

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 212
5565264

BETWEEN AHREN HEMMINGSON
Applicant

A N D MATTHEW RUSSELL
ANDREW SWAN t/a BARKER'S
GROOM ROOM
Respondent

Member of Authority: Rachel Larmer

Representatives: Nathan Santesso, Advocate for Applicant
Mark Colthart, Counsel for Respondent

Investigation Meeting: 16 June 2016 at Auckland

Date of Determination: 28 June 2016

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant's legal name is Ahren but she chooses to be known as Dakota Hemmingson. Ms Hemmingson was employed by Mr Matthew Swan from 04 March 2015 to 14 April 2015 as a hairdresser. She was based at Barker's Groom Room which is a hairdressing salon situated in High Street, Auckland.

[2] Ms Hemmingson claims she was unjustifiably dismissed by Mr Swan during their meeting on 14 April 2015 for "*not fitting the corporate profile*" after she told Mr Swan she had decided to transition to a woman.

[3] Mr Swan denies dismissing Ms Hemmingson. Mr Swan claims that Ms Hemmingson's employment ended as a result of her voluntarily resignation.

[4] Mr Swan says he had no issues with Ms Hemmingson's intended transition and that he was very surprised when Ms Hemmingson suddenly told him she wanted to resign during their meeting on 14 April. Mr Swan claims he tried to talk Ms Hemmingson out of leaving but that she was adamant she did not want to continue working.

[5] There is obviously a significant conflict in the evidence as to what occurred during the 14 April meeting.

Relevant background

[6] Ms Hemmingson said she spoke to Mr Swan briefly on 11 April 2015 and explained she had decided to transition to a woman and so wanted to know if Mr Swan would support her decision. Ms Hemmingson and Mr Swan had a good working relationship so she was not anticipating any problems.

[7] Ms Hemmingson says Mr Swan told her that information (meaning her decision to transition) had caught him by surprise and he wanted to know if it meant she would be dressing and working as a woman. Ms Hemmingson confirmed that it would.

[8] Ms Hemmingson says that Mr Swan told her he supported her decision to transition on a "*personal level*", but would need to discuss the situation with another one of his employees, Mr Nick Everett who was at that time the manager of the Groom Room. This conversation ended with the parties agreeing to meet to discuss the matter in more detail on 14 April.

[9] Ms Hemmingson believed that Mr Swan had expressed his support of her transition so she assumed their meeting would be to discuss the use of pronouns, dress code expectations, bathroom use or other such practical matters.

[10] When Ms Hemmingson arrived at work for the meeting on 14 April she noticed that all of her clients who had been booked in with her that day had been removed from her online calendar. Instead of working with clients, Ms Hemmingson's time had been blocked out for the entire day with an all-day meeting.

[11] Ms Hemmingson says she was shocked to see her client appointments had been removed but didn't immediately raise her concern about this because she was

about to meet with Mr Everett and Mr Swan and didn't want to cause any issues before they met.

[12] There is a significant conflict in the evidence between Mr Hemmingson and Mr Swan about what was said by whom and when during their meeting on 14 April. Mr Everett did not give evidence.

[13] There is no dispute that Ms Hemmingson's employment ended immediately, (without notice) during this 10 or 15 minute meeting. Each party says the other is responsible for the employment relationship ending.

Credibility

[14] This case turns on the factual findings I make about what was said and done during the meeting on 14 April 2016.

[15] I have therefore carefully assessed and evaluated what Ms Hemmingson and Mr Swan told the Authority and particularly how they presented when being questioned by the Authority or cross examined.

[16] As part of that assessment I have taken into account the time elapsed since the meeting on 14 April and the fact that witnesses in Authority proceedings may find their appearance at the Authority inherently stressful.

[17] I have carefully considered how reasonable, plausible and probable each witnesses' account of what occurred on 14 April is. I have applied logic and objectivity to my assessment of the evidence. I have also had regard to the content of the letter that Ms Hemmingson was asked by Mr Swan to sign after her employment ended.

[18] I have preferred Ms Hemmingson's version of events over Mr Swan's account of what occurred. I consider Ms Hemmingson gave consistent credible evidence which has not changed over time.

[19] Ms Hemmingson's account of what occurred has a ring of truth to it because it makes logical sense in terms of explaining how each party acted the way they did and it is consistent with the contents of the post termination letter she was given by Mr Swan.

[20] I found Mr Swan's evidence to be unsatisfactory. I consider he became unclear when pressed for details to support his account of the discussions. I further find that Mr Swan's actions were inconsistent with his account of what occurred and that in many respects his evidence did not make logical sense.

[21] The post termination letter Mr Swan signed also contradicts his evidence to the Authority that Ms Hemmingson suddenly and unexpectedly said she was resigning and could not be talked out of it. The post termination letter states:

"We would like to mutually agreed that due to the situation you have presented to us, that it would be in the best interests for both yourself and the business to end your employment [...] effective immediately";

[22] I have therefore resolved all material conflicts in the evidence in favour of Ms Hemmingson.

Factual findings

[23] The following facts were either not disputed or if they were disputed then I am satisfied that such facts have been proven on the balance of probabilities so are more likely than not to be correct.

[24] I make the following factual findings:

- a. The parties had a very good working relationship prior to 14 April. Mr Swan described Ms Hemmingson as a valued employee. Ms Hemmingson was likewise complimentary about Mr Swan as an employer;
- b. Although Mr Swan was "*personally supportive*" of Ms Hemmingson's transition he was concerned about the impact it may have on the business;
- c. Ms Hemmingson did not anticipate that her ongoing employment could be in jeopardy at the meeting on 14 April so she did not consider taking, and was not invited to take, a support person or representative with her;

- d. If Ms Hemmingson had known that Mr Swan had issues with her ability to continue working post her transition she would have ensured she had arranged appropriate support going into the 14 April meeting;
- e. Ms Hemmingson's client appointments scheduled for 14 April were removed from her diary before she attended work that day. I consider this action indicates Mr Swan's thinking around Ms Hemmingson's perceived inability to continue working as usual;
- f. Mr Everett and Mr Swan raised concerns with Ms Hemmingson about "*safety issues*". Although Mr Swan tried to put sole responsibility for having safety concerns onto Mr Everett, I do not accept that evidence. I find that even if the safety concerns did not originate from Mr Swan, he shared them and wanted to discuss them with Ms Hemmingson;
- g. The perceived "*safety concerns*" were entirely without merit. The safety concerns apparently arose from Mr Swan's belief that he and Mr Everett could not stop clients having negative feedback, making adverse comments or engaging in "*blokey banter*" that may upset or offend Ms Hemmingson;
- h. This unjustified perception caused Mr Swan and Mr Everett to believe they could not guarantee a safe work environment for Ms Hemmingson because they could not control how clients reacted to her. I want to make it clear that there was no legitimate basis for considering that Ms Hemmingson's decision to transition created or caused any "*safety*" concerns;
- i. Ms Hemmingson was told that Mr Swan and Mr Everett were concerned that her decision to live as a woman may make clients uncomfortable;
- j. Ms Hemmingson was told that Mr Swan and Mr Everett did not see her transition as "*fitting with the commercial profile of the business*";
- k. Ms Hemmingson was told words to the effect that, although Mr Swan and Mr Everett supported her personally, they did not see her transition as working for the business;

