

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 12/09
5140245

BETWEEN ANDREW McDONALD
 Applicant

AND BE GORGEOUS NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
 Daniel Gogna for Respondent

Investigation Meeting: Interview with applicant on 13 January 2009 at
 Christchurch
 Interview with respondent on 20 January 2009 at
 Wellington

Determination: 30 January 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr McDonald) says that he is owed the sum of \$1,557 made up of \$1,072 in wages and \$485 in the reimbursement of unpaid expenses.

[2] The respondent (Be Gorgeous) resists Mr McDonald's claim on the basis that Mr McDonald owes Be Gorgeous more money than Be Gorgeous owes him. Specifically, it is alleged that Mr McDonald cost Be Gorgeous over \$4,000 in lost revenue by allegedly pocketing money belonging to his employer, incurring costs in his employer's name without authority, and breaching his restraint of trade obligations.

[3] Mr McDonald commenced his employment with a company incorporated as Gorgeous Hair New Zealand Limited in December 2007 as a sales person and he ceased his employment with the respondent, Be Gorgeous, on 11 July 2008.

[4] There were two employment agreements, the first between Mr McDonald and Gorgeous Hair New Zealand Limited, which was signed and which I accept was current until 31 January 2008.

[5] Mr McDonald's evidence is that during his employment, he was asked to sign a further employment agreement with Be Gorgeous but that he declined to do so because the terms of the employment were, he felt, more onerous. In particular, he alluded to a shortening of the notice requirement from four weeks in the original signed agreement to two weeks in the unsigned agreement.

[6] Mr Gogna, for Be Gorgeous, told me that Gorgeous Hair New Zealand Limited, the original employer of Mr McDonald, had a different ownership structure from Be Gorgeous and that all of the staff of the original entity, by agreement, had had their employment relationships transferred to Be Gorgeous on and from 1 February 2008.

[7] Whether Mr McDonald signed the agreement with Be Gorgeous or not, I am satisfied that his employment relationship changed on 1 February 2008 to one of employment by Be Gorgeous. Further his employment relationship problem was with Be Gorgeous rather than with Gorgeous Hair New Zealand Limited, all the issues Mr McDonald complains about arising after 1 February.

[8] Mr McDonald's complaint against Be Gorgeous, as I have noted above, falls into two distinct categories. First, there is an allegation of unpaid wages (in fact, Mr McDonald's final pay), and second there is an allegation that Mr McDonald has incurred expenditure on behalf of Be Gorgeous for which he is entitled to reimbursement. It is appropriate to consider each of these in turn.

The expenses

[9] Mr McDonald identifies two distinct items of expenditure. The first is for a truck rental payment of \$120 which Mr McDonald incurred in Australia while marketing there for Be Gorgeous and the second is a payment of airfares for \$365 to get him to and from Australia on that same marketing trip.

[10] Mr Gogna told me that he had no knowledge of the costs incurred by Mr McDonald in relation to the truck rental but he was certainly aware of the expenditure in relation to airfares.

[11] Mr Gogna told me that the company's longstanding policy was that staff made their own bookings and paid their own airfares to trade fairs in Australia on the footing that Be Gorgeous would meet all of the internal costs and that after a 12 month period, if the employee was still in Be Gorgeous' employment, the airfares would be reimbursed.

[12] There is nothing in any of the documentation before the Authority to document such an arrangement and certainly no authority I can discern in either of the employment agreements for the withholding of reimbursement of the airfare costs for a 12 month period.

[13] The first signed employment agreement contains a mandatory requirement that the employer reimburse the employee for *their reasonable work related travel and accommodation costs upon production of appropriate receipts*.

[14] Furthermore, the signed agreement has a more general provision on reimbursement of expenses (that is expenses not specifically related to travel) in similar terms to the provision relating to travel expenses.

[15] Conversely, and in the unsigned second agreement, there is the following curious provision relating to expenses:

25.1 *In certain situations the employee may be entitled to be reimbursed for certain expenses incurred. The employee must have the permission of the employer before making an application for reimbursement.*

[16] That latter provision is so imprecise as to be virtually unintelligible. What are the *certain situations*? What is constituted by *certain expenses*? How can the employee *have the permission of the employer before making an application for reimbursement* when the employee must presumably ask the employer first if permission is required? Presumably this second sentence is meant to say that the employee may only apply for reimbursement of costs if the incurring of those costs has previously been approved by the employer. In my opinion, the clause is so vague as to be meaningless, and applying the *contra proferentem* rule whereby a document

is construed against its author in the event of lack of clarity, I hold that the expenses provisions which apply in the present case are those in the first signed agreement.

The final pay

[17] Mr McDonald calculates that he is owed \$1,072 in wages which, on the basis of his calculation, is a net sum after the deduction of PAYE of \$400, a further \$102 in respect of Mr McDonald's student loan and a further \$70 in respect of Mr McDonald's KiwiSaver.

[18] Be Gorgeous says that it is entitled to set-off against Mr McDonald's final pay moneys owed to it under the various heads I referred to earlier which, according to Mr Gogna's evidence, amounted to \$4,000 or thereabouts of loss sustained by the company as a consequence of Mr McDonald's activities. In those particular respects, Be Gorgeous relies upon the relevant provisions in the two employment agreements. In the first signed agreement, there is an explicit provision which requires a departing employee to return property belonging to the employer on termination. Mr McDonald says he has done this; Be Gorgeous resists that assertion.

[19] In the second unsigned agreement, there are two relevant provisions. The first, under the generic heading of *Deductions*, is a specific provision in the following terms:

7.3 *In the event of termination of employment the employee agrees the employer is authorised to deduct from the final pay (including holiday pay):*

(a) *A sum representing the cost of repair or replacement of damaged or unreturned property or equipment.*

...

(c) *Any other debt due from the employee to the employer (whether under this agreement or otherwise).*

[20] Finally, clause 36 of the new agreement contains another clause relating to the employee's obligations at termination and requires the employee to return all property owned by the employer and to *forthwith repay any loans and any other sums due to the employer.*

[21] There is dispute about whether Mr McDonald returned all property to Be Gorgeous or not. He says that he did; Be Gorgeous denies that he did. On this point, I prefer Mr McDonald's evidence and I hold that there is nothing owned by Be Gorgeous which Mr McDonald still has in his possession. Mr McDonald was clear in

giving his evidence on oath that all stock was collected when he ceased his employment and I accept that that is the position.

[22] There is a residual issue about product which Be Gorgeous says it supplied to Mr McDonald in lieu of paying his final pay. Mr McDonald says that these products were broken and/or unserviceable and therefore valueless, but even if that is not right, it is clear law that an employee is entitled to be paid his wages in money and not in kind.

[23] On the basis then of my conclusion that there is no property belonging to Be Gorgeous retained by Mr McDonald, that deals completely with the only relevant provision in the first signed employment agreement which related to this very point.

[24] The other relevant provisions are in the new unsigned agreement and they fall for consideration now.

[25] The Authority needs to address two questions. The first is whether the second unsigned agreement has any force or effect at all or whether, notwithstanding it was not signed by the parties, it in fact governed the relationship. The second question is, assuming that the second unsigned agreement is held to be a relevant arbiter of the employment relationship between the parties, whether the specific words in the agreement can be said to abrogate the general rule set out in s.4 of the Wages Protection Act 1983.

[26] The effect of s.4 of the Act is to create a general principle that an employee is entitled to the payment of his or her wages *without deduction*. However, the statute does allow of the possibility of exceptions to that general rule. There are four such exceptions. The first, which does not concern us in the present case, is in relation to any other specific statutory enactment.

[27] The second specific exception allows the employer to make deductions with the employee's written consent. Again, this exception does not concern us in the present case; there is no such written consent alleged or implied.

[28] The third exception allows compliance with orders of the Employment Court, the Employment Relations Authority or a provision of any **collective** agreement. Clearly, this exception does not apply either; there is no relevant order of the

Authority or of the Employment Court and Mr McDonald was not employed pursuant to a collective employment agreement.

[29] The final exception, which is also not relevant to the present proceedings, is the exception that applies when there is an allegation that an employee has been overpaid wages.

Does the second unsigned agreement apply?

[30] I am satisfied that the unsigned agreement between Mr McDonald and Be Gorgeous is in fact the operative employment agreement. I reach this conclusion because of the evidence from Mr Gogna (which I accept) that the employment relationships of all the staff were transferred from one entity to Be Gorgeous with effect from 1 February 2008 and so, with the exceptions that I have referred to in this determination, that is the operative employment agreement.

[31] The first exception relates to clause 25 *Expenses* which I have already made clear is so imprecisely drafted as to be meaningless. In lieu of that provision, I have applied the commonsense provisions in the earlier documents which I deem to still apply in the absence of a sensible provision in the new agreement.

[32] In respect of the attempt by Be Gorgeous to set-off its alleged losses from Mr McDonald's activities against his entitlement to receive a final pay, I have already referred to the terms of the Wages Protection Act 1983, its fundamental guiding principle in s.4 and the four exceptions to that central principle. As none of those exceptions apply in the present case, the words in clauses 7.3 and 36.1(b) of the new agreement, are also of no force or effect insofar as they purport to abrogate the effect of the Wages Protection Act 1983.

Determination

[33] Be Gorgeous is directed to pay to Mr McDonald the sum of \$1,557 net made up of \$1,072 net in wages (after deduction of PAYE, student loan of \$102 and \$70 for KiwiSaver), together with \$485 as reimbursement for expenses incurred by Mr McDonald.

Costs

[34] Mr McDonald has incurred the filing fee of \$70 and is entitled to reimbursement of that sum as well.

Certificate of decision

[35] For the avoidance of doubt, I direct that a certificate of decision is to be prepared and made available with this determination.

James Crichton
Member of the Employment Relations Authority