

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 187/08  
5118728

BETWEEN                      TERESA GAYE RAMSAY  
   Applicant  
  
AND                              CAROLYN UREN T/A HAIR  
   HUNTERS HIS AND HERZ  
   SALON  
   Respondent

Member of Authority:      Helen Doyle  
  
Representatives:              Jon Beck, Counsel for Applicant  
   Jen Wilson, Counsel for Respondent  
  
Investigation Meeting:      15 October 2008 at Dunedin  
  
Submissions received in    24 October 2008 from Applicant  
reply:                              28 October 2008 from Respondent  
  
Determination:                10 December 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Teresa Ramsay was employed in February 2006 as a trainee hairdresser by Carolyn Uren, the owner and operator of Hairhunters His and Herz Salon in Dunedin.

[2]      Ms Ramsay, to fit in with the needs of her two children, worked from 9.30am until 3.00pm four days a week at the salon and took unpaid leave over the school holiday period. At the end of 2007 Mrs Uren wanted to change Ms Ramsay's hours because she felt they did not meet the needs of the business. She gave Ms Ramsay a written proposal on 21 December 2007, which was Ms Ramsay's last day at work for the year, setting out the proposed changes to the hours to 11am to 4.30pm with half an hour for lunch. Ms Ramsay was then away for the school holidays, intending to

return to work on 12 February 2008. On 10 February 2008 Ms Ramsay advised Mrs Uren that the change to her hours was not suitable to her.

[3] There were further telephone discussions between Mrs Uren and Ms Ramsay on 11 and 12 February 2008. Ms Ramsay resigned and did not return to work on 12 February 2008. She has claimed that her resignation was in the nature of an unjustified constructive dismissal because Mrs Uren refused to negotiate with her about the change in hours and they were to be implemented unilaterally. She also said that Mrs Uren raised some issues with Ms Ramsay that had not been raised with her previously and that caused her to become upset.

[4] Mrs Uren does not accept that Ms Ramsay was unjustifiably constructively dismissed and denies that there was any breach of duty or conduct on her part that would justify such a claim.

### **The issues**

[5] The Authority has to consider the following issues in this matter:

- What was said during the telephone discussions in February 2008 which led to the resignation;
- Did Mrs Uren follow a course of conduct with the deliberate and dominant purpose of coercing Ms Ramsay to resign and/or was Ms Ramsay's resignation caused by a breach of duty on the part of Mrs Uren;
- If it is found that there was such conduct or a breach then was it reasonably foreseeable to Mrs Uren that Ms Ramsay would not be prepared to work under the prevailing conditions at the salon;
- If Ms Ramsay was unjustifiably constructively dismissed, then what remedies is she entitled to and are there issues of contribution.

*What was said during the telephone discussions leading up to the resignation?*

[6] I am not satisfied that Mrs Uren advised Ms Ramsay at the time her employment commenced or before 21 December 2007 that her hours could be

changed in the future. There had been some discussions with another employee about opening the salon on a Saturday but that did not affect Ms Ramsay.

[7] On 21 December 2007 Mrs Uren advised Ms Ramsay when she handed her the proposal, that the proposed hours were better for the business and she wanted Ms Ramsay to think about the hours and get back to her. Ms Ramsay told Mrs Uren that she wanted to talk to WINZ about a subsidy for the Oscar after school programme. The proposal provided:

*Teresa* *17/12/07*

*Proposed hrs for 2008  
year starting 11/02/08  
Hrs to be worked.  
Tue to Fri (5 hrs a Day)  
11AM to 4.30pm with ½ hr for lunch.*

*Changing to these hrs I believe will benefit the business, as it is busyer later in the Day than morning.*

*Please consider this proposal with any suggestions!*

*Carol Uren*

[8] On 9 January 2008 Ms Ramsay attended at the salon to fill a shampoo bottle and she had some waxing and tinting work done. Both Ms Ramsay and Mrs Uren agreed that the exchanges at that time were pleasant. I accept in all probability that Mrs Uren formed the view that Ms Ramsay must have been happy with the proposal but it was not unreasonable that Ms Ramsay did not mention the new hours of works because she had not at that time contacted WINZ and she wanted to keep the conversation friendly.

*10 February 2008*

[9] Ms Ramsay telephoned Mrs Uren on 10 February 2008. I find that the conversation opened with reference by Ms Ramsay to the proposal and she then advised Mrs Uren that the new hours did not suit her as she had other commitments. I find that Mrs Uren responded by advising that they were the new hours and that Ms Ramsay's hours did not suit the business. There is a difference in the evidence as to whether Mrs Uren suggested that they talk about the hours of work face to face. I find it more likely that a face to face discussion was not suggested during the telephone call on 10 February 2008. I prefer Ms Ramsay's evidence that she

understood that she did not have a say in the new hours and that they were non-negotiable. I have reached that view because the evidence is consistent with Ms Ramsay advising Mrs Uren that she would make a telephone call to the Department of Labour to get some advice. I do not find it likely that she said would contact WINZ as Mrs Uren said in her evidence. If Mrs Uren had suggested that the two of them talk about the hours then I consider it most unlikely Ms Ramsay would have felt the need to get some advice.

[10] Ms Ramsay had already made contact with WINZ and had established that child care, even with subsidies available, was going to cost her an amount of money that would not have made the new hours worth her while. Ms Ramsay told Mrs Uren she would call her again after she had spoken to the Department of Labour. I place some reliance on notes that Ms Ramsay said she made immediately after that first telephone call to Mrs Uren to the extent that they are consistent with the evidence.

*11 February 2008*

[11] Ms Ramsay telephoned Mrs Uren at 7.30pm on 11 February and spoke to her husband. Mrs Uren was unavailable and Ms Ramsay was told to telephone back at 9.30pm.

[12] At 9.30pm Ms Ramsay contacted Mrs Uren and I find the conversation started with Ms Ramsay asking if the hours were negotiable. There is again a difference in the evidence. Mrs Uren said in her evidence that her response was that the hours were negotiable but not over the telephone and they needed to talk face to face. Ms Ramsay said that Mrs Uren's response to negotiation was *no* and that Mrs Uren said *they are the new hours for the business*.

[13] I do not find it likely that Mrs Uren said at that point in the conversation to Ms Ramsay that the hours were negotiable and they needed to talk face to face. I have reached that conclusion because had Mrs Uren made a comment of that nature then it is unlikely that Ms Ramsay would have gone on to say that she had no option but to resign and that she had a personal grievance.

[14] When Ms Ramsay said that she had a personal grievance, Mrs Uren became upset and raised a number of other issues with Ms Ramsay. I find that she advised that she thought she would have heard back from Ms Ramsay the preceding week. She also made a comment with respect to the resignation and said that could not occur

because her intention had not been to dismiss Ms Ramsay. Mrs Uren also advised Ms Ramsay that Ms Ramsay had lied to her by telling her she was married when in fact she was separated from a de facto relationship. She also referred to Ms Ramsay badmouthing her to a client in a hotel and explained that that was why she had reacted badly to Ms Ramsay since September/October 2007.

[15] Ms Ramsay had noticed the relationship between her and Mrs Uren cool from about September 2007 and I accept that she was concerned about that. When Mrs Uren made these comments I find Ms Ramsay responded along the lines that she had felt uncomfortable at that time and that Mrs Uren had made her *feel like shit*. Ms Ramsay asked Mrs Uren why she had not brought these issues up previously. I accept having heard from Mrs Uren that these matters were raised because Mrs Uren was angry about the threat of legal action and that these matters were considered by her too trivial by her to raise at the time.

[16] I find that it was after this exchange that Mrs Uren proposed a face to face meeting to discuss matters. Ms Ramsay did not want to have such a meeting because she was upset by the issues raised by Mrs Uren.

*12 February 2008*

[17] Mrs Uren telephoned Ms Ramsay on 12 February 2008. I find that was a very short telephone call. Mrs Uren asked Ms Ramsay if she was coming back to work. Ms Ramsay responded that she was not at the new hours proposed. I think it likely that then Mrs Uren asked for a resignation in writing but Ms Ramsay refused because she said that she was not resigning by choice. The telephone call then terminated. I think it is significant that even at that point Mrs Uren never advised Ms Ramsay that she could return at her existing hours while they worked through a process and discussed the matter.

[18] Ms Ramsay said that she started looking for work in late February 2008 and was successful in obtaining and commencing another position on 26 March 2008.

**Did Mrs Uren follow a course of conduct with the deliberate and dominate purpose of coercing Ms Ramsay to resign and/or was Ms Ramsay's resignation caused by a breach of duty on the part of Mrs Uren**

[19] I find that the claim by Ms Ramsay falls more to be considered as a breach of duty by Mrs Uren leading Ms Ramsay to resign rather than being considered with

respect to the other two situations where a constructive dismissal may occur as set out by the Court of Appeal in *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

[20] Mrs Uren was entitled to manager her own business and make decisions to reflect the needs of that business. Ms Ramsay did not have a written employment agreement, although from the time she commenced employment in February 2006 she had worked between 9.30am and 3pm and those hours were I find an express term and condition of her employment.

[21] I do not find in the absence of a provision in a written employment agreement that the hours of work were able to be changed unilaterally. I accept that the hours proposed by Mrs Uren were to meet what she saw as a genuine business reason as there were more customers later in the morning. Mrs Uren could not however implement the change unilaterally. I think that the main difficulty in this matter was that Mrs Uren had not considered what would happen if Ms Ramsay said no to the proposal.

[22] If, as happened here, Ms Ramsay said no to the change of hours and any alternative put forward by Ms Ramsay remained unacceptable, then there remained the option for Mrs Uren to restructure Ms Ramsay's position and create a new role with different hours. That would have required consultation with Ms Ramsay and if the proposal to disestablish the position went ahead then a notice period. In the meantime however Ms Ramsay was entitled to remain at her original hours.

[23] I find Mrs Uren's position on the telephone on 10 February was that the new hours proposed were in fact the new hours Ms Ramsay would be working and there would be no negotiation.

[24] Ms Ramsay then made some inquiries as to her legal rights and armed with those I have found that again she asked Mrs Uren on 11 February 2008 whether the new hours were negotiable and was told again that they were not. Mrs Uren then became annoyed at Ms Ramsay for advising that she was giving notice of a personal grievance and raised a number of issues for the first time with Ms Ramsay. It was at the end of this process that a face to face meeting was proposed by Mrs Uren, but Ms Ramsay said, and I accept, that she was too upset to contemplate such a meeting.

[25] I find that Ms Ramsay resigned because she believed that a proposed change to her contractual hours of work was not negotiable and that such change would simply be unilaterally implemented. Although there was some discussion of a face to face meeting that was only after Ms Ramsay had given notice of a personal grievance and after some historical issues of concern were raised by Mrs Uren.

[26] The proposed change to the hours of work was a significant one for Ms Ramsay and not one that Mrs Uren could unilaterally implement. I find Mrs Uren saying that the proposed hours were Ms Ramsay's new hours and indicating that they were not negotiable to be a breach of Ms Ramsay's terms and conditions of employment. I find that there was a breach of Mrs Uren's implied obligation not to act in a manner calculated to destroy or damage a relationship when she raised concerns she had about Ms Ramsay which Ms Ramsay was otherwise unaware of and a breach of obligations of good faith to be responsive and communicative.

**If it is found that there was such conduct or a breach, then was it reasonably foreseeable to Mrs Uren that Ms Ramsay would not be prepared to work under the prevailing conditions?**

[27] I find that it would have been clear to Mrs Uren that Ms Ramsay was not prepared to work the new hours. Ms Ramsay then gave a clear indication that she intended to pursue a personal grievance on 11 February 2008. It was foreseeable to Mrs Uren that Ms Ramsay would not wish to continue to work under the conditions of a unilaterally implemented change of hours of work. There was no reassurance to Ms Ramsay even on 12 February 2008 that if Ms Ramsay returned she would continue under her existing hours.

[28] Ms Ramsay has a personal grievance that she was unjustifiably constructively dismissed. Ms Ramsay is entitled to remedies.

## **Remedies**

### ***Contribution***

[29] I have considered whether Ms Ramsay contributed to her personal grievance by not getting back to Mrs Uren sooner and advising that the proposed change of hours was unacceptable to her. I do not find that Ms Ramsay can be said to have contributed to that when there was no timeframe within the proposal for her to return to Mrs Uren with her views.

[30] I do not find that Ms Ramsay contributed to her personal grievance.

***Lost wages***

[31] Ms Ramsay was without employment from 12 February until 26 March 2008, which is a period of six weeks. She was paid \$12.50 per hour for 20 hours work at the time of her dismissal.

[32] There was a short delay before she started to look for other employment but she applied for three jobs and was successful in one of those applications. I am satisfied that she attempted to mitigate her loss in those circumstances.

[33] Even if there had been a need to restructure Ms Ramsay's position because an agreement could not be reached as to the hours of work, I find that with the required consultation and notice period, the amount claimed would not have been materially different.

[34] I order Carolyn Uren to pay to Teresa Ramsay the sum of \$1,500 gross being lost wages for a period of six weeks calculated at the rate of \$250 gross per week.

***Compensation for hurt and humiliation***

[35] I find that Ms Ramsay's humiliation and hurt was twofold. There was humiliation and hurt associated with the refusal to negotiate the proposed change of hours and there was also humiliation with respect to the issues raised with her. I have taken into account that there some was unlikelihood that the relationship would have continued long term.

[36] In all the circumstances, and taking all matters into account, I find that a fair compensatory award would be the sum of \$3,000. I order Carolyn Uren to pay to Teresa Ramsay the sum of \$3,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

***Costs***

[37] I reserve the issue of costs. I encourage the parties to attempt to reach agreement as to costs. Failing agreement being reached the applicant has until 30 January 2009 to lodge and serve submissions as to costs and the respondent has until 20 February 2009 to lodge and serve submissions in reply.

**Summary as to findings and orders made**

- I have found that the applicant was unjustifiably constructively dismissed.
- I have awarded the applicant the sum of \$1,500 gross being six weeks lost wages.
- I have awarded the applicant the sum of \$3,000 being compensation for hurt and humiliation.
- I have reserved the issue of costs and timetabled for an exchange of submissions should agreement not be reached.

Helen Doyle  
Member of the Employment Relations Authority