

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 161/10
5293080

BETWEEN

RACHEL TAN
AND JOANNA TAN
Applicant

AND

BROADWAY HAIR
AND BEAUTY LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Michael Tan for Applicants
Vincent Godhino and Keith Coelho for Respondent

Investigation Meeting: 30 March 2010

Determination: 7 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Rachel Tan and Joanna Tan were employed as beauty therapists by Broadway Hair and Beauty Limited (BHBL). They started work on 24 November 2009 at a salon in Newmarket operated by BHBL.

[2] On 22 December 2009 the manager of the business Keith Coelho spoke with Joanna Tan about her employment arrangements. He told her the business was “bleeding” and she could no longer be provided with a guaranteed number of hours each week. There is a dispute about whether the minimum hours were agreed to be 24 or 32 hours a week at that time.

[3] Joanna Tan was told that from then on she was to work only on an ‘as required’ basis. Mr Coelho indicated that he hoped the situation might change in January 2010 but encouraged her to seek other employment.

[4] Mr Coelho had a similar conversation with Rachel Tan the next day.

[5] On the basis of those conversations Joanna Tan and Rachel Tan say they were dismissed from their permanent part-time jobs on 22 and 23 December 2009 respectively. They have lodged claims in the Authority for the payment of wages, holiday pay and a notice period which they say remain due to them. It is a wage claim, not a personal grievance application about the circumstances of the end of their employment.

[6] The matter was not resolved in mediation and was set down for an investigation meeting. At that meeting I heard sworn or affirmed evidence from Joanna Tan, Rachel Tan, Mr Coelho and BHBL's director Vincent Godinho. Some submissions on the facts were also given by Joanna and Rachel Tan's father and representative, Michael Tan, and by Mr Coelho.

[7] The issues for resolution by the Authority are:

- (i) what were the agreed and applicable terms regarding the hours of work for Joanna and Rachel Tan; and
- (ii) what wages and holiday pay remain due to them (if any); and
- (iii) are Joanna and Rachel Tan entitled to be paid for a notice period, and if so, what is the length of that notice period; and
- (iv) what orders regarding wages are required?

What were the agreed hours of work

[8] Joanna and Rachel Tan say their wages should be based on a guaranteed 32 hours minimum each week for the period from 24 November to 22 and 23 December respectively.

[9] They rely on the terms of a written employment agreement provided to them before they started work. They did not sign the agreement but agree they were the terms under which they were employed. BHBL accepts the written agreement sets out the terms on which Rachel and Joanna Tan were each employed.

[10] Clause 6.1 of the agreement states “*normal hours of work shall be thirty two hours per week*”. Clause 6.4 allows for variation of working hours “*by mutual agreement between the employee and the employer*”. However if agreement cannot be reached the employer may vary the hours “*provided that the employee’s minimum hours of work are not reduced below thirty two hours*”.

[11] BHBL says the employment was offered on the basis of a minimum of 24 hours in the first two weeks with a minimum of 32 hours a week thereafter. It points to an email to Rachel Tan dated 16 November 2009 as evidence of that term. However I find that proposal was superseded by the terms set out in the written employment agreement sent to both Rachel and Joanna on 21 November 2009. That document was an offer of employment clearly made and accepted on the basis of a 32-hour week minimum at a rate of at least \$20 an hour.

[12] There is an email from Rachel Tan dated 28 November querying her hours of work and referring to two days a week but I do not find that this is evidence of accepting a reduction in agreed minimum hours as it is even less than the 24 hours which BHBL alleged were the agreed minimum hours. Rather it is evidence of her being provided with fewer than the agreed hours at the time.

[13] However the position did, I find, change on 1 December 2009. By that time Mr Coelho and Mr Godinho had reached the view there was not enough work for Rachel and Joanna for four days a week at the salon on Broadway. Mr Godinho operated another business in Manukau called ‘Hairport’. The two therapists were given the option of working there or working only three days a week at the Broadway salon. By email on 1 December Rachel and Joanna agreed to working three days a week as “*best for now*” and “*till get busy*”. I take that change to apply to the following pay period which started on 5 December.

[14] The offer to work at Hairport does not negate the minimum hours requirement on BHBL. Hairport was operated by another company also owned by Mr Godinho. While the BHBL employment agreement allowed for relocation to another “branch”, Hairport was not a branch of the business operated by BHBL which at that time had only one location, its salon in Broadway.

[15] In summary I find that the agreed and binding minimum hours of work were 32 a week from 24 November to 4 December and 24 hours a week from 5 December until the end of the employment. BHBL was obliged to pay Rachel and Joanna Tan for at least that number of hours in each week.

Are wages and holiday pay still due?

[16] The following table sets out information from BHBL's pay records (which are not disputed) and shows the hours worked in the three fortnightly pay periods that Rachel and Joanna Tan were employed. It also shows the shortfall between the hours worked and the minimum hours guaranteed.

	<i>Rachel Tan</i>			<i>Joanna Tan</i>		
	<i>Worked</i>	<i>Guaranteed minimum</i>	<i>Shortfall</i>	<i>Worked</i>	<i>Guaranteed minimum</i>	<i>Shortfall</i>
<i>24-11-09 - 4-12-09</i>	28	64	36	35.5	64	28.5
<i>5-12-09 - 18-12-09</i>	46.5	48	1.5	51	48	-
<i>19-12-09 - 1-01-10</i>	33	48	15	15	48	33
			52.5			61.5

[17] I note that the hours worked in the last fortnight period include 16 hours paid as public holiday pay to Rachel Tan for December 25 and January 1 because those public holidays were accepted by BHBL as falling on days of the week she would otherwise have worked. Similarly Joanna Tan was paid for 26 December in that period on the same basis. She was also paid 8 hours pay for the January 2 holiday and that 8 hours should be deducted from the shortfall owed to her. The effect is that the holiday pay is counted as forming part of the guaranteed minimum hours.

[18] On this basis what remains owing because of the shortfall in hours is \$1050 for Rachel Tan (for 52.5 hours at \$20 an hour) and \$1070 for Joanna Tan (for 53.5 hours at \$20 an hour).

[19] Including payment for the shortfall, gross earnings for the period worked should have been \$3200 for Rachel Tan and \$3260 for Joanna Tan. They are each entitled to be paid eight per cent on those amounts for annual leave, which was not

paid on the termination of their employment. For Rachel Tan this is \$256 and for Joanna Tan \$260.80.

Is a notice payment due, and if so, for how long?

[20] The discussion Mr Coelho had with Joanna Tan on 22 December and with Rachel Tan on 23 December effectively terminated their employment on the grounds of redundancy. He told them there was no more work for them on the permanent and on-going basis on which they had been employed. In those circumstances their employment agreement contained a specific clause about termination for redundancy which provided for two weeks notice. That clause expressly excludes the application of a “general clause” providing four weeks notice. Having failed to provide the notice period specified in the event of a redundancy, BHBL must now pay Joanna Tan and Rachel Tan for that two weeks – that is an additional 48 hours pay, being \$960.

Orders of the Authority

[21] For the reasons given BHBL is to pay the following amounts by no later than 14 days after the date of this determination:

- (i) To Rachel Tan:
 - (a) \$1050 as wages; and
 - (b) \$256 as pay for annual leave; and
 - (c) \$960 as pay for the notice period.
- (ii) To Joanna Tan:
 - (a) \$1070 as wages; and
 - (b) \$260.80 pay for annual leave; and
 - (c) \$960 as pay for the notice period.

[22] BHBL is also to reimburse Joanna Tan and Rachel Tan for the \$70 fee paid for lodging this claim in the Authority.

Robin Arthur
Member of the Employment Relations Authority