

**IN THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

[2013] NZERA Christchurch 174
5398780

BETWEEN NICKOLAS WINDER
 Applicant

AND HAIR CHOICE LIMITED
 First Respondent

 HAIR CHOICE NEW ZEALAND
 LIMITED
 Second Respondent

Member of Authority: Christine Hickey

Representatives: Peter Macdonald, advocate for applicant
 The respondents were not represented

Investigation Meeting: 21 May 2013 at Christchurch

Submissions received: At the hearing from the applicant and further evidence on
 31 May and 23 August 2013

Determination: 26 August 2013

DETERMINATION OF THE AUTHORITY

- A. Hair Choice New Zealand Limited to pay Nickolas Winder \$338,746.19 gross in unpaid wages and holiday pay.**
- B. Nickolas Winder was unjustifiably dismissed by Hair Choice Limited.**
- C. Hair Choice Limited is to pay Nickolas Winder \$6,853.81 gross unpaid wages and holiday pay.**
- D. Hair Choice Limited is to pay Nickolas Winder \$34,620 gross in lost remuneration.**
- E. Hair Choice Limited to pay Nickolas Winder \$8,000 compensation for humiliation, loss of dignity and injury to his feelings.**

Employment relationship problem

[1] Nickolas Winder was employed as the General Manager of Hair Choice New Zealand Limited (Hair Choice NZ) from 1 August 2010 until 31 August 2012. On 1 September 2012 he became employed as the Chief Sales Officer of Hair Choice Limited (Hair Choice).

[2] Simon Clarke is the chief executive officer and chairman of Hair Choice and the sole director of both respondent companies.

[3] Mr Winder was tasked with setting up the first New Zealand branch of Hair Choice in Auckland and worked closely with Mr Clarke, who is based in Australia.

[4] Mr Winder says that he was never paid his agreed base salary in either position and that he borrowed money to live on and to invest in the business. He says that he was wrongly accused of dishonesty and unjustifiably dismissed by Mr Clarke from Hair Choice on 17 September 2012.

[5] Mr Winder seeks:

- Compensation under s.123(c)(i) in the amount of \$30,000;
- Payment of unpaid salary of \$320,000 from 1 August 2012 to 17 September 2012;
- Holiday pay on unpaid salary;
- Lost remuneration from 18 September 2012;
- An order that the respondents supply wages and time records;
- Costs of representation.

[6] Hair Choice says that Mr Winder was employed by Hair Choice NZ from 1 August 2010 until 31 August 2012 *in a profit share position as a shareholder* and Hair Choice does not owe him any salary for that period. Hair Choice says from 1 September 2012 Mr Winder was employed by it on an annual salary drawn against profit share. It says that he was justifiably dismissed for serious misconduct, because

he provided false profit and loss statements to a prospective investor and transferred funds from Hair Choice NZ accounts for his own personal use.

[7] Hair Choice says that if Mr Winder was unjustifiably dismissed his contribution to the situation giving rise to his dismissal disentitles him to any remedies.

Procedural history

[8] On 7 November 2012 Mr Winder lodged a statement of problem with the Authority against Hair Choice. On 12 December 2012 Hair Choice lodged a statement in reply with the Authority.

[9] On 4 February 2013 the Authority held a telephone directions conference. Peter MacDonald represented Mr Winder and Lesley Brook as counsel for the first respondent, Hair Choice. The parties were directed to mediation.

[10] On 8 February 2013 the applicant lodged an amended statement of problem adding Hair Choice NZ as second respondent.

[11] The Authority served the amended statement of problem and notice of direction to mediation on Ms Brook. On 5 March 2013 Ms Brook notified the Authority that she had emailed Simon Clarke, the director of both respondent companies, the amended statement of problem, the Authority's notice of direction and a letter dated 26 February 2013 advising that she could not longer act for him due to his failure to provide her with instructions. She notified the Authority that she had not received a non-delivery message for any of her emails to Mr Clarke and that she had had no communication from either respondent since the telephone conference with the Authority.

[12] Mediation did not take place because there was no response from Mr Clarke or anyone else representing either of the respondents to attempts by the Mediation Service to arrange a date for mediation.

[13] The Authority organised a further case management telephone conference for 18 March 2013 at 2 p.m. Mr Clarke and both respondents were notified in writing of the telephone conference.

[14] The telephone conference was held as arranged on 18 March 2013. Mr MacDonald represented the applicant but there was no representation for the first and second respondents. The Authority's Support Officer attempted to telephone Mr Clarke on two different telephone numbers. However, both calls went to voice mail and messages were left.

[15] On 19 March 2013 the Authority issued a notice of direction noting that Hair Choice NZ had been added as a second respondent by way of the applicant's amended statement of problem lodged on 11 February 2013 and also notifying the parties that it would conduct an investigation meeting in Christchurch on 21 May 2013 at 10 a.m. A notice of the investigation meeting was attached confirming the time and venue. The notice of investigation meeting also included notification that:

If the respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.

[16] The 19 March 2013 notice of direction also noted that the second respondent had not lodged a statement in reply to the amended statement of problem and gave it an opportunity to do so in writing no later than 4 p.m. on Friday 3 May 2013. The notice of direction directed the applicant to lodge and serve any statements of evidence by 19 April 2013 and the respondents to file any statements of evidence in writing by Friday 3 May 2013.

[17] The Authority has had no contact from the first or second respondents since the first respondent lodged its statement in reply.

[18] The investigation meeting was due to start at 10 a.m. on 21 May 2013. There was no appearance for the first and second respondents. The Authority waited in case the respondents' representative was running late. Section 173(2) of the Employment Relations Act 2000 and clause 12 of Schedule 2 of the Act allow me to proceed to investigate a matter in the absence of a party. At 10.12 a.m., I proceeded to investigate Mr Winder's problems in the absence of any representative of the respondents. I heard sworn evidence from Mr Winder and asked him questions. The investigation meeting ended at 11.30 a.m.

[19] At the end of the investigation meeting the applicant offered to provide certain further written evidence and was directed to do so by 31 May 2013. Some of the

information was provided by then. Mr Winder provided evidence of the date on which he started his new job and his new rate of pay on 23 August 2013.

[20] Mr Winder also forwarded the Authority a copy of an email sent to him on 21 May 2013 by Mr Clarke:

...I'm willing to drop a pending fraud and theft case with a substantial counter claim.

I'm willing to discuss and resolve this without lawyers to prevent further hardship for you and your family and perhaps even start a reconciliation process.

[21] There have not been any criminal charges laid against Mr Winder and no counterclaim against Mr Winder was lodged with the Authority.

[22] The Registrar of Companies had initiated action to remove the first respondent and the second respondent from the Companies Register. Mr Winder objected to the removal of both respondents from the Register. On 16 May 2013 the Registrar notified Mr Winder that she had accepted his objections and had suspended action to remove the companies from the Register for a minimum period of six months.

Issues

[23] The issues the Authority needs to determine are:

- a. Is Mr Winder owed any unpaid salary?
- b. Is Mr Winder owed any unpaid holiday pay?
- c. Was Mr Winder unjustifiably dismissed?
- d. What remedies is Mr Winder entitled to?

Determination

[24] Under s.174 of the Act I do not need to set out a record of all the evidence or the findings on credibility of any evidence. Having said that, it is clear that because the respondents were not represented and presented no witness evidence at the investigation meeting my findings of fact are based on Mr Winder's evidence. I found Mr Winder to be a sincere, consistent and credible witness.

Does Hair Choice NZ owe Mr Winder unpaid wages and unpaid holiday pay?

[25] Mr Winder's individual employment agreement with Hair Choice NZ commenced on 1 August 2010 and includes the following relevant provisions:

7. Remuneration

- 7.1 *You to be paid [sic] the remuneration described in Schedule 2 on a monthly basis.*
- 7.2 *You will also be reimbursed for reasonable expenses incurred in carrying out your duties, subject to any restriction or requirements we may impose from time to time.*
- 7.3 *We can deduct any money owing to us by you from any payment due to you as salary, or holiday pay.*

[26] Schedule 2 contained the following:

Remuneration: *Base Salary with monthly and yearly bonuses.*

- 1. **Remuneration:**
- 2. **Base Salary:** *\$160000 NZ inclusive of superannuation (Drawn against profit share) and*
- 3. **Bonuses:** *...*

[27] At the start of his employment Mr Winder became a 20% shareholder in Hair Choice NZ. Mr Winder says that initial negotiations for his employment were on the basis that he would only be paid a profit share but he was not satisfied with that arrangement. Therefore he negotiated that he would be paid a salary on a monthly basis. However, he understood that his monthly base salary would be deducted from his 20% share of the profits of the company at the end of the financial year before any profit was paid to him.

[28] Schedule 1 required Mr Winder to work 40 hours per week between 8.30 a.m. to 5.30 p.m. Monday to Friday. Mr Winder says that he worked those and considerably more hours to establish the business.

[29] During his employment Mr Winder raised money from investors and raised personal funding that he invested in Hair Choice NZ in exchange for an increased shareholding. Mr Winder says that there was a clear understanding that the company would repay him the funds he had invested when it was able enough to do so.

[30] Mr Winder says that he often asked Mr Clarke to pay him his salary and was made promises that he would be paid as soon as possible. A number of different promises were made to him and a number of different reasons given for why he could not be paid that particular month.

[31] Mr Winder's employment with Hair Choice NZ ended on 31 August 2012 pursuant to a new employment agreement he signed on 18 June 2012 with Hair Choice.

[32] As a part of the change in business arrangements negotiated Mr Winder says that Mr Clarke verbally agreed to take over his debt and his salary arrears. Mr Winder sold his 20% shareholding in Hair Choice NZ in exchange for Hair Choice NZ taking over his personal debts of approximately \$120,000 that he had invested in Hair Choice NZ. In exchange, Mr Winder was granted a 7.5% shareholding in Hair Choice.

[33] In July and August 2012 Mr Clarke sent e-mails to Avanti Finance and to 'futurepc' introducing himself as Mr Winder's employer and offering to clear Mr Winder's debts to those two entities. However, Mr Winder has not been paid any salary arrears by Hair Choice NZ.

[34] I accept Mr Winder's evidence that he was to be paid a monthly salary and not solely on a profit share basis. A salary is a payment for work done. I am satisfied that Mr Winder did work for Hair Choice NZ from 1 August 2010 to 31 August 2012 without his salary being paid. Hair Choice NZ breached its duty to pay Mr Winder his salary as set out in his employment agreement. Mr Winder did not affirm Hair Choice NZ's breaches because he regularly notified Hair Choice NZ that he did not accept that his salary should not be paid. He was regularly assured that it would be and those assurances were given at least up until June 2012.

[35] By my calculations Mr Winder is owed unpaid wages of:

- \$160,000 for the period 1 August 2010 to 31 July 2011;
- \$160,000 for the period 1 August 2011 to 31 July 2012;
- \$13,333.33 for the period 1 August 2012 to 31 August 2012.

[36] That totals \$333,333.33 in unpaid wages. However, Mr Winder only claimed \$320,000 in total for unpaid salary against both respondents and I cannot award more than was claimed. I make an order that Hair Choice NZ owes Mr Winder \$313,653.88 in unpaid salary, which is \$320,000 less the \$6,346.12 I order to be paid by Hair Choice (see below).

[37] Hair Choice NZ also owes Mr Winder 8% of his total salary in holiday pay¹. Mr Winder was not paid any holiday pay over his entire period of employment. Eight per cent of \$313,653.88 is \$25,092.31. Therefore, Hair Choice NZ owes Mr Winder \$25,092.31 in unpaid holiday pay.

Does Hair Choice owe Mr Winder unpaid wages and unpaid holiday pay?

[38] Mr Winder's second individual employment agreement with Hair Choice was for employment that began on 1 September 2012. It included the following relevant terms:

7. Remuneration

7.1 You to be paid [sic] the remuneration described in Schedule 2 on a monthly basis.

[39] Schedule 2 included the following:

Remuneration: Base Salary

1. Remuneration:

2. Base Salary: \$150 000 NZD per annum (drawn against Hair Choice Ltd profit share)

(In the event that Nick Winder moves to Australia the salary currency is paid in AUD)

[40] In the statement of problem Mr Winder included a request for time and wages records for the duration of his employment with Hair Choice. I consider that request was related records on his employment that the respondent was liable to keep under s.130(1) and to produce upon an employee's request under s.130(2) of the Act.

¹ Section 23(2) of the Holidays Act 2003.

[41] The first respondent has not provided time and wages records. There was no point in me ordering them as part of the investigation meeting in light of the lack of engagement in the Authority's process by Hair Choice.

[42] Section 132(1) of the Act allows me to accept Mr Winder's evidence that the first respondent failed to produce time and wages records and that failure prejudiced his claim to bring an accurate claim for wage arrears. Section 132(2) allows me to accept Mr Winder's evidence to prove any wages paid to him and the hours, days and times worked by him.

[43] Mr Winder's salary was \$150,000 gross per annum which amounts to \$2,884.62 per week or \$576.92 gross per day. Mr Winder's evidence is that he was not paid anything from the start of his employment with the first respondent on 1 September 2012 until the day he was dismissed on 17 September 2012. That was a period of eleven working days. Therefore, Mr Winder is owed \$6,346.12 in unpaid wages by the first respondent.

[44] The first respondent owes Mr Winder 8% of his total salary in holiday pay². Eight per cent of \$6,346.12 is \$507.69. The first respondent owes Mr Winder \$507.69 in unpaid holiday pay.

Was Mr Winder unjustifiably dismissed by Hair Choice?

[45] On 17 September 2012 Mr Clarke sent Mr Winder an email with the subject heading 'Letter of Termination'. The covering email read:

Please find the attached letter of termination from HAIR CHOICE Limited.

After lengthy discussions with HAIR CHOICE Australia management it has been agreed that you will be provided a 12 month trial period to operate a HAIR CHOICE catchment in metropolitan Melbourne.

Providing that the minimum HAIR CHOICE model targets are met ...after 12 months you will be provided the opportunity to purchase up to 2% of HAIR CHOICE Limited shares and up to 5% HAIR CHOICE Australia shares.

...

On a personal note if this was anyone else they would not be afforded this last opportunity for a HAIR CHOICE career.

² Section 23(2) of the Holidays Act 2003.

Pleas provide the keys to the Auckland office to Rob Leicester when you leave the office today. Please also let me know when you can be available for a Skype tomorrow to discuss this matter.

[46] The attached letter of termination read:

In accordance to [sic] clause 22.4 of your employment agreement you are hereby terminated due to acts of dishonesty.

Act 1. Providing false profit and loss statements to prospective investor.

Act 2. Transferring funds from business accounts for personal use after being specifically instructed not to do so.

A forensic audit will also be completed in the coming weeks to confirm the amount loaned to HAIR CHOICE New Zealand. Any funds paid to yourself in excess of \$60 000 NZD per annum will be required to be repaid.

In accordance with the HAIR CHOICE Limited purchase agreement you are required to sell back all HAIR CHOICE Limited shares. You will receive this agreement shortly.

[47] The letter of termination was the first time any alleged dishonesty had been raised with Mr Winder. He denies that he provided false profit and loss statements or transferred funds from business to personal accounts without authorisation.

[48] Mr Winder made numerous attempts by texts and telephone calls to get hold of Mr Clarke to discuss the issue of his dismissal from Hair Choice in New Zealand and the proposed transfer to Hair Choice Australia. However, Mr Clarke did not get back in touch with Mr Winder except by email on the evening of 19 September 2012:

Due to further breaches coming to light in the past 24 hours the prospective offer of employment with HAIR CHOICE Australia has been withdrawn effective immediately. You are "persona non grata" at all HAIR CHOICE locations effective immediately.

You are not to contact any HAIR CHOICE staff effective immediately. Your flight to Australia has been cancelled. ...

[49] Also on 19 September 2012 Mr Clarke sent an email to the Auckland Hair Choice staff attaching the email he had just sent to Mr Winder alleging further breaches and saying:

Please see the below correspondence to Nick Winder. If he arrives at the studio ask him to leave immediately. If he refuses to leave call the police and have him removed.

[50] Justification of Mr Winder's summary dismissal is to be assessed in light of the justification test in s.103A of the Employment Relations Act 2000 (the Act).

[51] The full Employment Court in *Angus and McKean v Ports of Auckland*³ provides guidance on how the justification test is to be applied in practice. The Employment Court made it clear that under s.103A so long as the outcome, and how it as arrived at, is one of the outcomes that a fair and reasonable employer in all of the circumstances could have decided upon, then the decision will be justified.

[52] Section 103A of the Act requires the Authority to objectively assess whether what Hair Choice did (substantive justification) and how Hair Choice did it (procedural fairness) were what a fair and reasonable employer in all the circumstances could have done at the time Mr Winder was dismissed.

[53] Section 103A(3) of the Act says that in considering whether Hair Choice's actions were those of a fair and reasonable employer the Authority must ask whether before deciding to dismiss Mr Winder Hair Choice:

- Sufficiently investigated the allegations against him;
- Raised its concerns with him before deciding to dismiss him;
- Gave him a reasonable opportunity to respond to its concerns; and
- Genuinely considered any explanation he gave regarding the allegations.

[54] The full Employment Court in *Angus* held that failure to meet any of the s103A(3) tests would render a dismissal unjustified. Hair Choice presented no evidence about what investigation it undertook into the serious allegations of dishonesty it made against Mr Winder. I am unable to conclude whether it undertook any investigation let alone an adequate one.

[55] Hair Choice did not raise its concerns about Mr Winder's alleged dishonesty with him before it decided to dismiss him. It follows that Hair Choice did not give Mr Winder any opportunity to respond to its concerns and did not genuinely consider his explanation in relation to the allegations before it dismissed him.

³ [2011] NZEmpC 160.

[56] I consider the defects in the process undertaken by Hair Choice were not minor, and resulted in Mr Winder being treated unfairly.

[57] In addition, there is no evidence that any alleged dishonesty actually happened. When an employer seeks to prove an allegation of something that amounts to criminal behaviour it must be proved to a high level; higher than the usual civil standard of more likely than not. There is absolutely no evidence presented and therefore no proof that Hair Choice had any substantive justification for dismissing Mr Winder for dishonesty in his employment.

[58] I conclude that Hair Choice's decision to dismiss Mr Winder was not one a fair and reasonable employer could have made in all the circumstances. Therefore, Mr Winder has a personal grievance of unjustified dismissal and is entitled to remedies.

Remedies for unjustified dismissal

Lost remuneration

[59] Mr Winder found it very difficult to look for new jobs immediately after his dismissal because his confidence had been severely dented. However, fairly quickly Mr Winder did apply for jobs. He applied for at least 50 jobs, including many junior roles, before securing a new role. I consider that Mr Winder adequately mitigated his loss.

[60] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Hair Choice of the whole or any part of wages Mr Winder lost as a result of his grievance.

[61] Section 128(2) of the Act provides that I must order Hair Choice to pay Mr Winder the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration lost as a result of his grievance. Three months, or thirteen weeks, after his dismissal on 17 September was 17 December. Mr Winder started in a new role on 12 December 2012 as a contractor being paid \$720.00 per day. Therefore, Hair Choice should pay Mr Winder three months ordinary time remuneration (\$37,500) less what he earned in his new role (\$720 x 4 days = \$2,880). Hair Choice must pay Mr Winder \$34,620 gross in lost remuneration.

[62] In addition, s.128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s.128(2); that is, for more than thirteen weeks. In all the circumstances, including that Mr Winder obtained new relatively well paid work within three months I do not consider that Hair Choice should pay any further lost remuneration.

Compensation

[63] Mr Winder has claimed \$30,000 in compensation for humiliation, loss of dignity and injury to his feelings arising out of his unjustified dismissal.

[64] Mr Winder says that he took the termination of his employment *pretty hard* and he was:

...naturally very upset and I felt totally humiliated. I was left confused and very upset. I realised that, throughout my employment, I had been 'used' ...

This whole experience has put me and my family under enormous mental pressure. I have found it very difficult to find the confidence to locate new work and in this regard I have sought the assistance of Dr John McKewan [sic] who has been counselling me.

[65] Dr McEwan wrote that Mr Winder consulted him a number of times from 26 September 2012:

This man was experiencing all the standard stress related symptoms, with significant gastric and cardiac indicators of stress in his body. The impact of the work situation had created significant problems within his relationship with [his wife]. ...

The dismissal was traumatic ...

[66] Dr McEwan does not appear to be a medical doctor⁴, but is a registered counsellor. Mr Winder was badly affected by his dismissal and to that extent I accept Dr McEwan's view of how he was affected. However, some of Mr Winder's problems in his relationship with his wife are more to do with how much money Mr Winder had borrowed without her knowledge and were not wholly due to his unjustified dismissal. Therefore, I do not take the entirety of Mr Winder's relationship problem into account in calculating compensation.

⁴ Or if he is qualified as a medical doctor he does not currently practise as one as he is not registered with the Medical Council.

[67] Mr Winder says that Mr Clarke diverted Mr Winder's work phone from about 19 September 2012 and told callers that Mr Winder had gone and *was a crook*. Mr Winder also says that Hair Choice studio staff told a friend of Mr Winder's from whom he had borrowed money to invest in Hair Choice NZ that he had stolen from the business. Mr Winder's friend came over to his place and confronted him with that accusation.

[68] Mr Clarke's allegations about Mr Winder's honesty to Hair Choice staff, an investor and to callers were upsetting and humiliating to Mr Winder on top of his unjustified dismissal.

[69] It is reasonable that Hair Choice pays Mr Winder \$8,000 in compensation.

Costs

[70] As the successful party Mr Winder is entitled to a reasonable contribution towards his actual costs for representation. The parties are encouraged to resolve costs themselves. However, if that is not possible, then Mr Winder has 28 days within which to file a costs memorandum and the respondents have 14 days within which to respond.

[71] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is \$3,500. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff. The investigation meeting took less than half a day.

Christine Hickey

Member of the Employment Relations Authority