

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 61/09
5132167

BETWEEN TRACEY LEIGH TAYLOR
Applicant
AND PAULETTE DENESE JONES
Respondent

Member of Authority: Philip Cheyne
Representatives: Anjela Sharma, Representative for the Applicant
David Patten, Counsel for the Respondent
Investigation Meeting: 20 February 2009 at Nelson
Determination: 8 May 2009

DETERMINATION OF THE AUTHORITY

[1] Tracey Taylor says that she was unjustifiably dismissed by Paulette Denese Jones who owned and operated a business in Nelson called Cardells Hair Salon. Mrs Jones says that Ms Taylor did not raise any grievance within 90 days, that she has not consented to a grievance being raised out of time and that there are no exceptional circumstances to justify the Authority granting leave to Ms Taylor for an out of time grievance now to proceed.

[2] Despite the assertion in correspondence on the respondent's behalf that no employment agreement was ever concluded, Mrs Jones' evidence is that she offered and Ms Taylor accepted an apprenticeship which was to commence in February 2008. That reflects Ms Taylor's evidence. However, Ms Taylor never actually commenced that apprenticeship but she was a person intending to work so an employee for the purposes of the Employment Relations Act 2000. Ms Taylor says that she was

dismissed during a phone discussion with Mrs Jones in early December 2007. Mrs Jones says that she never dismissed Ms Taylor.

[3] To resolve this employment relationship problem I will first set out what steps were taken by Ms Taylor in December 2007 after the disputed phone conversation and determine whether a personal grievance was raised within time. If no grievance was raised in time I must then consider whether there are exceptional circumstances and whether leave should be granted for an out of time grievance. If a grievance was raised within time or leave is granted, I will need to determine whether there was a dismissal, and if so, whether it was justified.

[4] Although the respondent was identified as *Denise Jones* in the statement of problem, Mrs Jones' correct name is *Paulette Denese Jones*. By consent, I amend the name of the respondent to reflect Mrs Jones' correct name.

Did Ms Taylor raise a grievance within time?

[5] The second to last direct contact between Ms Taylor and Mrs Jones was on or about 3 December 2007. Ms Taylor phoned and spoke to Mrs Jones about working at the salon over the Christmas period prior to commencing the apprenticeship in February 2008. There are some disputes between the two women over precisely what was said. Ms Taylor says that she was told she was no longer needed. Mrs Jones' account is as follows.

I declined her request for work experience, not because I was turning her down for her apprenticeship due to start the following February, but because I had taken temps on for the month of December and had no time to spend with her.

[6] For present purposes it is sufficient to accept that Ms Taylor thought she had been dismissed. On 13 December 2007, at her mother's suggestion, Ms Taylor rang Mrs Jones and asked to be given a trophy won by her under Cardells name at a regional competition earlier in 2007. Apparently the practice is that such trophies are held by the salon rather than the individual. Mrs Jones told Ms Taylor that she could not have the trophy. That caused Ms Taylor to burst into tears during their telephone discussion and the call then ended.

[7] On or about 14 December 2007, Ms Taylor wrote a letter of that date to Mrs Jones. Ms Taylor had the assistance of her mother (Kristine Carpenter) and grandmother (Barbara Vercoe) and advice from an employment advocate (Brent

Climo). Once the letter was finalised it was printed at Mrs Carpenter's work and she and Ms Taylor went and posted it. I infer that the envelope was correctly addressed because the letter is. There is no reason to doubt Mrs Carpenter's evidence about the letter being posted on 14 December 2007 and it is accepted for Mrs Jones that the 14 December 2007 letter probably was posted. However, Mrs Jones' evidence is that she never received this item until she received a copy of it on or about 13 March 2008 enclosed with a letter from Mr Climo dated 12 March 2008.

[8] Normally one would expect posted items to be delivered but that alone is not sufficient to disbelieve Mrs Jones' evidence. There is no other good reason to disbelieve Mrs Jones on this point so I therefore accept her evidence that she did not receive the December letter until March 2008.

[9] The starting point for calculating the 90 day period for a grievance to be raised is when the action alleged to amount to a grievance occurs or comes to the notice of the employee, whichever is later: see s.114(1) of the Employment Relations Act 2000. In the present case, the action complained of is the communication to Ms Taylor on or about 3 December 2007 which Ms Taylor says amounted to the termination of her apprenticeship. I take that date as the starting point of the 90 day period.

[10] A grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employer wants the employer to address: see s.114(2) of the Employment Relations Act 2000. I find that in drafting, signing and posting her letter of 14 December 2007, Ms Taylor took reasonable steps to communicate to Mrs Jones her dissatisfaction with her dismissal.

[11] Counsel for Mrs Jones submitted that the content of Ms Taylor's letter was insufficient to raise a grievance. In *Ruebe-Donaldson v Sky Network Television Ltd (No 1)* [2004] 2 ERNZ 83 the Employment Court found that *raise* was virtually synonymous with *submit* in the context of that case. In *Creedy v Commissioner of Police* [2006] ERNZ 517 the Employment Court confirmed that the legislative purpose of requiring a grievance to be raised was to enable an employer to remedy that grievance rapidly and as near as possible to its point of origin. A grievance must be specified sufficiently so as to enable an employer to address it. In *Clark v. Nelson Marlborough Institute of Technology* unreported, Couch J, 19 August 2008, CC12/08,

the Employment Court approved a concession by counsel that a letter detailing an aggrieved employee's issues and asking for the mismanagement to be remedied amounted to the raising of a grievance. In the present case, I find that Ms Taylor's letter did convey, from the perspective of an objective observer, that she claimed to be aggrieved about her dismissal: see *Winstone Wallboards Ltd v. Samate* [1993] 1 ERNZ 503. The letter sufficiently detailed her grievance so as to enable Mrs Jones to address it.

[12] To summarise, I find that by posting her correctly addressed 14 December 2007 letter in a post box, Ms Taylor took reasonable steps to make Mrs Jones aware that she was alleging a personal grievance that she wanted the employer to address. Ms Taylor raised her grievance within time and should have it dealt with on its merits.

[13] In case that conclusion is wrong, I will set out my conclusions about whether leave would be granted for Ms Taylor to raise her grievance out of time.

Leave to raise an out of time grievance

[14] Ms Taylor sought advice from an employment advocate (Brent Climo) about her 14 December 2007 letter. Later, she instructed Mr Climo to proceed with her grievance claim. Ms Taylor was unable to be more precise about when she did this other than to say it was some time in mid-February 2008. Mr Climo is now deceased and Ms Sharma has taken over this file. The file contains a letter dated 28 February 2008 drafted by Mr Climo. There is no evidence that this letter was posted. Ms Taylor was unaware of its existence at the time, and Mrs Jones' evidence is that she never received such a letter. There is no reason to disbelieve Mrs Jones' evidence on this point. While the letter was not sent, it does support Ms Taylor's evidence that in mid-February she asked Mr Climo to proceed with her grievance concerning the termination of her apprenticeship.

[15] The Employment Relations Act 2000 empowers the Authority to grant leave for an employee to raise a grievance out of time if the delay in raising the grievance is occasioned by exceptional circumstances and if it is just to do so. Exceptional circumstances include when the employee has made reasonable arrangements to have their grievance raised on their behalf by an agent who has unreasonably failed to ensure the grievance was raised within time. I accept Ms Taylor's evidence that, in mid-February 2008, she arranged for Mr Climo to proceed with her grievance.

Mr Climo failed to ensure that the grievance was raised within time. Instead, he sent a letter on 12 March 2008 outlining Ms Taylor's grievance and her claim for compensation. Mrs Jones received that letter on 13 March 2008, 12 days after the end of the 90 day period.

[16] Mrs Jones instructed counsel who sent an email to Mr Climo on 31 March 2008 saying that he had received partial instructions and hoped to be able to respond to the 12 March letter *by later this week*. That did not happen. Mr Climo had a terminal illness which incapacitated him from about this time. Counsel learned of Mr Climo's illness and decided not to trouble him, expecting to hear further if Ms Taylor's matter was to be pursued. As noted above, Ms Sharma took over Mr Climo's file on this matter after his death. On or about 12 July 2008, Ms Sharma went to see Mrs Jones to talk to her about Ms Taylor's grievance, it not being apparent from Mr Climo's file that Mrs Jones had instructed counsel. There is a dispute about what happened, but that is immaterial for present purposes.

[17] Ms Sharma's visit prompted counsel to send Ms Sharma an email on 17 July 2008 asking for confirmation about the status of Mr Climo's letter of 12 March 2008. In reply, Ms Sharma confirmed her instructions to proceed with the grievance. There was then correspondence on 22 July 2008 by both representatives that crossed, both letters dealing with the substance of Ms Taylor's grievance claim. The substantive response on behalf of Mrs Jones supports the conclusion that the 14 December 2007 letter contained all the information necessary to raise a personal grievance. Following further correspondence from Ms Sharma, counsel wrote a letter dated 29 July 2008 mentioning for the first time the issue about whether a grievance had been raised within time.

[18] From this sequence, it is clear that the respondent's delay in replying from March until July 2008 vastly exceeded the delay after 90 days in raising the grievance, assuming the grievance was raised on 13 March 2008. In addition, Mrs Jones was fully able to and did respond to the substance of the grievance. The delay did not prejudice Mrs Jones ability to deal with the substance of the grievance. Accordingly, if it was necessary to do so, I would find it just to grant leave.

[19] I now turn to whether there was a dismissal.

Was Ms Taylor dismissed?

[20] There is some dispute between Mrs Jones and Ms Taylor about precisely what was said over the phone on 3 December 2007. In her 14 December letter, Ms Taylor says:

... you said you didn't have any positions as you had taken on more "littlies" and you didn't need me any more. I was stunned. I felt worthless and wondered what they had that I didn't, especially as you had guaranteed me a job.

... I now have to make other plans for my future having turned down jobs from other salons. It was now too late in the year for me to find a job easily, as other salons had already taken on littlies.

I'm writing to let you know how I feel so that you think first and don't treat any other young hairdressers the way you treated me.

[21] Mrs Jones' evidence is that she only told Ms Taylor that she was not required for work experience over Christmas and did not terminate the apprenticeship due to start in February 2008. I do not accept this evidence. First, Ms Taylor's evidence is supported by what she wrote on or about 14 December 2007. Secondly, if Mrs Jones had not terminated the apprenticeship she would have contacted Ms Taylor sometime before February 2008 to finalise the arrangements but she did not do so. When I asked why not, Mrs Jones could offer no explanation. It is also clear that Mrs Jones had by early December 2007 become disgruntled about Ms Taylor, thinking that she was the source of some rumours apparently circulating at polytech, so she had a reason to terminate the apprenticeship. For these reasons, I find that Mrs Jones did terminate Ms Taylor's apprenticeship during their exchange on or about 3 December 2007.

Justification

[22] Justification for a dismissal must be determined on an objective basis by considering whether the employee's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[23] Mrs Jones' decision to dismiss Ms Taylor is completely without justification. The only issue which emerged during the investigation meeting was Mrs Jones' attribution to Ms Taylor of the negative rumours circulating at the Polytech. However, that matter was never raised at the time with Ms Taylor. There is no evidence to support the suggestion that Ms Taylor had any part in the rumours.

[24] The dismissal being unjustified, Ms Taylor has a personal grievance.

Remedies

[25] There is no evidence that Ms Taylor contributed in a blameworthy way to the situation giving rise to her grievance.

[26] There is a claim for compensation for loss of income mentioned in the statement of problem, but Ms Taylor's evidence is that she obtained another full time position (not an apprenticeship) in January 2008. As a result, Ms Taylor did not suffer any loss of remuneration.

[27] There is a claim for \$5,000 compensation for distress. I accept Ms Taylor's evidence about the effects on her of the unjustified dismissal. In addition, there is the evidence of Mrs Carpenter who says that her daughter took a long time to recover from her ordeal which turned her from a driven, confident young woman into a young woman with a broken spirit and low self esteem who could barely get herself out of bed in the mornings to face the world at large. In light of this evidence, which I also accept, the claim for \$5,000 compensation is modest and I award it in full.

[28] Ms Sharma did not press the claim in the statement of problem for compensation for Ms Taylor's course fees, travel costs and living expenses relating to her course in Christchurch prior to the apprenticeship with Mrs Jones. The course was not part of Ms Taylor's employment agreement to be employed as an apprentice so those costs cannot be compensated for as part of the established grievance.

[29] There is a claim for compensation of \$5,000 for *unfair disadvantage*. It is unclear what this relates to. It may arise from the exchanges between Ms Taylor and Mrs Jones prior to the agreement for her apprenticeship to start in February 2008. There is much conflicting evidence about various exchanges which commenced in April 2007. It has not been necessary to canvass those conflicts in this determination because of Mrs Jones' and Ms Taylor's evidence that there was an agreement for an apprenticeship starting in February 2008. This agreement overtook earlier arrangements and expectations but Ms Taylor now considers that she should not have changed the earlier arrangements. That may be so, but it cannot form the basis for any compensation now.

Summary

[30] Ms Taylor raised her grievance within time. Even if she had not done so, I would have granted leave for her grievance to be raised out of time.

[31] Mrs Jones unjustifiably dismissed Ms Taylor so Ms Taylor has a personal grievance.

[32] To remedy this grievance, Mrs Jones must pay Ms Taylor compensation of \$5,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[33] Costs are reserved. Any claim for costs must be made within 21 days and the other party may reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority