

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 130
5522495

BETWEEN

MOBEEN BHIKOO
Applicant

AND

STEPHEN MARR HAIR
DESIGN NEWMARKET
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Paul Pau for Applicant
Paul Wicks for Respondent

Investigation Meeting: 16 March 2015

Submissions Received: 31 March 2015 from Applicant
9 April 2015 from Respondent

Determination: 8 May 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Bhikoo was not unjustifiably dismissed.**
- B. The application for penalties for breaches of the Employment Relations Act 2000 is declined.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Mobeen Bhikoo claims he was unjustifiably dismissed from his employment at Stephen Marr Hair Design Newmarket Limited (Marr Hair Design) and questions whether he is bound by a restraint of trade provision. Mr Bhikoo also claims Marr Hair Design is in breach of the Employment Relations Act 2000 (the Act)

for not providing him with an employment agreement and has breached its statutory obligations of good faith. Mr Bhikoo also claims that a restraint of trade provision contained in a Shareholders and Directors Agreement is unreasonable and unenforceable.

[2] Marr Hair Design denies the claims.

[3] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Bhikoo and Marr Hair Design but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Mr Bhikoo's relationship with Marr Hair Design

[4] Mr Bhikoo was initially employed by Marr Hair Design in 2005. At the time of his dismissal Mr Bhikoo was employed as the Manager of the Newmarket Salon. Mr Bhikoo was not only an employee of Marr Hair Design, he was also a shareholder and director.

[5] After his employment had commenced Mr Bhikoo became a 25% shareholder in the Newmarket salon. This was followed by a similar shareholding in the Takapuna salon.

[6] During 2013 Mr Bhikoo had become concerned about a number of issues relating to the administration of the companies for which he was a director including financial transactions between the companies and other legal entities owned by Mr Marr, the current accounts, and rebates from suppliers. As events have transpired the difficulties between the parties with respect to the accounting matters are complicated and even the experts engaged by each party have been unable to agree on a number of aspects of them.

[7] Mr Bhikoo's status as a shareholder and director was formalised in a Shareholders and Directors Agreement (the Agreement). This Agreement prohibits Mr Bhikoo from working in competition to Marr Hair Design for a period of 12 months and within 10 kilometres of the business following the termination of his

directorship. In consideration for entering into the restraint of trade clause, Mr Bhikoo received an allocation of shares in the business.

[8] The Agreement sets out that Mr Bhikoo is to be employed full time by Marr Hair Design and provides for his shareholding to be automatically transferred on termination of the employment relationship. A review of the Companies Register shows Mr Bhikoo continues to be listed as a minority shareholder.

[9] The Agreement provides for disputes arising out of, or relating to the Agreement to be resolved by discussion and negotiation. In the event that resolution is not achieved the parties are to attend mediation. If mediation is not successful the dispute is to be resolved by Arbitration in accordance with the Arbitration Act 1996.

[10] After the differences outlined above arose between Mr Bhikoo and Mr Marr and his partner Ms Lucy Vincent and in accordance with the Agreement, mediation was arranged by Mr Marr and Ms Vincent in February 2014 in an effort to resolve the differences. Mediation was not successful.

[11] Mr Bhikoo decided to leave the business after he was unable to find a resolution to the issues regarding the accounting and financial transactions. Mr Bhikoo had reached a conclusion that he no longer trusted Mr Marr and Ms Vincent and he did not believe matters would improve.

[12] The parties entered into discussions about how the commercial relationship would end. At this time the discussions were centred on how the parties would disentangle themselves from the director/shareholder relationship. The parties had involved their accountants in attempting to find a way forward.

Events leading to the ending of the employment relationship

[13] On 19 March 2014 Mr Marr and Ms Vincent wrote to Mr Bhikoo requesting a timeframe for when Mr Bhikoo expected to formally leave the business so that arrangements for a managed transition could be made. Mr Marr and Ms Vincent reiterated the restraint provision set out in the Agreement and invited Mr Bhikoo to discuss a possible relaxing of the restraint as part of an overall exit package. That is an exit from the commercial arrangements and the employment arrangements.

[14] Mr Bhikoo was reminded that he continued to have obligations as a director of the company to act in its best interests and was asked to act appropriately when dealing with customers, clients, business contacts and staff. Mr Marr and Ms Vincent felt Mr Bhikoo had been acting in an aggressive and threatening manner towards them, and advised him that the behaviour was unacceptable and had to stop.

[15] Under cover of a letter dated 19 March 2014 a notice of a Special Meeting of Directors with the proposed resolution that Mr Bhikoo be removed as a director and a new director be appointed was given to Mr Bhikoo on 20 March 2014. Mr Marr says that when he gave Mr Bhikoo the letter Mr Bhikoo reacted by yelling and abusing him in front of employees and customers.

[16] As a result of his conduct Mr Bhikoo was invited to attend a disciplinary meeting to discuss his behaviour. Mr Bhikoo was advised that possible penalties included dismissal if the behaviour was considered to be serious misconduct. Mr Bhikoo was encouraged to seek advice and have a representative attend with him at the meeting. Mr Bhikoo was suspended on full pay so that he could seek advice.

[17] A dispute then arose as to whether the incident on 20 March 2014 arose in Mr Bhikoo's capacity as an employee or a director/shareholder of the company. The letter dated 19 March 2014 and the accompanying resolution addressed issues with respect to the shareholding and Mr Bhikoo's obligations as a director. Mr Bhikoo requested that Mr Marr remove himself from the disciplinary process as he was the complainant and would also be standing in judgment of Mr Bhikoo, a position which may lead to Mr Marr becoming less than partial in his decision making.

[18] Through correspondence between the parties the suspension was lifted on 25 March 2014 however Mr Bhikoo did not return to work as the letter advising of the lifting of the suspension advised that it would be "*unwise and unhelpful*" if Mr Bhikoo did return. Concurrently the parties also entered into confidential discussions to try and resolve the issues between them. Those discussions did not resolve matters and a further disciplinary meeting was arranged. To overcome the concerns about Mr Marr's impartiality, Ms Vincent was appointed as decision maker.

[19] Mr Bhikoo refused to attend the disciplinary meeting and requested further information in order for him to properly answer all of the allegations against him including allegations that he had been contacting customers who had contacted the salon and had been abusive towards employees. Mr Bhikoo also raised concerns about the impartiality of Ms Vincent and requested an independent person be appointed to undertake the investigation.

[20] In response Marr Hair Design wrote to Mr Bhikoo setting out each of the allegations and provided copies of all documents or referred to previous correspondence in which the requested information had been provided. Marr Hair Design rejected the request to appoint an independent person as a decision maker and confirmed Ms Vincent's appointment as decision maker.

[21] Mr Bhikoo refused to attend the disciplinary meeting due to continued concerns about the impartiality of Ms Vincent. In response, Marr Hair Design advised Mr Bhikoo that his concerns were not valid and that the disciplinary meeting would proceed and reiterated that this was Mr Bhikoo's opportunity to provide his explanations to the allegations.

[22] The meeting proceeded in the absence of Mr Bhikoo. Ms Vincent reached conclusions on all of the allegations and set those conclusions out in writing including the conclusions that the conduct of Mr Bhikoo constituted serious misconduct and termination of his employment was proposed. Mr Bhikoo was invited to attend a further meeting to discuss the conclusions. Mr Bhikoo was also invited to make written submissions if he preferred.

[23] In response Mr Bhikoo denied that the allegations could be found to be serious misconduct and again raised concerns about the impartiality of Ms Vincent and reiterated his request for an independent third party to investigate the allegations.

[24] After considering the response from Mr Bhikoo, Marr Hair Design confirmed its conclusions with respect of the allegations of serious misconduct and gave notice of Mr Bhikoo's summary dismissal effective on 30 May 2014.

The issues

[25] The issues for this determination are whether:

- a) Mr Bhikoo's dismissal is unjustified;
- b) If the dismissal is unjustified, what, if any, remedies should be awarded;
and
- c) The restraint of trade is enforceable.

The allegations

[26] The allegations upheld by Marr Hair Design and which formed the basis for Mr Bhikoo's dismissal are:

- a) Mr Bhikoo's conduct on 20 March 2014 toward Mr Marr;
- b) Mr Bhikoo's conduct in walking out of the salon on 20 March 2014;
- c) Mr Bhikoo advising employees of his intention to set up his own salon and making disparaging comments about the business; and
- d) Unauthorised personal use of a company credit card

Mr Bhikoo's conduct on 20 March 2014 toward Mr Marr;

[27] This allegation relates to the way in which Mr Bhikoo responded when Mr Marr gave him an envelope containing the 19 March 2014 letter and resolution. Mr Bhikoo says that Mr Marr emailed him on 19 March 2014 and asked if he could pop in to drop a letter in to him. Because of the strained relationship between them, Mr Bhikoo advised Mr Marr he would prefer him to email the letter.

[28] Notwithstanding the request for the document to be emailed Mr Marr attended the salon to hand Mr Bhikoo the letter personally. Mr Bhikoo says he was shocked and upset that Mr Marr did this as Mr Marr knew his presence would upset him. I do not accept Mr Bhikoo's evidence that Mr Marr would know that his presence with the letter would be upsetting to Mr Bhikoo. Mr Bhikoo himself, gave evidence that despite their differences over the commercial aspects of the business he and Mr Marr had worked together in the salon the previous day without incident.

[29] The letter contained a notice of a resolution to remove Mr Bhikoo as a director. Ms Vincent says the constitution did not allow for delivery of this type of

notice by email, and at the time their lawyers did not know who Mr Bhikoo's lawyers were. When Mr Marr personally delivered the letter and notice to Mr Bhikoo he was acting under his lawyer's advice.

[30] Ms Robyn Ancell, the Front of House Manager for the Salon was present throughout the incident on 20 March 2014. Ms Ancell provided a written note of what she witnessed and heard to Ms Vincent as part of the disciplinary enquiry into Mr Bhikoo's conduct. Ms Ancell says in her note that Mr Bhikoo was shouting, calling Mr Marr a thief and was swearing. Ms Ancell says the interaction between Mr Marr and Mr Bhikoo took place in front of a supplier, customers and employees.

[31] CCTV footage recorded during the incident on 20 March 2014 has been provided to, and viewed by, the Authority. As held by the Employment Court in *Harris v The Warehouse Limited*¹ CCTV footage is helpful to the limited extent that it can corroborate that a person was in a particular place at and for a particular time and can corroborate the degree of animation of a person while speaking as indicated by hand gestures. CCTV footage cannot corroborate what was said.

[32] The CCTV footage provided to the Authority shows Mr Bhikoo acting in an agitated way. Mr Bhikoo appears to be gesturing in a way that shows he was unhappy with receiving the letter and shows other employees present in the area working and customers and suppliers can be seen entering the salon during the exchange between Mr Bhikoo and Mr Marr. At the investigation meeting Mr Bhikoo acknowledged that he was "pretty angry" during the time covered by the CCTV footage.

[33] Following her investigation Ms Vincent concluded Mr Bhikoo's conduct on 20 March was aggressive and abusive, took place in front of employees, customers and suppliers and constituted serious misconduct.

[34] Mr Bhikoo says he did not conduct himself as an employee at that time, as the letter he was given had been given to him in the context of his role as a shareholder and/or director of the company and that this should have been taken into account by Ms Vincent when reaching her conclusions.

¹ [2014] NZEmpC 188 at [177].

[35] Ms Vincent says she considered that, but at the time the incident occurred Mr Bhikoo was working as an employee, at his place of work and during working hours. Ms Vincent did not accept that because the documents related to shareholder/director issues Mr Bhikoo was relieved of his obligations owed as an employee. Ms Vincent also took into account that Mr Bhikoo had found it necessary to apologise to staff at the salon the following day for his conduct on 20 March 2014 but did not find it necessary to apologise to Mr Marr.

Mr Bhikoo's conduct in walking out of the salon on 20 March 2014

[36] Following the exchange between Mr Bhikoo and Mr Marr, Mr Bhikoo left the salon. At the time he left, Mr Bhikoo was in the process of working with a longstanding client who was halfway through her colour treatment which had to be completed by another Senior Stylist.

[37] For the two hours after Mr Bhikoo left the salon, approximately four customers were scheduled for appointments. At least one of those became very upset that Mr Bhikoo was not available as she had been waiting four months to see him and was flying to Australia the next day. Another customer was so upset the Salon staff provided him with a complimentary hair cut to make up for his disappointment.

[38] Mr Bhikoo did not consider leaving the salon as suddenly as he did on 20 March 2014 was sufficiently serious to constitute serious misconduct. Mr Bhikoo denies he was in the middle of working with a customer. Mr Bhikoo says he had finished with the customer and only had another two clients booked. Mr Bhikoo says he advised another employee that he could not keep working and asked her to apologise to his clients and make arrangements with them.

[39] Mr Bhikoo's explanation was not accepted by Ms Vincent who reminded Mr Bhikoo that the Salon is a service provider where its customers make appointments, sometimes well in advance, and those appointments are often linked to a particular occasion or because of Mr Bhikoo's availability.

[40] Ms Vincent concluded that the sudden departure of Mr Bhikoo on 20 March 2014 without any regard for his customers constituted serious misconduct.

Mr Bhikoo advising employees of his intention to set up his own salon and disparaging comments

[41] On 21 March 2014 Mr Bhikoo called the employees of the Newmarket Salon together and advised them he was intending to leave the business and set up on his own. During that meeting it is reported that Mr Bhikoo told the employees that he was leaving because he was “...*fucked off*...” with how the company was being run.

[42] Mr Bhikoo denies the information he relayed to the employees on 21 March 2014 constituted misconduct.

[43] Ms Vincent considered the comments by Mr Bhikoo, as the Manager of the Newmarket Salon, criticising the management of the company constituted misconduct.

Unauthorised personal use of a company credit card

[44] This allegation was originally one of dishonesty regarding Mr Bhikoo’s use of a company credit card. Following receipt of Mr Bhikoo’s explanation and further documents supporting his explanation, Ms Vincent accepted that he had not been dishonest but that the expenditure on the credit card for personal items was unauthorised and was a misuse of the card and amounted to misconduct.

Was the dismissal unjustified

[45] The fact that Mr Bhikoo’s employment was terminated is accepted. The onus falls upon Marr Hair Design to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.²

[46] In applying the test of justification the Authority must consider the matters set out in section 103A(3) of the Employment Relations Act 2000. These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

² Employment Relations Act 2000, section 103A(2).

[47] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly.³ A failure to meet any of the section 103A(3) tests is likely to result in a dismissal being found to be unjustified.⁴

[48] Ms Vincent acted impartially in undertaking her role in the disciplinary process. Ms Vincent gave uncontested evidence that she was not a complainant or a witness in relation to any of the events and did not take Mr Marr's account of events into consideration but relied on the CCTV footage and the corroborating statements provided by witnesses.

[49] Mr Bhikoo's continued refusal to engage in the process was unreasonable. He was provided with ample opportunity to provide his explanations. Some of those explanations have been provided to the Authority, but were not provided to the employer before the decision to dismiss was made. At the time the decision was made the employer did not have the benefit of his explanations and was not able to take them into consideration.

[50] Ms Vincent concluded that the incident on 20 March 2014 and Mr Bhikoo's walking off the job that same day constituted serious misconduct. Ms Vincent also concluded Mr Bhikoo's announcement to staff on 21 March 2014 and the use of the company credit card to purchase personal goods, while not done dishonestly, was inappropriate and unauthorised, constituted misconduct.

[51] I find that these conclusions were open to an employer acting fairly and reasonably. Mr Bhikoo was afforded a reasonable opportunity to respond to all of the allegations before the decision to dismiss was made. That reasonable opportunity included addressing the matters raised regarding allegations of bias and lack of independence together with repeated opportunities to meet to respond. Even in the absence of Mr Bhikoo meeting to respond to the allegations Ms Vincent took into account all explanations provided by Mr Bhikoo through his lawyer and undertook further investigations when that became necessary.

³ Ibid at section 103A(5).

⁴ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [26].

[52] At the investigation meeting Mr Bhikoo raised concerns about Ms Vincent being the decision maker and the potential for bias in her conducting the process. I am satisfied Ms Vincent did not demonstrate bias in her investigation or decision making process. Ms Vincent was not deciding on any matters in which she was a witness and avoided any issues of potential bias by taking no regard of any statements made by Mr Marr. Any argument that Ms Vincent would profit from Mr Bhikoo's dismissal by receiving a portion of his shares on termination were avoided by a decision of the majority shareholders not to enforce clause 4.6.2(c) of the Agreement to transfer Mr Bhikoo's shares in the event he was dismissed.

[53] Mr Bhikoo was not unjustifiably dismissed and I can be of no further assistance to him.

Is the restraint of trade enforceable?

[54] Mr Bhikoo claims the restraint of trade clause contained in the Agreement is unenforceable. The restraint of trade clause is not contained in an employment agreement. It is contained in the commercial Agreement relating to the purchase of shares. That Agreement was entered into two years after the employment relationship commenced and is not founded on the employment relationship.

[55] In *BDM Grange v Parker*⁵ the High Court held:

There is however nothing in the ERA to indicate that the existence of an employment relationship was intended to draw into the scheme of the ERA disputes arising as a result of the entirely separate obligations owed by a director in that capacity to the company.

[56] I find the Authority has no jurisdiction to make any findings on the commercial arrangements entered into between the parties including the restraint of trade which was entered into in exchange for the transfer of shares in Mr Bhikoo's favour.

[57] The commercial Agreement between the parties provides for dispute resolution processes which allow all parties to have concerns about the enforceability of the Agreement addressed outside the jurisdiction of the Authority.

⁵ [2005] ERNZ 343 at [77].

Breaches of the Act

[58] Mr Bhikoo says Marr Hair Design breached the Act by not providing him with a written employment agreement and by acting in a way that breached its statutory good faith obligations.

Employment agreement

[59] It was common ground that no written employment agreement could be found by either party. Mr Bhikoo was the Manager of the Newmarket Salon. Mr Bhikoo's evidence is that he never requested a written agreement and was in fact responsible for, and did ensure all employees under his management were provided with a written employment agreement. This included Mr Bhikoo making a check at times that all employees had a signed employment agreement.

[60] There is no dispute that Mr Bhikoo has never received a copy of his employment agreement and therefore Marr Hair Design is in breach of the Employment Relations Act 2000 (the Act).

[61] Mr Bhikoo seeks the imposition of a penalty for the breach. I find that Mr Bhikoo was always aware of the requirement for a written employment agreement from the time of his initial employment. An action for the recovery of a penalty must be commenced within 12 months after the earlier of the date when the cause of action first became known or should reasonably have become known to Mr Bhikoo.

[62] I find Mr Bhikoo was aware from at least 2007 when he became a director of the company and was managing the Newmarket salon that all employees should have a written employment agreement. The action for recovery was commenced in October 2014 which is more than 12 months after Mr Bhikoo should reasonably have become aware that he did not have a written employment agreement. The application for a penalty is declined.

Breaches of good faith

[63] The evidence does not establish Marr Hair Design has breached its statutory obligations of good faith toward Mr Bhikoo and the application is declined.

Costs

[64] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Marr Hair Design shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Bhikoo shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority