

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 25  
5309068

BETWEEN                    TANIA MERCER-BLACK  
   Applicant  
  
AND                            ZAIBATSU 2006 LIMITED  
   Respondent

Member of Authority:    M B Loftus  
  
Representatives:        Damian Black, Advocate for the Applicant  
   Diccon Sim and Ella Tait, Counsel for the Respondent  
  
Investigation Meeting:    28 September 2010 and 20 October 2010 at Dunedin  
  
Submissions Received:    At the investigation meeting  
  
Determination:            16 February 2012

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**DETERMINATION OF THE AUTHORITY**

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**Citation of respondent**

[1]     When initially filed, the application identified the respondent as Jaimee Smith of Zaibatsu Hair Art. This was questioned and when the parties discussed the matter they agreed that the respondent should have been more properly identified as Zaibatsu 2006 Limited. By consent, the identity of the respondent was changed accordingly.

**Employment Relationship Problem**

[2]     The applicant, Tania Mercer-Black, claims that she was unjustifiably dismissed by the respondent, Zaibatsu 2006 Limited (Zaibatsu), on or about 9 July 2008.

[3]     Zaibatsu's response comes in two parts. Its initial contention is that it could not have dismissed Ms Mercer-Black as it never employed her but had, instead, permitted her to operate her own business from Zaibatsu's premises. In the

alternative, and assuming that is not accepted, it is contended that Ms Mercer-Black stole money from Mrs Smith and had, by her actions, totally destroyed the element of trust crucial to the maintenance of the relationship (whatever form it may have taken) thus justifying its termination.

[4] Ms Mercer-Black disputes that she was operating her own business. She does however, essentially accept the charge of theft but contends the dismissal was unjust as the process leading to termination was so grossly deficient that termination may not have resulted. In particular she relies on the fact that she was summonsed to a meeting without warning of its purpose; that the discussion she had with her employer was heated and abusive and, most particularly, she was not given a fair opportunity to explain. Ms Mercer-Black is of the view that she had a valid explanation for her actions which may have satisfied Mrs Smith and prevented the termination.

### **Acknowledgement**

[5] Unfortunately a considerable period of time has passed since the investigation meeting. The situation has arisen as a result of workload issues compounded by the file being inaccessible for a considerable period due to Christchurch's earthquakes. I appreciate the parties patience and regret any inconvenience suffered.

### **Background**

[6] Ms Mercer-Black's relationship with Zaibatsu commenced in 2006 when she responded to an approach from her (then) friend, Mrs Smith. From her perspective the relationship was one of employer/employee and in support of this she refers to the fact that while she was paid a percentage of her sales the remuneration was subject to PAYE; her tax code was that of an employee (M); she was entitled to holiday pay and sick leave and was required to work set hours to meet Zaibatsu's needs.

[7] Zaibatsu's position is best summarised by Mr Sim's submissions. He states that the two had entered into *a collaborative relationship ... which enabled her to carry on her profession as a hair stylist serving her own client base, and effectively doing so on her own account.*

[8] Irrespective of which may be correct, and for the purposes of outlining the background to this matter, I shall use the term dismissal when referring to the arrangement's cessation.

[9] From Mrs Smith's perspective the chain events which culminated in the dismissal commenced toward the end of 2007. She says:

*For as far back as about December 2007 I had had difficulty balancing the till with there being regular unexplained cash shortfalls. The issue became much more significant in the period leading up to the Australia trip.*

*The matter was of major concern to me and was a priority agenda item at numerous staff meetings. I never raised the matter as one of stealing but rather focused on encouraging staff to ensure they were careful in ringing up transactions and in handling money. Although I did not raise it in that way, my concern grew about the possibility of theft. Cash had started going missing from my handbag and wallet. I discussed matters with Gabby Docherty who managed the salon and she started making checks on the salon cash which was kept drawer of the filing cabinet in the back office between bankings – which were typically weekly.*

[10] Mrs Smith goes on to comment about the amount she believes went missing and whilst she accepts that she is unable to identify a concluded amount she is of the view that it could have been in the order of some \$12,000.

[11] From Ms Mercer-Black's perspective, her problems commenced with the trip to Australia that Mrs Smith referred to in paragraph 9 above. That trip occurred in June and was to a hair expo in Sydney.

[12] Mrs Smith says that the arrangement she entered into was one whereby she would pay for the airfares and accommodation but all other costs, including tickets to the expo and meals etc. would be the responsibility of individual employees.

[13] Notwithstanding the fact that the accommodation had been paid for prior to arriving in Sydney the party found, when they arrived at the hotel, that a credit card was required as security against incidental costs and to *release the room*. It appears that for some reason Mrs Smith's card would not work and, according to Ms Mercer-Black, she asked if anyone else had one. Ms Mercer-Black says that she consulted with her partner, Damian, who had accompanied the party and that he agreed to her proffering their card. About this she says:

*My provision on my credit card to Mrs Smith was in the context of an employee supplying the employer with a card on a work trip.*

*In this context I expected that this credit card use would not endure any charges but that such charges would be refunded by the employer to the employee.*

*This was not a lending of the credit card by one friend to another and this forms the basis of my belief that the charges on this card should be repaid by the employer and my colour of right' belief for this to be so.*

[14] In her brief of evidence (in which Ms Mercer-Black refers to herself in the third person) she goes on to say:

*Upon returning to New Zealand Mrs Mercer-Black found charges on her personal credit card which she believes belonged to Mrs Smith. The charges were for incidentals and room cleaning of \$374.00.*

*Mrs Mercer-Black presented these charges to Mrs Smith for reimbursement however Mrs Smith refused to repay the amount as per her previous undertaking.*

*This situation went on for some time with Mrs Smith requesting Mrs Black organise a collection from the other staff employed in the salon to repay the credit card and included Mrs Black placing a notice on the staff notice board for such a request. This was unsuccessful in reclaiming any money.*

[15] Returning to Mrs Smith's concerns about the missing monies. She says:

*Because of my suspicions, I arranged for a security company to install a camera in the office at Zaibatsu early in July 2008. I then took care to undertake regular checks on the amount of cash in the 'takings' drawer in the office. On Tania's first working day after the camera went in a count of the money in the drawer at lunchtime revealed a shortfall. For this reason I privately reviewed the security camera footage. That footage, which I now produce as evidence, clearly shows Tania taking money from both my personal handbag and wallet and from the cash drawer. The footage shows her placing money in her own bag and also hiding it about her person.*

[16] Mrs Smith says that she watched the video several times to confirm that what she initially thought she had seen was *definitely taking place*. She says she reluctantly come to the conclusion that the recordings evidenced theft and that she was *absolutely distraught at the thought that someone whom I liked and trusted had been behaving in this way*.

[17] She says she was at a loss to know what to do and initially discussed the matter with a friend who operated an adjoining business and also sought advice from her husband (Ryan). The conclusion was that she needed to discuss the issue with Ms Mercer-Black.

[18] Ms Mercer-Black says that at about 6.15 that evening she was approached by Mrs Smith and asked if she had finished work to which she replied yes. She says that Mrs Smith then asked that she wait a moment and went to the rear of the saloon before returning with her husband and that both asked her to come with them to the rear office. She says she followed and that they closed the door once the three had entered the office.

[19] She complains that she as not told what the meeting was to be about, its possible consequences or given an opportunity to get support before going on to say (refer the initial statement of fact appended to the statement of problem) that:

*Jaimee then asked me if I had been stealing from her to which I replied "no".*

*Jaimee then stated she had evidence and turned on a DVD player and asked me to watch a picture. I complied and watched as a video image was played of myself in the back office alone at an earlier time during the day.*

*The video picture indicated myself moving to a bag and removing an item from the bag, and also an item from a drawer in the office, and placing this into my clothing or bag.*

*Jaimee then asked me what I was doing. I stated that I had taken money from the office and if she continued the video she would see my replacing some of the money at a later time in the day.*

*Jaimee and Ryan began talking about our personal relationship and accusing me of theft and stating that I had been doing this for some time.*

*I denied this and stated this occurred today only and tried to explain but was not given an opportunity to.*

*I asked Jaimee to continue to view the tape to show my further actions but she said she didn't believe a word I said and would not watch any more until later in the evening.*

*Jaimee told me she had spoken to the Police and asked for the return of my salon keys and that I was dismissed.*

*I again tried to explain my actions but was not given a chance with Jaimee and Ryan talking over me.*

*I complied with their request and handed my keys to her.*

[20] The explanation to which Ms Mercer-Black alludes and which she believes she was not allowed to give relates to the trip to Sydney and her belief that Mrs Smith was withholding moneys that were rightfully owing to her. She goes on to say that she was becoming more upset and disillusioned with this and:

*... knowing my Visa bill was coming due, I needed to make at least the interest payment, I in an error judgment, entered Jaimee's office on the day in question and removed \$60 from her bag and drawer.*

*I felt extremely guilty about this and I worked out that I only needed \$40 for my initial interest payment so I later returned and replaced \$20 with this amount...*

*I am extremely remorseful for this event and wish I had never made this decision.*

[21] In oral evidence, Ms Mercer-Black states that she took money three times that day and with \$20 being removed on each occasion from either Mrs Smith's handbag or the cash drawer but that she later returned one of the notes.

[22] Mrs Smith's recollection differs in some material ways. She says:

*I asked to talk to Tania in private in the office. Tania agreed and joined me in the office. Ryan was with us but he did not participate actively in the meeting.*

*I explained to Tania that I had suspected a member of the staff had been stealing money and that this had been going on for some time. I asked Tania directly if she knew anything about it to which she responded "no". I told Tania that I suspected that it might be her and offered her the opportunity to tell me if she had taken any money. Again she said she didn't know anything about it.*

*At that point I told her about the camera. Tania was eager to see the recording then and there and, with Ryan still present, we reviewed the footage.*

*Once we had watched the film I asked Tania why she had taken money from the cash draw to which she replied that she had not. I then said that the footage clearly showed her doing that. At that point Tania changed her response to say that she "borrowed some money". Tania then removed, I think, \$20 from her bag and tried to give it back to me. I declined to accept the money and said something about how unhappy I was made by what she had done. She said she wanted to sort something out with me, but I said I didn't want to deal with things that evening. By that point my wish was to end the meeting and to deal with the matter at a later time.*

[23] Mrs Smith denies the accusation that there was any swearing or other heated discussion. That denial was supported by her husband. Mrs Smith also denied that she advised that the relationship was over at the meeting but does accept that she asked Tania to return her keys but states *I think it was probably pretty clear to both of us that there was a complete breakdown in trust between us which would make it difficult for us to continue our arrangement*, before going on to add that she expected there would be a further meeting to discuss the situation. She also denies that she had, as alleged,

already approached the police and that appears to be supported by the relevant police documentation which suggests they were not approached until 6 August.

[24] Mrs Smith says that later that evening text messages passed between the two with Ms Mercer-Black asking for an opportunity to discuss the situation further. Mrs Smith says she replied by advising that she did not want to discuss the matter through texts but would be happy to meet in person. Ms Mercer-Black says the response was *f... off*.

[25] As events transpired, there was no meeting and matters quickly escalated with the involvement of formal representation.

[26] There was also considerable evidence about subsequent events which Ms Mercer-Black contends has caused her extreme harm and humiliation. These relate to an allegation that Mrs Smith has discussed the events and her accusations of theft with a number of other people; that she has shown the video to others and that she made a complaint to the ethics committee of the Otago Association of Registered Hairdressers along with a request that Ms Mercer-Black be stood down as a judge of industry competitions. Ms Mercer-Black also takes issue with the police involvement and, in particular, her accusation that after the Police decided to issue a letter of warning, but not prosecute, Mrs Smith attempted to have the Police revisit the issue and take more serious action. That did not occur.

[27] There is also an issue about property that Ms Mercer-Black claims was hers; which she left at Zaibatsu's premises and which has never been returned. Mrs Smith claims that she has searched for said property but that none of it remains on her premises.

### **Issues**

[28] There are a number of issues to be determined in this matter. They are:

- (a) Was Ms Mercer-Black an employee of Zaibatsu or a self-employed contractor?;
- (b) If she was an employee, was she dismissed?; and
- (c) Can Zaibatsu justify a dismissal if one occurred?

***Was Ms Mercer-Black an employee?***

[29] In addressing the nature of the relationship Mr Sim submits that:

*The applicant was not integrated into the Zaibatsu business. She effectively served her own client base rather than Zaibatsu's customers, was not allocated new customers ..., did not work at the less desirable hours that other staff did and was not regarded as part of the cover for holiday purposes. The Applicant's hours were not dictated by the Respondent; the Applicant made plain in her evidence that to the extent her hours were reasonably regular that was dictated by her family needs, not by the salon's needs. The Applicant worked on a commission basis.*

*The economic reality of the situation was that the Applicant was on business on her own account.*

[30] Whilst I accept that Ms Mercer-Black's hours were not as onerous as others engaged at the salon, I conclude that the indicia referred to by Mr Sim are overwhelmed by those that suggest the relationship was that of employer and employee. In particular I refer to:

- a. The fact the relationship was governed by a **individual employment agreement** (emphasis is mine);
- b. The agreement bestowed benefits that simply would not be available to a contractor such as public holidays and annual leave;
- c. The agreement is extremely complete and contains various terms and obligations that simply would not apply to a contractor or self employed person;
- d. The tax arrangements applied by Zaibatsu to Ms Mercer-Black's remuneration were those of an employee and there is no evidence that she engaged in any of the tax or accounting practices expected of a person conducting their own business; and
- e. There is no evidence that Ms Mercer-Black was charged chair rental or similar fees that would be expected had she been using Zaibatsu's premises for the conduct of her own business;

[31] Given the factors above, and particularly the express terms of the agreement between the two, I conclude that Ms Mercer-Black was an employee.

***Was Ms Mercer-Black dismissed?***

[32] The conclusion Ms Mercer-Black was employed raises the question of whether or not she was dismissed. Ms Mercer-Black says she was expressly advised that she had been dismissed while Mrs Smith denies that occurred. She says that the discussion remained incomplete with the termination being affected by Ms Mercer-Black's decision not to return. That decision was a considered one as confirmed by the texts and correspondence which followed.

[33] In support of the contention that Ms Mercer-Black was not dismissed, Mr Sim points to her brief of evidence and, in particular, paragraph 19. At no point does the brief claim the word dismissed was used. Instead, Ms Mercer-Black says that she *felt* she had been dismissed and, it is submitted, that falls short of an express event.

[34] When answering questions during the investigation Ms Mercer-Black's answers remained consistent with her view she had been dismissed. Mr Smith's answers were indecisive and he had no recollection of exactly what was said. Mrs Smith, while remaining adamant she did not tell Ms Mercer-Black she was dismissed, accepts that when she asked for the keys, she also told Ms Mercer-Black to take her belongings. When asked about a claim by Ms Mercer-Black that she had been told she was no longer wanted, Mrs Smith denied making that comment but stated her comment was *get your gear and go*.

[35] A dismissal is a sending away. A comment such as *get your gear and go*, when combined with a request for the keys which have permitted an ability to access the workplace enjoyed since commencement can, in my view, be interpreted as a sending away. They amount, in my view, to an act of dismissal and I consider that Ms Mercer-Black can, given the circumstances and facts, rightfully conclude she was dismissed that evening.

**Was the dismissal justified?**

[36] The conclusion Ms Mercer-Black was dismissed means Zaibatsu is required to justify the dismissal. Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is 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 the dismissal ... occurred.*

[37] That test is used as the cause of action arose prior to the present test coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[38] The fact the legislative environment extant prior to 1 April 2011 applies also means the express procedural requirements now contained in s.103A(3) do not apply. Instead I must apply the law as it existed at the time. I refer to this as Ms Mercer-Black does not deny she stole from her employer, but essentially relies on a range of procedural improprieties that, in her view, render the dismissal unjustified. The most significant of these is her view that her explanation was not given, let alone considered.

[39] The law, as it applied at the time, accepts there could be actions so grievously destructive of the employment relationship that irrespective of procedural deficiencies an employer's knowledge of them destroyed the trust required for the maintenance of a viable relationship. There are, albeit rare, examples where an employer can act without inquiry such as *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand* [1990] 3 NZLR 549 (CA) where the Court said *In some instances the facts are so clear that instant dismissal is justified*.

[40] This is not, however, a matter where the process is so bereft of fairness that I consider it to render the dismissal unjustified. Here the employee was aware of her obligations, but chose to ignore them. Indeed she did so more than once, admitting that she repeated her act of theft three times on the one day. Her admission came, according to Ms Mercer-Black's own evidence, before she was advised of her dismissal. In such circumstances I consider the employer had enough knowledge – they had put the concern and despite initial denial (which perhaps aggravated matters further) obtained an admission.

[41] I consider that most employers would, in such circumstances, dismiss and justifiably so as the admitted conduct is, I conclude, totally destructive of the trust that is an essential element in an ongoing employment arrangement, especially given the fact this agreement was initially founded on personal friendship.

[42] Even if the above conclusion is wrong, I do not believe the outcome would alter.

[43] As said earlier, Ms Mercer-Black's claim relies on procedural deficiencies and, in particular, a claim she was not allowed to explain.

[44] I consider her 'justification' deficient. I heard evidence from a number of Zaibatsu's employees. Most were called by the company but one appeared on Ms Mercer-Black's behalf. Their evidence was consistent – all staff (including Ms Rebecca Smith who was called by Ms Mercer-Black) knew the rules – they were liable for the costs that were, ultimately, incurred on Ms Mercer-Black's credit card.

[45] Additionally all agree that while they were aware that some charges had been incurred, Ms Mercer-Black did not seek a contribution from them. Instead she appears to have done nothing more than demand Mrs Smith address the issue. The evidence would also suggest that when Mrs Smith correctly responded by saying *approach the staff*, Ms Mercer-Black chose not to.

[46] Explanation aside, and even if I concluded that the dismissal was unjustified on some procedural ground, section 124 of the Act requires that I then consider whether or not the 'successful' employee contributed to the situation in which she found herself and reduce any award accordingly.

[47] I can not get past the fact that theft is theft. By engaging in that activity Ms Mercer-Black contributed absolutely to the situation in which she found herself. When the dismissal occurred, the employer had an admission and an acceptance that the behaviour was totally unacceptable. In such circumstances I would consider a finding of 100% contribution appropriate.

[48] In *Wilmshurst v McGuire* [1999] 2 ERNZ 128 (a case involving a breach of the duty of fidelity as opposed to theft) the Court held that there could be breaches that exposed the employee to heavy penalty even if performed in ignorance of the employee's obligations and notwithstanding what would normally be considered fatal procedural deficiencies. The Court commented that there is not, in such circumstances, any benefit in making an award and then removing it. It went on to suggest that when faced with such a situation the Tribunal (now read Authority) should simply say there is no merit to the claim and no benefit should accrue.

[49] Finally I comment on the claim of unreturned property. I have no evidence that gives me any reason to question Mrs Smith's statement that the property is no longer present and therefore take the claim no further.

[50] For the above reasons I conclude that irrespective of how Ms Mercer-Black's claim is considered, no remedies would accrue. Her claim therefore fails.

### **Costs**

[51] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that Zaibatsu wishes to seek a contribution toward its costs, it is required to file its application within 28 days of this determination. A copy shall be served on Ms Mercer-Black who is to file any response within 14 days of the application.

M B Loftus  
Member of the Employment Relations Authority