

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 159
5564376

BETWEEN	BRITTANY VICTORIA HUGHES Applicant
A N D	CATHERINE DEVON RYBURN t/a MARLBOROUGH DAY SPA First Respondent
A N D	MARLBOROUGH MEDI SPA LIMITED Second Respondent

Member of Authority:	Rachel Larmer
Representatives:	Peter Radich and Miriam Radich, Counsel for Applicant Graham Hill and Graeme Gowland, Counsel for Respondents
Investigation Meeting:	18, 19 and 20 July 2016 at Blenheim
Submissions:	26 July 2016 from Applicant 01 August 2016 from Respondent 03 August 2016 from Applicant
Date of Determination:	19 September 2016

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Ms Catherine (Devon) Ryburn purchased the Marlborough Day Spa (the Spa) on 23 September 2014. Ms Ryburn employed Ms Brittany Hughes to work at the Spa as an Advanced Beauty Therapist under an employment agreement dated 17 September 2014. Ms Hughes started work at the Spa on 23 September 2014.

[2] Ms Hughes' employment agreement dated 17 September identified her employer as "*Marlborough Day Spa*" which is not a legal entity but is the trading name for the Spa business. The parties therefore agree that Ms Ryburn personally employed Ms Hughes from 17 September 2014 until 31 March 2015.

[3] Ms Ryburn is the sole director and shareholder of Marlborough Medi Spa Limited (Medi Spa) which was incorporated on 01 December 2014. In early 2015 Ms Ryburn started talking to the Spa staff about rebranding the business as the Medi Spa.

[4] In late March 2015 Ms Ryburn gave Ms Hughes a new employment agreement which offered her employment in the same position but with Medi Spa as her employer, starting on 01 April 2015. This new employment agreement records Ms Hughes' proposed new employer as being "*Marlborough Medi Spa Limited*" not Ms Ryburn personally.

[5] Ms Hughes signed Medi Spa's proposed new employment agreement on 27 March 2015 and she started work for Medi Spa on 01 April 2015 in the same role she had been doing for Ms Ryburn at the Spa.

[6] On 14 April 2015 Ms Ryburn met with Ms Hughes and Ms Lucy Bertogg who was the then Medi Spa receptionist.¹ During this (informal) regular catch up meeting Ms Ryburn:

- (a) Expressed concern about what she believed were ongoing stock discrepancies;
- (b) Told Ms Hughes and Ms Bertogg that the free underarm depillar treatment Ms Hughes had recently given Ms Bertogg² should have been charged for;
- (c) Advised that she would be taking over control of all stock control until she could work out why the apparent stock discrepancies were occurring.

¹ Ms Bertogg makes substantially the same claims against Medi Spa.

² Ms Hughes and Ms Bertogg say they thought the underarm waxing was free as part of the "treatment of the month" perk. Ms Ryburn says underarm waxing was not one of the allowable 'perks'.

[7] Ms Hughes and Ms Bertogg both say they felt that they had been accused of stealing in the 14 April meeting. Ms Ryburn denies that. Ms Ryburn says she was trying to figure out why stock appeared to be missing but hadn't formed any conclusions about that so did not make any accusations.

[8] Ms Hughes resigned on 21 April 2015 and worked out her notice period so her employment ended on 16 May 2015. Ms Bertogg resigned on 06 May and worked out her notice so her employment ended on 03 June 2015.

[9] Ms Hughes says she felt shaken and scared after meeting with Ms Ryburn on 14 April. Ms Hughes says she felt she had to leave Medi Spa *"for her own physical and mental wellbeing, to protect her personal and professional reputation and to protect her financial security"*.³

[10] Ms Hughes' written resignation (after giving notice) states:

Thank you for the opportunity to work for this company. It is now time for me to start my new venture, I wish Medi Spa all the best for the future.

[11] Ms Hughes started her own beauty therapy business in June 2015 which she still owns and operates.

[12] The parties acknowledge Ms Hughes had two separate periods of employment:

- (a) From 23 September 2014 to 31 March 2015 when Ms Ryburn personally employed her to work for the Spa;
- (b) From 01 April to 16 May 2015 when Medi Spa employed Ms Hughes to work for it.

[13] Ms Hughes accepts that she was not dismissed by Ms Ryburn (when Ms Ryburn was her employer) so her (Ms Hughes') constructive dismissal claim relates to Medi Spa only.⁴ Notwithstanding that, Ms Hughes sought to rely on a list of complaints she had about Ms Ryburn⁵ (while Ms Ryburn was her employer) as evidence that Medi Spa had disadvantaged her (Ms Hughes) and/or had constructively dismissed her.

³ Ms Bertogg in her witness statement gave the exact same reason for resigning.

⁴ Ms Hughes' employment with Ms Ryburn ended when Ms Hughes started working for Medi Spa.

⁵ Which Ms Ryburn disputes.

[14] Evidence about what Ms Ryburn said or did that potentially impacted on the Authority's assessment of credibility issues was permitted but evidence about alleged disadvantages or breaches of contract that occurred before Ms Hughes and Medi Spa were in an employment relationship was held to be inadmissible.

[15] The claims before the Authority involve an investigation into what Medi Spa as Ms Hughes' employer did or did not do, so issues predating their employment relationship are not relevant to whether or not Medi Spa breached its obligations as an employer to Ms Hughes.

[16] Ms Hughes claims her resignation from Medi Spa was a constructive dismissal because Medi Spa either:

- (a) Embarked on a deliberate course of conduct designed to coerce her resignation; or
- (b) Fundamentally breached a term of her employment which made her resignation reasonably foreseeable.

[17] Ms Hughes also claims that Medi Spa unjustifiably disadvantaged her by:

- (a) Including a trial period provision in her employment agreement which was of no legal effect;
- (b) Failing to advise her of the right to take legal advice on the new offer of employment from Medi Spa;
- (c) Creating a work environment that involved suspicion that Ms Hughes had taken stock;
- (d) Failing to give training or effective communication around stock management processes;
- (e) Not explaining the legal implications of Medi Spa being a limited liability entity.

[18] Medi Spa denies all of Ms Hughes' claims. Medi Spa says Ms Hughes was not disadvantaged in her employment and that she was not dismissed. Medi Spa says that Ms Hughes' employment ended because she freely and voluntarily resigned.

The issues

[19] The Authority needs to determine the following issues:

- (a) Should Ms Ryburn be a party in her personal capacity to these proceedings?
- (b) Was Ms Hughes unjustifiably disadvantaged in her employment?
- (c) If so, what if any remedies should be awarded?
- (d) Was Ms Hughes dismissed?
- (e) If so, was her dismissal justified?
- (f) If not, what if any remedies should be awarded?
- (g) What if any costs should be awarded?

Should Ms Ryburn be a party in her personal capacity to these proceedings?

[20] With the limited exception in s.134(2) of the Employment Relations Act 2000 (the Act), the Authority only has jurisdiction to investigate and determine claims involving parties to an employment relationship.

[21] While Ms Hughes and Ms Ryburn were in an employment relationship from 17 September 2014 until 31 March 2015, in which Ms Ryburn in her personal capacity was Ms Hughes' employer, that employment relationship between Ms Hughes and Ms Ryburn ended when Ms Hughes started new employment with Medi Spa on 01 April 2015.

[22] Because Medi Spa is a standalone legal entity, it is legally separate from Ms Ryburn, notwithstanding that Ms Ryburn is Medi Spa's sole director and shareholder. This means that Medi Spa is legally responsible (as Ms Hughes' employer) for its own acts and omissions.

[23] Ms Ryburn is not able to be held personally legally responsible (as a private individual) for Medi Spa's actions as Ms Hughes' employer.

[24] In terms of the Authority's jurisdiction, Ms Ryburn could potentially be held personally liable for a penalty under s.134A of the Act but no such claim was put

before the Authority so any potential liability under s.134A of the Act is not one of the claims to be investigated in these proceedings.

[25] There is no claim currently before the Authority that relates to the period in which Ms Ryburn (in her personal capacity) was Ms Hughes' employer that the Authority has jurisdiction to investigate.

[26] I therefore find that Ms Ryburn should not be a party to these proceedings in her personal capacity. Accordingly Ms Hughes' claims against Ms Ryburn personally do not succeed.

[27] This investigation therefore only involves what did or did not occur from 01 April 2015 to 16 May 2015 being the period during which Medi Spa and Ms Hughes were in an employment relationship.

Was Ms Hughes unjustifiably disadvantaged in her employment?

[28] Ms Hughes bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. If she discharges that onus then the burden of proof moves to Medi Spa to establish on the balance of probabilities that any disadvantage was justified.

[29] Justification is to be objectively assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act).

[30] Ms Hughes claims the five issues in paragraph [17] above disadvantaged her, so I deal with each of these in turn.

Invalid trial period provision

[31] The parties agree that the trial period provision Medi Spa included in Ms Hughes' employment agreement was invalid because it failed to meet the requirements of s.67A of the Act.

[32] Ms Hughes says she was disadvantaged by the fact that Medi Spa had included a trial period (even if it was invalid) into her agreement because it made her feel less secure in her employment.

[33] Medi Spa's failure to comply with the requirements of s.67A of the Act meant it was prevented from relying on the trial period to prevent Ms Hughes from pursuing a dismissal grievance if she was dismissed during the invalid trial period.

[34] I therefore find that because the trial period clause was of no effect it did not actually disadvantage Ms Hughes.

[35] I consider that it was Ms Hughes' lack of knowledge that the trial period was invalid that disadvantaged her not the mere fact that there was a trial period clause.

Failure to advise her of the right to take legal advice

[36] Medi Spa admits that it failed to advise Ms Hughes of her right to take legal advice about the proposed intended employment agreement in breach of s.63A(2)(b) of the Act.

[37] I find that failure disadvantaged Ms Hughes because she was not aware she had the right to take legal advice before accepting Medi Spa's offer of employment, so she failed to do so. That omission caused Ms Hughes to be unaware that the trial period was invalid. Ms Hughes therefore incorrectly believed Medi Spa could dismiss her without cause and she would not be able to bring a grievance relating to her dismissal.

[38] I find that Medi Spa's breach disadvantaged Ms Hughes because it caused her to become overly anxious about her employment which she believed was not secure. That assumed greater significance than it may otherwise have because at the same time Ms Hughes also felt that Medi Spa was blaming her for stock discrepancies.

[39] I am satisfied that such disadvantage was unjustified. A fair and reasonable employer is expected to comply with its statutory obligations but Medi Spa failed to do so.

Creating a work environment of suspicion

[40] While Ms Hughes appeared to genuinely believe that she had been subjected to an "*environment of suspicion*" I consider that is merely her subjective view over Medi Spa's understandable concern about apparent stock discrepancies.

[41] Medi Spa raised its stock concerns with all staff, not just Ms Hughes. It was to be expected that Medi Spa would ask Ms Hughes about the stock issues because she was responsible for recording what stock was removed from the stock room and what stock had been used by therapists on beauty therapist treatments each week.

[42] On or around 10 April 2015 Ms Ryburn could not find a bottle of depillar she believed was missing from the stockroom, so she asked Ms Hughes where it was. Ms Hughes believes she was being accused of taking it but I find the evidence did not go that far because that accusation was never directly made while she was employed.

[43] As it turned out, the following day Ms Hughes found the missing bottle lying down on its side in a box on the top shelf which could explain why Ms Ryburn did not see it. I do not consider this incident went as far as disadvantaging Ms Hughes under the Act, although I acknowledge that she subjectively found Ms Ryburn's interactions with her about this unpleasant.

[44] Ms Ryburn was perhaps understandably agitated to discover that a \$200 bottle of product she had recently seen on the shelf in the stockroom was no longer there but had not been signed out by the therapists or sold to a customer. This discovery fed into Ms Ryburn's concerns about stock discrepancies, but I note the matter was addressed when Ms Hughes located the missing item when she searched the box of products.

Failing to give training or communicate effectively about stock management

[45] I consider that Medi Spa could have had better stock management processes in place but I do not accept that disadvantaged Ms Hughes. I find that Ms Hughes was already well aware of what had to be done with stock because she had been responsible for recording stock used by staff in their treatment rooms and for arranging for stock to be reordered while employed by the Spa and those requirements had not changed after Medi Spa employed her.

[46] Ms Hughes was one of Medi Spa's most experienced employees. If she believed she needed more training around stock issues she could have asked for it. The fact she did not do so suggests this was not a training issue and I do not consider Ms Hughes was confused about her obligations regarding stock.

[47] Ms Hughes had far more experience with stock issues than Ms Ryburn did because Ms Ryburn had never worked as a beauty therapist while Ms Hughes did. This meant that Ms Hughes was best placed to understand what stock would be required and used for what specific treatments and the like. It made sense for Ms Ryburn to raise her concerns with Ms Hughes as part of Medi Spa's investigation into stock concerns.

Failure to explain legal implications of employment by company

[48] I do not consider Medi Spa was legally required to explain to Ms Hughes the legal implications of Medi Spa being a limited liability company. I therefore do not find that Medi Spa disadvantaged Ms Hughes in this regard.

Outcome of disadvantage grievances

[49] Medi Spa unjustifiably disadvantaged Ms Hughes when it failed to meet its obligation under s.63A(2)(b) of the Act to advise her of the right to take legal advice on its proposed intended employment agreement before she accepted Medi Spa's offer of employment.

[50] In this particular case, I find that omission did in fact disadvantage Ms Hughes because she believed Medi Spa could dismiss her without recourse when it could not.

[51] If Ms Hughes had been advised of her right to take legal advice I consider it likely that she would have done so. In which case Ms Hughes would probably have been advised that Medi Spa could not rely on the invalid trial period clause and of the legal effects the change in employment relationship had for her, if she accepted Medi Spa's offer of employment.

[52] Medi Spa is ordered to pay Ms Hughes \$3,000 under s.123(1)(c)(i) of the Act to compensate her for the hurt, humiliation, loss of dignity and injury to feelings she has suffered as a result of the unjustified disadvantage she suffered by not being made aware of her legal right to take advice.

[53] I find that s.124 of the Act does not apply because Ms Hughes did not engage in any blameworthy conduct that warrants a reduction being made to her remedy.

Was Ms Hughes dismissed?*Relevant law*

[54] A dismissal in law involves a sending away or an ending of the employment relationship which originates from or is initiated by the employer. A voluntary resignation is not a dismissal. Because Medi Spa denies dismissing Ms Hughes she bears the onus of establishing on the balance of probabilities that she did not freely or voluntarily resign.

[55] Ms Hughes sought to rely on issues⁶ she claims arose when Ms Ryburn personally employed her. However these allegations predate Medi Spa's employment relationship with Ms Hughes.

[56] I find these issues (even if established) cannot be evidence of a breach by Medi Spa of its legal obligations to Ms Hughes as her employer because they were not in an employment relationship at the time the alleged issues arose.

[57] I find that the actions which give rise to the unjustified dismissal claim must involve Medi Spa because it is Medi Spa that Ms Hughes alleges fundamentally breached her employment agreement and/or acted with the deliberate or dominant purpose of coercing her resignation.

Was there a course of conduct designed to coerce resignation?

[58] Ms Hughes claims that there was a concerted course of conduct designed with the deliberate and dominant purpose of securing her resignation. I find the evidence does not support that view.

[59] I do not accept that Medi Spa's failure to advise Ms Hughes of the right to take advice on the proposed intended employment agreement was designed to coerce her resignation. That omission occurred before Ms Hughes had accepted the offer of employment. I am satisfied Medi Spa wanted to employ Ms Hughes which is why it offered her employment.

[60] I do not accept that the inclusion of an invalid trial period provision is an example of an intention to coerce Ms Hughes' resignation. Again, this issue arose

⁶ Ms Ryburn denies all of Ms Hughes' allegations of wrongdoing.

before Ms Hughes accepted Medi Spa's offer of employment at a time when Medi Spa was attempting to secure Ms Hughes' services as an employee.

[61] I find that Medi Spa wanted to employ Ms Hughes which is why it offered her employment and gave her an employment agreement so these cannot reasonably be seen as actions that were deliberately designed by Medi Spa to coerce Ms Hughes' resignation.

[62] Ms Hughes claims that Medi Spa made allegations of wrongdoing against her. I do not accept that. Ms Hughes's perception was that allegations had been made against her but I find as a matter of fact they had not.

[63] Medi Spa had not made any allegations because it did not know why there appeared to be stock discrepancies so it was still investigating the supposed problem. I am satisfied on the balance of probabilities that no conclusions had been formed while Ms Hughes was still employed.

[64] Medi Spa's questioning Ms Hughes about stock issues was not an attempt to coerce her resignation – rather it was a genuine attempt to work out why some of its stock appeared to be missing.

[65] It was to be expected Ms Hughes would be spoken to about stock concerns because the nature of her role and her considerable experience as a beauty therapist meant she was best placed to be able to explain the usual stock movements in the salon.

[66] I consider that Ms Hughes' unfavourable view of Ms Ryburn adversely coloured Ms Hughes' perception of Medi Spa's investigation into its stock concerns. I also consider that the rude manner in which Ms Ryburn raised the supposed missing depillar bottle on 10 April 2015 with Ms Hughes' unsettled her. However merely rude or abrupt behaviour by an employer is insufficient in itself to establish a breach.

[67] Ms Hughes claims that Medi Spa's failure to properly investigate stock issues was designed to coerce her resignation. I do not accept that. Medi Spa did not fail to investigate its stock concerns. I am satisfied that Medi Spa was trying, with the resources it had, to investigate the stock issues but it was having difficulty identifying why the problem was occurring.

[68] Ms Hughes claims that video surveillance cameras were put in place to coerce her resignation. I do not accept that. The presence of cameras on the business premises predated Ms Hughes' employment by Medi Spa. Ms Hughes was aware of the use of security cameras on site before she accepted Medi Spa's offer of employment so the use of cameras cannot be viewed as an attempt to coerce her resignation.

[69] Ms Hughes claims that Medi Spa unilaterally removed her contractual responsibilities for stock control from her on 14 April 2015 when Ms Ryburn advised all staff that she was taking over full responsibility for all stock related matters until the stock concerns had been resolved.

[70] I do not accept this was an action designed to coerce Ms Hughes' resignation. It was a reasonable and understandable decision made by Medi Spa in an attempt to get greater clarity about what was happening with its stock. I consider that the temporary removal of stock duties was positive because it removed Ms Hughes from responsibility for stock problems that occurred from that point onwards.

[71] I find that Ms Hughes has failed to establish to the required standard of proof that Medi Spa embarked on a course of conduct designed to coerce her resignation.

Was there a fundamental breach of contractual term?

[72] Ms Hughes claims that Medi Spa's investigation of stock concerns was a fundamental breach of contract. I do not agree. Medi Spa was not actually investigating Ms Hughes personally. All staff were spoken to about stock issues, not just Ms Hughes.

[73] Medi Spa was investigating the entire way stock was dealt with within its business in an attempt to get clear on why there appeared to be discrepancies between the stock ordered, stock used, stock sold and stock held on the shelves.

[74] I find that Medi Spa was in an information gathering stage with the sole purpose of understanding more about its internal stock movements. I do not consider that such action is a fundamental breach of contract, much less one that made Ms Hughes' resignation reasonably foreseeable.

[75] I note that Ms Hughes' resignation letter does not refer to a constructive dismissal or breach of contract but instead expresses the desire to start her own business, which she did.

[76] I find that the way in which Medi Spa (in the person of Ms Ryburn) raised its concern about the missing depillar bottle with Ms Hughes on 10 April 2015 was likely to have been rude, confrontational and abrupt. However that in itself is not a fundamental breach of contract.

[77] While I accept that Ms Hughes was upset and taken aback by Ms Ryburn's very direct questioning, about where the missing depillar bottle was and by Ms Ryburn's statements that the \$200 bottle could not have just disappeared because she had seen it there a few days earlier, I find that this is not a fundamental breach by Medi Spa.

[78] This interaction has to be put into context. Medi Spa had been raising and investigating stock concerns then from its perspective suddenly an expensive bottle of product had 'disappeared' from the stock room and could not be located in any of the treatment rooms.

[79] Ms Hughes was responsible for tracking the movement of stock from the stockroom to the treatment rooms and for recording how much product had been used for treatments. So it is to be expected that she would be asked to explain where the 'missing' bottle was. As it turned out Ms Hughes did in fact locate the bottle and the matter was not taken any further.

[80] I note that Ms Hughes' resignation and subsequent conversations with Ms Ryburn gave no indication that she considered she had been constructively dismissed.

[81] I find that Ms Hughes' claim that Medi Spa constructively dismissed her when it fundamentally breached her terms and conditions of employment does not succeed.

Genuine resignation

[82] I find that Ms Hughes has failed to discharge the onus of establishing on the balance of probabilities that her employment ended because Medi Spa constructively dismissed her. I consider it more likely than not that Ms Hughes genuinely resigned.

[83] I consider Ms Hughes was unhappy at work, she was upset that Ms Ryburn had questioned her about apparent stock discrepancies, she felt she had been unfairly blamed for a missing product which she later found lying down in a container on the top shelf of the stock room, she disliked Ms Ryburn and did not like the way she was running the Medi Spa business, which meant she (Ms Hughes) did not enjoy working for Medi Spa. Ms Hughes was also thinking about starting her own beauty therapy business, which she then did.

[84] I do not consider Ms Hughes' resignation can be linked to an act or omission by Medi Spa or to any fundamental breach that made Ms Hughes' resignation reasonably foreseeable. Accordingly, Ms Hughes' unjustified dismissal claim does not succeed.

Costs

[85] Both parties have had some success. The parties are therefore encouraged to resolve costs by agreement within 14 days of the date of this determination.

[86] If agreement is not reached then either party has 21 days from the date of this determination to file a costs application. The other party then has 14 days within which to file their costs submissions, with the party who has filed the original costs application having a further 7 days within which to respond.

Rachel Larmer
Member of the Employment Relations Authority