IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 207
5396442

	BETWEEN	JUSTINE WARD Applicant
	AND	KATHERINE SOPER t/a SOPHISTICUTZ Respondent

Member of Authority:	M B Loftus
Representatives:	Anjela Sharma, Counsel for Applicant Kay Chapman, Advocate for Respondent
Investigation Meeting:	27 June 2013 at Nelson
Submissions received:	5 July 2013 and 2 August 2013 from Applicant 22 July 2013 from Respondent
Determination:	4 October 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Justine Ward, claims she was unjustifiably dismissed by the respondent, Katherine Soper, on 13 June 2012.

[2] Ms Ward also claims she is yet to receive holiday pay entitlements and seeks payment accordingly.

[3] Ms Soper accepts she dismissed Ms Ward but contends the dismissal was justified by reason of redundancy. Ms Soper denies there are monies owing and instead claims Ms Ward was actually overpaid by $620.30. She seeks repayment.

Background

[4] Ms Soper operated a small hairdressing business trading as Sophisticutz. She engaged Ms Ward as an intermediate hairdresser in August 2010. There was no written employment agreement.

[5] Ms Ward says her hours of work were reduced in March 2012 when she, along with other staff, was approached by Ms Soper who requested the reduction as workloads had decreased with the arrival of cooler months. Ms Ward claims Ms Soper told staff the previous hours would be reinstated when warmer months returned.

[6] Ms Soper accepts the hours reduced but denies the cut was temporary and related to reduced trade during winter months. She says she explained the business was in financial difficulty and up for sale. She says she advised staff that to avoid redundancies in the interim, action would have to be taken. She proposed reduced hours for all and the staff accepted the idea.

[7] The reduction has been mentioned as it illustrates the issues facing Sophisticutz but while Ms Ward was dissatisfied with this and some other issues canvassed in evidence, these shall not be delved into further. There are no specific claims with respect to them and they do not affect determination of the two questions I have been asked to address, namely, whether the dismissal was justified and do wages owe.

[8] On 7 June Ms Soper scheduled a half hour lunchtime meeting between her and Ms Ward. This was notified via an entry in the salon's appointment book which also served as a staff communication tool. Ms Soper then removed the appointment and replaced it with another. There were several further changes over the next day or two.

[9] Ms Soper attributes the changes to her reticence about facing the difficult and emotional task ahead: namely, advising Ms Ward of a decision to make her redundant.

[10] Ms Ward says Monday 11 June was a day off yet she received a text asking that she come into Sophisticutz for a meeting at 1.45pm. She says there was no indication as to what the meeting was for but was worried there may be a performance

concern. She therefore telephoned her mother who agreed to come with her. Ms Soper was accompanied by her mother's partner, Mr Steven Kerr.

[11] About the meeting Ms Ward says:

> *To my shock, Katherine started saying that she would have to let me go, and that her business was not doing very well. I was not expecting this at all.*
>
> *A question was asked whether we could have the decision in writing but Mr Kerr told us that it was not a dismissal but a redundancy…*
>
> *The meeting was over within minutes, and I was in a state of shock. While I had sensed that there was something going on, it never occurred to me that I was about to lose my employment.*

[12] Notwithstanding the allegation she was told the termination would not be confirmed in writing, it was. By letter dated 13 June 2012 Ms Soper advised:

> *Dear Justine,*
>
> *I regret to inform you that your employment with us is terminated with immediate effect.*
>
> *This is due to the position having been made redundant and in no way reflects your performance which has been entirely satisfactory.*
>
> *Yours sincerely,*
> *….*

[13] While adding a bit more detail, Ms Soper's recollection of the meeting does not differ markedly from Ms Ward's. She accepts she had already made the decision to dismiss Ms Ward in response to pressure she address the state of the business from both her mother and Mr Kerr. She says she did not want to make Ms Ward redundant, but:

> *I knew I couldn't afford to keep Justine employed any more. I was at crisis point financially, struggling to pay the wages, and I couldn't afford to get any expert assistance on the redundancy.*
>
> *I knew I had to do it because there was no other option. I had tried all the options already. There was more money going out of the bank account than going in.*

[14] Ms Soper explains the selection process as follows:

> *To make the decision on who would be made redundant I went through the appointments book to look at each staff member and the clients they were bringing in, and compared the costs of keeping them on. It was clear Justine was not covering the cost of her employment.*

> …
>
> *Fundamentally Justine was costing the business more than she was bringing in. She no longer had the client base she used to. I attribute this in part to her frequent absences and therefore we were often calling her clients to cancel or another stylist would do the appointment.*

[15] Ms Ward denies the allegation of frequent absences and the parties agree the issue was never formally discussed between the two.

[16] With respect to the holiday pay, Ms Ward says that on termination she was paid $1,118.02 net without explanation as to how it was calculated. Having then approached Work and Income about an unemployment benefit, she was told Ms Soper had advised a final pay of $3,374.74. This meant there was a stand down and precluded immediate assistance. Ms Ward complains the discrepancy has never been explained.

[17] Ms Soper accepts she gave inaccurate advice given to Work and Income but claims the error was genuine. She says she tried to rectify it but was stymied by an inability to provide documentary evidence to Work and Income. She says Work and Income advised they would return to her if there were problems and never did.

Determination

[18] As already said Ms Soper accepts she dismissed Ms Ward. In doing so she also accepts she is required to justify the dismissal.

[19] Section 103A of the Employment Relations Act 2000 (the Act), states 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 could have done in all the circumstances at the time the dismissal … occurred.*

[20] In applying that test the Authority must consider whether:

a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;

b. The employer raised its concerns with the employee prior to taking action;

c. The employer gave a reasonable opportunity for response;

d. The employer genuinely considered the explanation before taking action; and

e. Any other appropriate factors.

[21] In essence points 20 (b) to (d) summarise that which has long been accepted. An employer is required to put issues in its mind, allow a response and consider it. The possibility these requirements might be relaxed by reason of an employer's lack of resources or the fact the outcome might not have changed despite the deficiencies does not exist when redundancy is involved as a fair and reasonable employer must comply with its statutory obligations: see *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 where the Employment Court held:

> *The relationship between s.4(1A)(c) and s.103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure that does not comply with s.4(1A)(c) will not be justifiable.*

[22] The statutory obligation, s.4(1A)(c), was initially introduced to address consultation in a redundancy situation. It requires an employer who is proposing to make a decision that will, or is likely to have an adverse effect on the continuation of an employees employment give the employee access to relevant information and an opportunity to comment before the decision is made.

[23] Ms Soper admits she did not do this. The decision was made before she spoke to Ms Ward and the meeting was for no purpose other than to convey it.

[24] The dismissal must therefore be unjustified.

[25] The conclusion the dismissal is unjustified raises the question of remedies. Ms Ward seeks wages lost as a result of the dismissal and compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[26] Turning to the wage claim. 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. Additional amounts may be awarded on a discretionary basis. Ms Ward asks that I exercise the discretion given a failure to find replacement employment for some 35 weeks.

[27] Before addressing the request I award more than three months and given the defence of redundancy, I must first ask whether Ms Ward would have been made redundant in any event. If she would, there can be no loss in respect of wages as she would not have earned the money in any event. I conclude the answer is no. There was no consultation process which meant Ms Ward was deprived of an opportunity to offer alternates which may have avoided the redundancy and which she may well have done given she was close to completing her apprenticeship (though how close is a matter the parties dispute) and desperate for on the job hours.

[28] There is also the fact Ms Ward was not the only employee. This raises issues about a lack of input regarding the selection process and the fact another employee may have been chosen. There is then the fact Ms Soper admitted when answering questions that performance and attendance concerns were also in her mind when she made the decision to dismiss Ms Ward. Those should not be addressed via a declaration of redundancy. Instead they should have been addressed for what they were and, assuming they had validity (which I am not convinced about given the evidence) that may have seen a rectification which may have gone some way to addressing Sophisticutz cash flow problems. Finally, and while Sophisticutz was clearly in a poor financial state and used some unpaid voluntary labour, I am not convinced the situation was as dire as portrayed given evidence it also covered some of Ms Soper's personal expenditure.

[29] Having concluded it appropriate to award lost wages I turn to whether or not I exercise the discretion and award more than the three months provided for in the Act.

[30] Here I must take two factors into account. First is the strong medical evidence Ms Ward was unable to consider working for some time after her dismissal and this affected her ability to mitigate her loss. Indeed her condition was such she obtained a sickness benefit. While this situation was partly attributable to depression resulting from her loss of employment both Ms Ward and her doctor accepted, when questioned, there were other stressors which also contributed.

[31] Second there is the fact Ms Soper was a sole trader. She is personally liable for any award I might make. The evidence is she is in a poor financial state and will probably struggle to pay any award I may make. There is no sense in trying to get blood out of a stone and make it impossible for her to comply. When I add the fact Ms Soper cannot be held totally responsible for Ms Ward's inability to mitigate her

loss I conclude the award should be limited to that required by statute – three months (13 weeks). At the point of dismissal Ms Ward was engaged to work approximately 25 hours per week which means the award totals $4,387.50.

[32] I use 25 hours given Ms Ward's statement at paragraph 32 of her brief, the fact that after the reduction documents produced at the investigation show she worked an average of around 24 hours a week and the fact that while disgruntled at the change she did not challenge it.

[33] Turning to compensation. Ms Ward seeks $20,000. While there was strong supporting evidence, its effect was diminished by the concessions referred to in 30 above. Having considered the evidence I consider an award of $7,500 appropriate.

[34] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Ward contributed to her dismissal in any significant way. The answer is no. She was made redundant and by definition that means no fault.

[35] There is then issue of outstanding holiday pay.

[36] Ms Ward says Work and Income was told her final pay amounted to $3,374.67. The document which advises that sum shows $3,163.32 was attributable to accrued holiday pay.

[37] Ms Soper accepts the advice was given to Work and Income but claims it was inaccurate. Her position, as presented at the investigation meeting, is Ms Ward accrued a leave entitlement valued at $3,088.80 but took more than that, hence the claim of overpayment. The alleged use comprises absence for both illness and holiday.

[38] Section 132 of the Employment Relations Act 2000 provides that where there is a failure to keep or produce wage records I may accept the claim unless the respondent can prove it is incorrect. There was given no record that complies with the requirements of 130(1) of the Act though various documents were provided, including time sheets though they were not signed by Ms Ward.

[39] I cannot accept Ms Soper's contention I offset Ms Ward's alleged sick leave against her annual leave entitlement as she has done in her reconciliation. First she is

entitled to sick leave by statute and there are a number of doctors certificates appended to the records. Second, and more importantly, section 39(2) of the Holidays Act 2003 says such offset can only occur when the employee has requested it. There is no evidence of such requests and an employer cannot force the issue (s.39(2)(a)).

[40] The time sheets appear to show Ms Ward took a total of 138 hours annual leave valued at $1,863 but they must be considered dubious. Apart from the fact the sheets were not signed by Ms Ward there was the oral evidence of both Ms Soper and her mother (who sometimes assisted in documentation and accounts) when they tried to explain these and other documents presented to dispute the claim. It was not good.

[41] Ms Soper had extreme difficulty explaining the documents and their content. She was also unable to explain alternations made to various documents including the time sheets. There was also confusing and contradictory evidence as to who (Ms Soper or her mother) did the pays and when. Finally the documents proffered at the investigation contradicted ones provided earlier in the process.

[42] In short, Ms Soper has failed to prove the claim is incorrect or convince me she should not be held to the information she originally provided to Work and Income. The $3,374.67 gross, minus the $1,118.02 already paid, remains owing. I cannot calculate the exact sum as the $1,118.02 was net. I do not know how much tax was removed.

[43] I leave it to the parties to calculate the amount owing ($3,374.67 minus $1,118.02 minus any tax deducted before payment of the $1,118.02). If the parties are unable to agree the sum they may return to the Authority for a determination.

[44] Finally there are two penalty claims and a request they be paid to Ms Ward. The first is for a breach of s.4(1A) and the duty to communicate. It essentially relates to two key failures – the process adopted when the hours were reduced and the simultaneous decision to stop paying Ms Ward for attendance at polytechnic as previously occurred. The other is for the failure to produce a written employment agreement.

[45] The answer is no. Penalties are fines for wilful, deliberate and repeated failures. Here, and putting aside disputes as to the extent of discussion over the reduction in paid hours, I again come back to the fact it was not seen as sufficiently serious for Ms Ward to challenge at the time, nor did it warrant a cause of action

when the grievance was subsequently raised. That raises doubts as to whether the alleged breach warrants a penalty. There is then the issue of the employment agreement. The again disputed evidence suggests no more than two requests for an agreement. That does not suggest wilful and repeated failure, especially when I add the apprenticeship agreement had provisions reminding Ms Soper she should prepare one. The evidence, which includes that regarding the way Ms Soper went about preparing her accounts, suggests poor business practices and a lack of knowledge as opposed to deliberate and wilful failure. Finally there is the blood out of a stone argument. Ms Soper is going to have enough difficulty paying the awards already made and there is little sense in adding further sums and increasing the possibility of default.

Conclusion and Orders

[46] For the above reasons I conclude Ms Ward has a personal grievance as she was unjustifiably dismissed. She is also owed money for unpaid holidays.

[47] As a result the respondent, Ms Katherine Soper, is ordered to pay the applicant, Ms Justine Ward, the following:

i. $4,387.50 (four thousand, three hundred and eighty seven dollars and fifty cents) gross as recompense for wages lost as a result of the dismissal; and

ii. A further $7,500.00 (Seven thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and

iii. A further sum to be calculated by the parties in respect of unpaid holidays calculated as specified in 43 above.

[48] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority