

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 19
5534410

BETWEEN ANNE-MARIE STRANG
Applicant

AND BASIL RUTHERFORD
First Respondent

AND MENS GROOMING LIMITED
T/A BARKER'S GROOM
Second Respondent

Member of Authority: M B Loftus

Representatives: Anne-Marie Strang, on her own behalf and assisted by
Samantha Strang
No appearance for Respondent

Investigation Meeting: 10 February 2016 at Wellington

Submissions Received: At the investigation meeting

Determination: 10 February 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Anne-Marie Strang, claims she was unjustifiably dismissed (albeit constructively) on or about 16 October 2014. She says her resignation was prompted by her employers failure to respond to multiple requests for a written employment agreement and its habit of paying wages both late and incorrectly.

[2] Mens Grooming Limited (Mens Grooming) states it was the employer and not the first respondent, Basil Rutherford (the sole shareholder in Mens Grooming and an ex-director). Mens Grooming denies it constructively dismissed Ms Strang and asserts she left of her own volition.

[3] The issues which precipitated the dismissal are also raised, in the alternate, as disadvantage claims and there is an arrears claim with Ms Strang seeking unpaid holiday pay.

[4] Mens Grooming has not addressed the inconsistent payments or the failure to provide an employment agreement. As already said, its defence is no more than an assertion Ms Strang resigned of her own volition. With regard to the arrears claim it says Ms Strang was paid on 18 October 2014 but does not say what was paid or whether the amount included holiday pay.

[5] Finally there is a claim penalties be imposed. There is no response to this.

Non-appearance of the Respondent

[6] At the commencement of the investigation meeting Ms Strang advised acceptance of Mens Grooming's assertion it was the employer and the claim proceeded on that basis.

[7] Mens Grooming was neither present nor represented at the investigation meeting. That raised the question of whether or not I proceed in its absence.

[8] I am satisfied Mens Grooming is aware of the investigation meeting. Mathew Swan, the company's manager and sole director, participated in a telephone conference during which he agreed to the scheduling of today's investigation meeting. A notice of hearing was then sent to an address Mr Swan advised as that which should be used for service. It is clear it was received as Mr Swan subsequently acted on information sent with the notice through a solicitor who communicated with the Authority.

[9] During the telephone conference I cautioned Mr Swan that should he not attend the investigation it would most likely proceed in his absence. The notice reiterates that advice.

[10] I am therefore satisfied Mens Grooming is, or at least should be, aware of the investigation meeting and the consequences of non-attendance. Despite that it has not attended nor advised or explained its absence. I am therefore unaware of any reason why I should not proceed and choose to do so. Ms Strang is entitled to have her claims resolved.

Background

[11] Ms Strang applied for, and was successful in attaining, employment as a hairdresser with Mens Grooming with effect 14 July 2014. She says she was promised \$18 per hour but when she asked for an employment agreement was told that was unnecessary as she was on a 90 day trial. She says she was told an agreement would be forthcoming when she successfully completed the trial.

[12] Ms Strang says she enjoyed the work but a couple of issues marred the relationship. She says she continued to ask for an employment agreement. She did so frequently but one was never furnished. The other problem was that her pay was frequently late and often incorrectly calculated. The problems extended to having one of her pays deposited to the account of a co-worker. Ms Strang says these issues led to budgeting problems which adversely affected her.

[13] Her concerns, and the voicing thereof, led to an agreement she would meet with Mr Swan in early October and he promised to bring an employment agreement. He failed to do so and this proved the final straw for Ms Strang. She e-mailed her resignation on 16 October and after discussing this with Mr Swan it was agreed the resignation would take immediate effect.

[14] The following day (17 October) Ms Strang telephoned the Inland Revenue Department (IRD) to ascertain the balance of her student loan. In doing so she discovered the IRD had no record of her having worked for Mens Grooming and had received neither PAYE, student loan repayments or Kiwisaver contributions. A subsequent call from the IRD threatening penalties caused further anguish.

[15] Mr Strang then sought the assistance of an accountant to calculate the arrears and represent her interests with the IRD. As events have transpired Mens Grooming has now forwarded both PAYE and student loan deduction to the IRD but Kiwisaver remains outstanding.

Determination

[16] Ms Strang considers the failure to provide the employment agreement or pay her correctly and on time were significant breaches which brought about her decision to resign. In other words she says she was constructively dismissed.

[17] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign.

[18] There must also be a causal link between the employer's conduct and the tendering of the resignation² and the possibility of resignation in response to that conduct should be foreseeable.³

[19] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Ms Strang to establish, prima facie, there was such a breach.

[20] Having heard her evidence, and in the absence of any input or challenge from Mens Grooming, I am satisfied she has done so.

[21] At its simplest an employment agreement can be considered an exchange of labour for remuneration. A failure on the part of one party to provide its consideration (in this case the remuneration) in a timely and proper manner can, I conclude, be considered a breach and a significant one. That is especially so where there is evidence of a harmful effect as there is here. I also consider it foreseeable an employee might react negatively to such conduct.

[22] There is then the failure to provide the requested employment agreement. Not only is this a breach of a statutory requirement duty, the evidence supports a conclusion Mens Grooming has failed to comply with the duty of good faith in that it misled Ms Strang by giving undertakings it failed to honour and failing to act in a manner conducive to the maintenance of a productive employment relationship.

[23] As already said the evidence and Ms Strang's responses when I tested her assertions leads me to conclude Mens Grooming is guilty of various breaches which led Ms Strang to conclude the relationship was no longer viable. She has established she was constructively dismissed. The lack of a defence means the dismissal is unjustified.

¹ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

² *Z v A* [1993] 2 ERNZ 469

³ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[24] The conclusion Ms Strang was unjustifiably dismissed leads to a consideration of remedies. Ms Strang seeks lost wages along and \$2,000 as compensation for hurt and humiliation.

[25] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[26] Ms Strang took steps to mitigate her loss and acquired replacement employment some seven weeks after leaving Mens Grooming. Her accountant (refer [15] above) calculated she would have received \$5307.12 during that period (including holiday pay on the wages she would have earned⁴). In the absence of any contrary argument I accept the calculation is accurate and order that amount be paid.

[27] Turning to compensation. Ms Strang only seeks \$2,000. This is a very moderate claim especially as it was supported by more than adequate evidence. That evidence leads me to conclude the amount sought should be awarded in full.

[28] The conclusion remedies accrue means I must, in accordance with s124 of the Act, address whether or not Ms Strang contributed to her dismissal in a significant way. There is absolutely no evidence she did.

[29] There is then the claim for outstanding holiday pay in the amount of \$1,057.92. For the following reasons I conclude this is payable;

- a. I have no reason to disbelieve Ms Strang evidence in this regard and note it is supported by her accountant's records;
- b. The claim was not denied by Mens Grooming in its statement in reply;
and
- c. Section 132 of the Act and a lack of time and wage records would lead me to order payment in any event.

[30] Ms Strang seeks a further \$352.94 being Kiwisaver contributions Mens Grooming is yet to forward to the IRD. Again this is money that remains payable to Ms Strang (or more correctly her benefit via her Kiwisaver Account) and which she should receive.

⁴ Refer *Gunning v Bankrupt Vehicle Sales and Finance Ltd* [2013] NZEmpC 212 at [44]

[31] Ms Strang also seeks reimbursement of the accountant's bill (\$736) she incurred in trying to address the unpaid students loans and PAYE. This is a cost directly attributable to the employer's failures and which, but for those failures, would not have been incurred. I conclude it should therefore be reimbursed.

[32] Finally there is the claim for penalties which are sought for the following alleged breaches:

- a. Mens Grooming's failure to provide a written employment agreement;⁵
- b. Its failure to pay outstanding holiday pay;⁶ and
- c. A breach of section 63A(2) of the Employment Relations Act 2000 which specifies various requirements in respect to the offering of an employment agreement.

[33] The evidence leads me to conclude all three alleged breaches have occurred but the claim under s65(4) of the Act is untenable as such a claim can only be brought by a Labour Inspector. The other two claims do not face such an impediment.

[34] In addressing this claim I am cognisant of the principles enunciated in *Tan v Yang & Zhang*.⁷ I also conclude the breaches are of the egregious type which warrant condemnation via the imposition of a penalty. They are serious, numerous and repeated. I also note Mr Swan has a track record in this regard⁸ and that raises one of the prime reasons for imposing a penalty – deterrence. He did not learn from his previous experience so a considerable penalty is warranted. I consider a penalty of \$5,000 appropriate and order its payment to the Crown via the Authority.

[35] Finally there is an application for costs. As Ms Strang was self-represented recompensible costs are limited to reimbursement of the filing fee (\$71.56). Given her total success I consider it appropriate it be reimbursed and will order payment accordingly.

⁵ Section 65(4) of the Employment Relations Act 2000

⁶ Section 75(2)(a) of the Holidays Act 2003

⁷ [2014] NZEmpC 65

⁸ *Ingham (Labour Inspector) v Swan* [2015] NZERA Auckland 101

Conclusion and orders

[36] For the above reasons I conclude Ms Strang has a personal grievance in that she was unjustifiably dismissed and she has also established she is due unpaid monies. As a result I order the respondent, Mens Grooming Limited, to make the following payments to the applicant, Anne-Marie Strang, no later 4.00pm Friday 26 February 2016:

- i. \$5307.12 (five thousand, three hundred and seven dollars and twelve cents) gross as recompense for wages lost as a result of the dismissal; and
- ii. \$2,000.00 (two thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. \$1,057.92 being unpaid holiday pay; and
- iv. \$352.94 being unpaid Kiwisaver contributions; and
- v. \$736.00 being reimbursement of costs incurred (the accountants account) in addressing Mens Grooming's failures; and
- vi. a further \$71.56 (seventy one dollars and fifty six cents) as a contribution towards Ms Strang's costs.

[37] Mens Grooming is to pay a further \$5,000.00 (five thousand dollars), being a penalty payable to the Crown pursuant to section 135 of the Employment Relations Act 2000. Payment is to be made via the Authority⁹ no later than 4.00pm Friday 26 February 2016.

M B Loftus
Member of the Employment Relations Authority

⁹ Section 136 of the Employment Relations Act 2000