

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 297/07  
5050785

BETWEEN                      JOHN MCTAGGART  
   Applicant  
  
AND                                N & M WITEHIRA LTD  
   Respondent

Member of Authority:        Dzintra King  
  
Representatives:              John McTaggart In Person  
   Nick Witehira, Advocate for Respondent  
  
Investigation Meeting:        21 August 2007  
  
Determination:                25 September 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr McTaggart says that he has been unjustifiably dismissed by the respondent, N & M Witehira Limited. He says he was not provided with an employment agreement, that he was not paid what he was owed and not paid sick pay. He says his final pay was paid four days late and the employer did not act in good faith.

[2] Mr Witehira told me he dismissed Mr McTaggart because Mr McTaggart would not agree to a reduction in his hourly rate. He said there were also performance issues. These do not appear to have addressed.

[3] On 20 January 2006 the parties entered into an oral agreement to employ Mr McTaggart. He started work on 25 January 2006.

[4] Mr Witehira said he agreed to pay Mr McTaggart \$20 per hour on the understanding that Mr McTaggart would increase the salon's turnover by targeting clients from the hairdressing salon that Mr McTaggart used to own. Mr Witehira said he made it clear that in order to justify the payment Mr McTaggart had to generate a gross turnover rate of \$60 an hour. Mr Witehira said Mr McTaggart agreed that if he did not achieve this Mr Witehira would be able to review the pay rate.

[5] The parties agreed that the agreement would be reviewed after three months. In April there was a review and Mr Witehira said Mr McTaggart persuaded him to roll over the original conditions agreed and to continue for another three months, which Mr Witehira said would expire on 1 July 2006.

[6] Mr McTaggart said Mr Witehira pressed him to go on commission but he did not agree.

[7] On 6 July a meeting took place. Mr McTaggart had not achieved the agreed turnover rate. Present were Mr McTaggart, Mr Witehira and Mr John Ruka, who was a business adviser to the company. Mr Ruka said Mr Witehira had told him Mr McTaggart's contract was due for review and he understood that was the purpose of the meeting.

[8] Mr McTaggart said he had twice asked for an employment agreement before the meeting on 6 July.

[9] Mr Mc Taggart said he was given a written employment agreement at this meeting. This included a one month probation period and reduced the income to \$15 per hour.

[10] On 7 July Mr McTaggart sent Mr Witehira a letter in which he said he did not accept the changes and asked if Mr Witehira was prepared to go to mediation. He also wrote:

*I again request my original individual employment agreement, that you lead me to believe you have in your possession, as at the starting date of my employment with N + M Witehira Ltd, as per my legal entitlement under section 65 of the Employment Relations Act 2000.*

[11] On 9 July Mr Witehira wrote a letter to Mr McTaggart saying he was no longer prepared to extend the special conditions of his employment agreement and was changing his hourly rate to \$15, which was the highest rate being paid to his senior hairstylists. He said the contract offered had a standard probationary period of one month starting from 10 July.

[12] On 24 July Mr McTaggart received a second contract. The contract offered was for a three month probation period with a pay rate of \$20 per hour. Mr McTaggart said he corrected this agreement to reflect what the parties had agreed in January.

[13] Mr McTaggart said Mr Witehira told him that if he agreed to manage the salon he would continue to pay him \$20 an hour. Mr McTaggart said he did not want the extra responsibility and if he were to accept it the pay rate would have to be higher.

[14] Mr McTaggart gave his counter offer to Mr Witehira on 27 July. He said this was in accordance with what they had originally agreed in January.

[15] Mr McTaggart was dismissed by a letter dated 3 August. Attached to the letter was contract number three, which stated that the pay rate was \$20 an hour and that Mr McTaggart had agreed to bring in revenue of \$60 an hour.

[16] In the 3 August letter Mr Witehira said he found Mr McTaggart's counter offer of 27 July completely unsatisfactory and "as a result, I regretfully advise 2 weeks notice of termination." Mr McTaggart was instructed not to return to work after 9pm on 4 August 2006.

### **Was the dismissal unjustified?**

[17] Mr McTaggart denies that there was any agreement to the effect that his pay rate was conditional upon his bringing \$60 per hour into the business.

[18] I find that it was agreed that the pay rate was conditional upon Mr McTaggart bringing in \$60 per hour. That is borne out by the meeting which took place three months after the employment commenced to discuss the matter, the extension of the time period, the attempt to reduce the rate to \$15 and the fact that Mr McTaggart was paid more than any other employee.

[19] The problem for Mr Witehira is that there was no agreement as to what would happen if the condition was not satisfied. All that was agreed was that there would be a review of the rate. That is not the same as agreeing that the pay rate would be reduced and the amount by which it would be reduced. Nor was there any agreement that the employment would be terminated if Mr McTaggart did not bring in \$60 per hour.

[20] Mr Witehira was not entitled to dismiss Mr McTaggart because he did not agree to a reduction in the hourly rate. Mr McTaggart was not told that if he did not agree that his employment would be terminated nor was he given notice that his employment was at risk. The manner in which the dismissal was effected was unfair. Mr McTaggart said he thought the letter was a response to his proposal and was dismayed to find it was a termination letter.

[21] Mr McTaggart gave evidence about the effect the dismissal had had on him. He says he has been unable to look for alternative employment because of the distress caused by the dismissal.

[22] I told Mr McTaggart that if he was claiming lost remuneration since August 2006 it would be necessary for him to supply detailed supporting medical evidence.

[23] If Mr McTaggart wishes to supply further medical evidence he should do so by 15 October 2007.

[24] Mr Witehira will then have a period of two weeks from receipt of the applicant's additional medical evidence to make such comment as he wishes.

[25] If I do not receive anything further I will proceed to make a decision on the matter of remedies based on the information already provided to me.

### **Pay issues**

[26] Mr McTaggart said his final pay did not go into his bank account until three days later and was three hours short paid for sick pay. Also, the two weeks' pay in lieu was short paid by three hours per week.

[27] Mr McTaggart said Mr Witehira ordered him to change his normal rostered days so that he did not work statutory holidays. He said he was replaced by two workers on Queen's Birthday.

[28] Mr McTaggart worked an average of 32 hours per week.

[29] He was paid for five hours for a day's sick leave. He is owed an extra hour and a half's pay being \$30.00.

[30] He was paid for 60 hours for two weeks' pay in lieu. The number of hours should be calculated at 64. Mr McTaggart has been short paid by \$80.

[31] Mr Witehira accepted that he had not supplied a written employment agreement at the time employment commenced. He said they made a gentleman's agreement and sealed it with a handshake. Although Mr McTaggart has complained that Mr Witehira did not provide an employment agreement when requested to do so he has not sought a penalty for the failure to supply an employment agreement at the outset.

[32] Mr McTaggart said he worked according to a roster and that on two occasions Mr Witehira told him to change his rostered days so he would not work on a public

holiday. Mr Witehira recalled one of the days and accepted Mr McTaggart's evidence about the other day. Mr Witehira said he told the manager to give Mr McTaggart a public holiday off because he thought it would be nice for him to have the day as a holiday. The two days would normally have been working days for Mr McTaggart. Mr McTaggart was paid for the statutory holiday. His complaint is that he was denied the opportunity to be paid at time and a half for the hours actually worked on that day.

[33] Mr McTaggart's rostered days should not have been changed without his agreement. The average daily hours worked were 6.4. Assuming Mr McTaggart would have worked 6.4 hours each of the two public holidays in question he would have been paid an additional \$64 each day or \$128 for the two days. The respondent is to pay this amount to the applicant.

[34] Mr McTaggart says his holiday pay has been short paid but he has not worked it out. I have based my calculations on the information supplied to me by the respondent. The accuracy of this was not contested at the hearing. Mr McTaggart was paid of \$19,415 for the hours worked, including the two weeks' notice. The holiday pay was calculated at \$1,198.50. Six per cent of \$19,415 comes to \$1,164.90. Mr McTaggart should have been an additional \$238, of which 6% is \$14.28. Mr McTaggart has been overpaid his holiday pay by \$19.32. This amount should be deducted from the underpayments that have been made to him so that the income arrears owed to Mr McTaggart amount to \$218.68.

### **Costs**

[35] The matter of costs is reserved. I will wait to set a timetable until after I have issued the decision on remedies.

Dzintra King

Member of the Employment Relations Authority