

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 156
5426478

BETWEEN HAZEL MORTON
 Applicant

AND HAIRSHOP LIMITED t/a HAIR
 CLUB
 Respondent

Member of Authority: P R Stapp

Representatives: Bede Laracy, advocate for the Applicant
 No appearance for the Respondent

Investigation Meeting: 4 December 2013 at Wellington

Oral Determination: 4 December 2013
Written Determination: 5 December 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem arises from the payment of wages and Ms Morton being sent home at different times on different days during her employment. The employment then ended. Without the matters being resolved Ms Morton filed a personal grievance claim in the Authority. The employment relationship problem filed in the Authority involves numerous causes of action to resolve the problem with lost wages, compensation, unpaid wages, costs, the filing fee, penalties for a breach of good faith, unlawful deduction from wages, failure to provide an employment agreement, failure to keep and produce upon request a wage time and holiday record.

[2] In the employment there were difficulties with the arrangements in regard to the payment of Ms Morton's wages. She claims her wages varied with them being

paid sometimes in cash (to mid-April 2013) and other times into her personal bank account, but by her calculation the full amount of wages was not paid every time. She says that when she raised these issues and the tax on her wages her employer's response over time became abusive and threatening.

[3] The respondent has failed to provide a statement in reply. It has failed to communicate with the applicant's representative, and it has failed to be communicative and responsive to the Authority. In short the respondent has not assisted the Authority in the investigation at all. Ms Morton believes her employer was the Hairshop Limited (the Hair Club and/or the company). The sole director of the company is a Shamir Doutrous, but Ms Morton's dealings were with a Mr Joseph Brookes who she had direct contact with at work. She initially believed that Mr Brookes and Shamir Doutrous may be the same person but she does accept that they may be different people, with the former living somewhere overseas (according to information received by telephone from the accountants). Shamir Doutrous's address on the company registration as a director is "Princess Street, Auckland, 1010". The accountants have informed the Authority that there is a number in Princess Street. Mr Brookes was originally cited in the claims as a party personally, but his name was removed by the applicant when there were difficulties locating him and identifying who he actually is and/or the identifying the name he goes by. The address of the business's accountants is used as the official address for the company and for service. The accountants have been of assistance, but not able to help locate anyone from the respondent. There is something very much to explain about the activities of the company and Mr Brookes and Shamir Doutrous. The respondent failed to attend mediation services provided by the Ministry of Business, Innovation and Employment and which were arranged by the applicant's representative. The start of the Authority's investigation was delayed to make some contact with the respondent and to give the respondent time to arrive at the investigation meeting, albeit late. Nothing was achieved, despite a discussion by the support officer with Mr Brookes, who made it clear he would not be attending. There has been no good cause advanced for the respondent's failure to attend and/or be represented at the Authority's investigation meeting. I decided to act fully in the matter as if the respondent had attended or been represented (clause 12 of Schedule 2 of the Employment Relations Act).

The issues

- [4] How did Ms Morton's employment end?
- [5] Is there a dismissal/unjustified action?
- [6] If so was the respondent's action justified and fair?
- [7] Is Ms Morton owed any wage arrears?
- [8] Is this a matter for penalties?

The facts

[9] Ms Morton commenced her employment with the Hairshop Limited in January 2013 and she was required to work in the lower level of the North City Shopping Centre at Porirua. The business uses external accountants and has approximately 15 employees/contractors (hairdressers, barbers and beauticians) and a receptionist. Ms Morton was employed as a full time beautician and paid \$18 per hour to work six days per week, Tuesday to Sunday. Ms Morton says she agreed to work 45 hours per week, but her average hours worked out to be approximately 40 hour per week. There is no documentation and the respondent has failed to respond to requests for any documentation. Ms Morton says that Mr Brookes refused to provide an employment agreement upon request from her during her employment and told her to leave if she did not like it.

[10] Ms Morton says that on 23 May 2013 the business's owner, who she believed was Mr Brookes, caused a scene in regard to the payment of Ms Morton's wages and her request for pay slips. She claims Mr Brookes got angry, started to yell and threaten her job at the Hair Club and told her that if she did not like it, to get out. Ms Morton says Mr Brookes met her in the beautician's room and shut the door and that he got aggressive and was verbally abusive in regard to an issue about her rate of tax and her contact with the IRD where no tax had been paid. She says she began to cry and went to leave the room and he stood in front of the door and would not let her out. She began yelling and then was allowed to leave the room when other employees were alerted to what was happening. There are no pay slips and Ms Morton does not know if she has been paid correctly for public holidays that she claims to have worked.

[11] At the end of May 2013 and/or beginning of June 2013, a new manager started at the premises, but the same problems continued to occur with the wages. After a couple more weeks, the new manager started sending Ms Morton home after she had been at work for an hour or two on each occasion. Ms Morton says that no good reason was given. Ms Morton says she was put on new unrealistic targets and if the targets were not met, she would be sent home. Her days were cut down to three per week and then she was told not to work. There was no notice of any changes to hours and days.

[12] Ms Morton's work finished on 25 June 2013 when she was informed not to bother coming to work.

[13] There was some communication by text message between Ms Morton and the manager, and Ms Morton obtained the services of Mr Laracy for help and advice. He met with Ms Morton at the North City Shopping Centre on 26 June 2013 and there was an attempt by them to communicate with the manager at the Hair Club. Following this meeting, Ms Morton considered that she did not have a job anymore because it was clear that the manager had removed her from the roster for work.

[14] Mr Laracy tried to meet with the respondent without any result and the respondent did not cooperate when requested to provide necessary documents (an employment agreement, copy of wage time and holiday records) to explain what had happened in the employment arrangements and to make an assessment and check on the wages paid.

[15] He immediately raised a personal grievance in writing (letter dated 28 June 2013).

[16] The matter did not settle between the parties because the respondent failed to be involved. It now falls to the Authority to make a determination

Determination

[17] This is a disgraceful employment situation; even on the basis of what the applicant has said happened and had to put up with and with no reply from the respondent. The respondent's behaviour has not helped and through its personnel is wholly responsible for this one sided affair. They have had every opportunity to be involved and participate in the Authority's investigation and have wilfully failed to do

so by not replying and not attending the Authority's investigation meeting. Whoever the director of the company is must have some responsibilities, or I take it there is a belief that they can simply do what they want when they want to and in what manner they want to. That is an entirely unacceptable way to run a business in the labour market.

[18] There has been no reason given for the decision not to provide Ms Morton with any further work and reduce her hours at work and remove her from the roster. I hold that she reasonably came to a conclusion that her employment had ceased when she was sent home, her hours and days were changed without any input and the respondent's abusive and threatening response to her attempts to sort the matters out before the employment effectively ended. A fair and reasonable employer could not act in such a way, I hold. Further there has been no investigation of any problems in the employment and Ms Morton was not advised of any of the employer's concerns, if there were any. Indeed the employer's failure to reply means I have not been able to assess the resources available to it, except that it appears to use an external accounting firm. Therefore, Ms Morton had no opportunity to comment and respond to any matters that might have existed and impacted on her employment. Lastly, the employer could not therefore have genuinely considered a response from Ms Morton before changing her hours and days of work and taking her off the roster without any cause.

[19] Also, there were numerous matters arising during Ms Morton's employment. The matters serve as background to her employment ending. These included:

- i. That basic terms and conditions were not provided.
- ii. That there has been a failure to pay any tax on Ms Morton's wages.
- iii. That there has been abusive and threatening behaviour when Ms Morton raised reasonable and legitimate concerns about her employment.
- iv. That threats were made to Ms Morton about her employment.
- v. That there has been a failure to properly pay Ms Morton and to keep and produce proper records.

[20] I hold that Ms Morton's employment ended at the initiative of the employer without cause and a failure to follow proper procedure. These defects and omissions are not minor and did result in Ms Morton being treated unfairly. It follows that Ms Morton has a personal grievance for unjustified dismissal. The personal behaviour of Mr Brooke's is deplorable if it is true, and I have no reason in any way to doubt Ms Morton's evidence about what she says he said and did.

[21] The Hair Club's failure on request to provide an employment agreement and provide wage time and holiday records when asked to provide them were deliberate and wilful breaches of the statutory obligations to comply. The applicant has filed for penalties for breaches in the twelve months as required under the Act. The Hair Club's failure to provide the fundamental documentation in the employment relationship has meant that no proper scrutiny can be made of the terms and conditions of Ms Morton's employment at the Hair Club and no calculation can be made of her wages and holiday pay other than from Ms Morton's own records from the bank and her email log of her hours. In the absence of the respondent providing the documents and failing to turn up without good cause to the Authority's investigation meeting I have accepted the applicant's evidence as being the most reliable available. From the respondent's failure to reply and respond and attend the investigation meeting I conclude that it has accepted that there are claims and money owing. The applicant's calculation for her own records shows that a total of \$8,569.91 net was paid. She says she should have been paid \$12,772.80 net (calculating 20% for tax). The balance of unpaid wages amounts to \$4,202.89 net with the employer responsible to pay the tax in addition.

[22] It has also emerged that there is an amount owed for holiday pay entitlements. Since these were not claimed in the statement of problem I have reserved leave for any final details to be filed by memorandum and then to be served on the respondent in the usual way to address an employment relationship problem. I will deal with that matter subsequently.

[23] Ms Morton has lost wages due to her dismissal. These are calculated as \$5,760 gross; taking into account Ms Morton's attempts to mitigate her loss and get another job. Although Ms Morton claimed \$6,500 (statement of problem) she accepted that her average hours were actually 40 per week at \$18 per hour. She says that she was out of work for 8 weeks. I have reserved any variation on the sum of lost

wages if confirmation of her start date in her employment can be provided and the sum is more than that awarded by me.

[24] Ms Morton has suffered humiliation loss of dignity and injury to feelings because of the action of the Hair Club management, in particular Mr Brookes and the manager. The impact of the employer's actions has been to cause Ms Morton to feel stressed, depressed and abused. I accept that she was worried upset and shocked and had financial problems to arrange when her pay ceased. She had to rely on her family's help and assistance. She is entitled to \$6,000 under s 123 (1) (c) (i) of the Act.

[25] There is no deduction made to the lost wages and the compensation because Ms Morton did not contribute to the personal grievance.

[26] The events claimed for a breach of good faith are all matters in the background to the employment relationship. On first flush they are all deserving of a penalty as the claims have been made in time and the employer has not communicated and responded as a fair and reasonable employer could be expected, but as the employment relationship problem can be resolved as a personal grievance and the employment has ended I have decided not to impose penalties for breaches of good faith. Let there be no doubt though that the Hairshop Limited trading as the Hair Club, breached good faith by failing to provide an employment agreement for Ms Morton, failing to keep and provide wage time and holiday records for Ms Morton, by being abusive to Ms Morton and failing to communicate and properly respond to Ms Morton. These factors resulted in the respondent undermining the employment relationship, all at the employer's initiative.

Summary of the Authority's orders

[27] I order the Hairshop Limited to pay Hazel Morton:

- i. \$5,760 gross lost wages for her unjustified dismissal;
- ii. \$6,000 net compensation under s 123 (1) (c) (i) of the Act for humiliation loss of dignity and injury to feelings;
- iii. \$4,202.89 net unpaid wages in arrears (the employer is to pay the tax in addition).

[28] I cannot award a penalty against the Hairshop Limited for failing to provide an employment agreement because the claim for a penalty has not been brought by a labour inspector under s 65 (4) of the Act. I impose a penalty of \$3,000 against the Hairshop Limited for failing to keep and provide wage time and holiday records. The penalty sum of \$3,000 is to be paid to the Crown as the breach relates to public policy in terms of the requirements placed on employers under the Employment Relations Act 2000.

Costs

[29] The applicant is entitled to her costs based on the daily tariff of \$3,500. Her costs are on the basis of a contingency arrangement plus the filing fee of \$71.56. The investigation meeting lasted more than half a day. She was represented and preparation for the investigation meeting was required. This included a statement of evidence and production of the documents that at least were available (the personal grievance letter). However, during the investigation meeting, the applicant was able to produce bank statements and her log of hours from her email on her phone and complete her calculations. The delay for this during the investigation meeting was the applicant's responsibility because the information should have been reasonably provided before the investigation meeting. I am not prepared to compensate her any more costs for her delay. The information she provided proved to be important for the calculations of wages. The respondent's behaviour however has added to the applicant's costs, and the respondent, by not responding and engaging, has meant that the applicant has incurred unnecessary costs that very much could have been avoided. The respondent by not turning up to mediation has put the applicant to further costs that were unnecessary. The respondent's delays and omissions mean that the portion of costs on a half day tariff must be increased. Hairshop Limited is to pay Ms Morton \$3,000 costs, plus the filing fee of \$71.56.

[30] Finally, this company and the director would seem to be ideal candidates for the Ministry of Business, Innovation and Employment (MBIE) to investigate in regard to their conduct as an employer and registered company and for MBIE to use the tools available to it to address any omissions and failure by the respondent and its personnel to comply with their obligations. If the information is all true as presented this business and how it is run is disgraceful and maybe affecting other employees since there are approximately 15 other people engaged in the business. Hopefully it is an

aberration. However prospective employees need to be alerted with their eyes wide open as to what to expect from Mr Brookes and Shamir Doutrous and the running of the business they are involved in:-Hairshop Limited, trading as the Hair Club in the North City Shopping Centre at Porirua.

P R Stapp
Member of the Employment Relations Authority