driven by Mr Barker's assessment of what would be best for the business.

[49] The other new employee was Ms Sutherland but I accept that her position was substantially different from Ms McNair's.

[50] I agree with Ms McNair that Mr Barker's comment in the 21 December letter to Ms Sutherland indicates some dissatisfaction with her performance but it does not indicate any intention to dismiss her. I also agree that Mr Barker's refusal to answer the prospective employer's question also indicates some dissatisfaction despite the positively expressed reference. However, by that time the relationship had soured somewhat as a result of the dismissal. I see little significance in the other matters.

[51] In the end, despite the indications that caused Ms McNair to think there was some ulterior purpose, the main picture is of a business deriving insufficient income from sales of Pier Auge products to maintain the expense of a fulltime Pier Auge consultant. Mr Barker also had to introduce funds to the business several times. Overall I am satisfied that it was a genuine redundancy situation that motivated the decision to dismiss Ms McNair.

Personal Grievance Remedies

[52] There is a submission that Ms McNair contributed to the grievance by failing to take up Mr Barker's offer on 2 July 2010 to discuss things after the weekend. I do not accept that there can be any reduction in remedies as a result. On 2 July Ms McNair was told she was dismissed for redundancy. There was nothing blameworthy in her not wanting to discuss her redundancy with Mr Barker.

[53] As it happened Ms McNair was offered employment by the prospective employer who had called Mr Barker. Her lost remuneration is limited to one week's salary and benefits.

[54] While I accept that it was genuinely a redundancy situation that resulted in Ms McNair's dismissal I do not accept that her employment would necessarily have ended when it did if Mr Barker had properly consulted with her. That process would have taken a little time to handle properly. I also note that the employment agreement (whichever version) dealt with the issue of selection of employees to be made redundant and obliged the employer to make every effort to find an alternative position. That too might have required a little time. I find that Ms McNair has lost a week's salary as a result of the grievance for which she is entitled to compensation.

[55] I am asked to include in this award some allowance for the loss of benefits being the use of a vehicle and a mobile phone.

However there is no evidence to establish the value of that loss so I can take that matter no further.

[56] There is a claim for $20,000.00 compensation for distress. Compensation must be assessed on the evidence of hurt, humiliation and injured feelings caused by the established grievance. In light of the finding about the genuineness of the redundancy situation I cannot compensate Ms McNair for any distress arising from the loss of her position; nor can there be any compensation for Mr Barker's failure to honour the salary increase since that will be dealt with as an arrears claim. However, I am satisfied that Ms McNair's view about the dismissal being for an ulterior purpose resulted from the failure to consult with her. That view caused her considerable upset and undermined her confidence, all of which could have been avoided. Those effects were exacerbated by the way Mr Barker responded to the prospective employer and his conduct with respect to Ms McNair's curriculum vitae. There is evidence of the effects from Ms McNair and from her sister. $7,500.00 is the proper sum to compensate for these proven effects.

Orders

[57] Beauty Sense Limited must pay Ms McNair the difference between salary at $50,000.00 per annum and $47,500.00 per annum from 1 February 2010 until the termination of her employment, including holiday pay and the balance of the notice period.

[58] Beauty Sense Limited must pay to Ms McNair's KiwiSaver account a further 2% of her salary from the date the company reduced its employer contribution from 4% to 2%.

[59] Pursuant to s.123(1)(b) and s.128(2) of the Employment Relations Act 2000 Beauty Sense Limited must pay Ms McNair one weeks salary.

[60] Leave is reserved in case of any difficulty with quantum.

[61] Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 Beauty Sense Limited must pay compensation of $7,500.00.

[62] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne

Member of the Employment Relations Authority