- l. Mr Swan put to Ms Hemmingson that she could see how her transition might make clients uncomfortable and that because of that she would also feel uncomfortable at work;
- m. When Ms Hemmingson told Mr Swan that she could not be somewhere where she couldn't be herself, Mr Swan asked her if she wanted to resign. I do not accept Mr Swan's evidence that it was Ms Hemmingson who raised the possibility of resignation, I find that it was Mr Swan who did that;
- n. In response to Mr Swan's suggestion that she resign, Ms Hemmingson told Mr Swan she felt like she didn't have a choice. That should have put Mr Swan on notice that Ms Hemmingson did not freely or voluntarily wish to leave her job;
- o. Instead of inquiring into why Ms Hemmingson felt she had no choice but to resign (which is what I consider would have occurred if Mr Swan had genuinely not wanted Ms Hemmingson to leave) Mr Swan asked Ms Hemmingson if she wanted to leave immediately or work out her notice;
- p. I reject Mr Swan's evidence that he asked Ms Hemmingson to reconsider her resignation or that he told her she was acting too hastily. I accept Ms Hemmingson's evidence that such statements were never made by Mr Swan;
- q. Mr Swan told Ms Hemmingson that if her transition did not work out she was welcome to come back to work as a male. I consider this comment supports Ms Hemmingson's evidence that she was told her transition "*did not work for the business*" and did not fit the "*commercial profile*";
- r. At the end of the meeting Ms Hemmingson was told she would be "*required to sign something to avoid a discrimination claim*". I consider this referred to the post termination letter she was subsequently given, but declined to sign;

- s. After the meeting Mr Swan and Mr Everett both signed a post termination letter which says the ending of Ms Hemmingson's employment was "*mutually agreed*". I find that it was not mutual at all but instead was what Mr Swan believed was in the best interests of the business;
- t. The post termination letter refers to "*the situation you [Ms Hemmingson] have presented to us*". I find that reference is to Ms Hemmingson's decision to transition to a woman which meant she would be presenting at work with the gender she identified with and not her male persona;
- u. The post termination letter prepared and signed by Mr Swan is inconsistent with his evidence to the Authority about what occurred at the 14 April meeting;
- v. The post termination letter supports Ms Hemmingson's evidence that she was told her transition would not work for the business so it was in both parties' best interests to end the relationship.

Issues

[25] The following issues are to be determined:

- (a) Was Ms Hemmingson dismissed?
- (b) If so, was dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) What if any costs should be awarded?

Was Ms Hemmingson dismissed?

[26] Because Mr Swan denies that Ms Hemmingson was dismissed, she bears the onus of proof of establishing on the balance of probabilities that she was in fact dismissed.

[27] I find that Ms Hemmingson has discharged that onus. I am satisfied that it is more likely than not that Ms Hemmmingson was dismissed because I find that the initiative for her employment ending effectively came from Mr Swan and not her.

[28] I find that this is not a situation where Ms Hemmingson freely or voluntarily resigned. I accept Ms Hemmingson's evidence that she felt she had no choice but to resign because of what had been communicated to her during the 14 April meeting.

[29] Ms Hemmingson had been told by her employer that:

- a. her transition would make clients uncomfortable;
- b. she had to be able to see that clients would be uncomfortable;
- c. her transition created "*safety concerns*" in the workplace;
- d. it believed it could not keep her safe at work because adverse comments were likely to be made by its clients;
- e. her transition was not 'on brand' and/or was inconsistent with the brand message and image;
- f. her transition meant she no longer fitted the commercial profile of the business;
- g. if her transition did not work out she could come back to work if she presented as her male persona.

[30] I find that the way in which Mr Swan dealt with Ms Hemmingson's disclosure of her transition amounted to a fundamental breach of the trust and confidence inherent in the employment relationship. Ms Hemmingson was not given a fair or reasonable opportunity to talk through any issues Mr Swan may have had.

[31] I find that Mr Swan approached the 14 April meeting with a pre-determined view that Ms Hemmingson's decision to transition did not suit the business. I accept Ms Hemmingson's evidence that was what was conveyed to her during the meeting which made her feel she had no choice but to leave her job.

[32] I also consider it reasonably foreseeable that Mr Swan's fundamental breach of the implied term of trust and confidence was so serious that Ms Hemmingson could not be expected to continue working in such circumstances.

[33] This is a situation in which Ms Hemmingson was merely expressing her gender identity. She was the same person, working alongside the same employees, with the same skills, doing the same job, from the same premises, for the same clients.

[34] I consider that telling Ms Hemmingson that her transition was not going to work for the business, that her gender identification meant she was not on brand and no longer fitted the commercial profile for the business, that her transition created safety issues, that her employer was concerned about her safety at work, that she must understand how clients would be uncomfortable and that she would likely also be uncomfortable, all created a situation where Ms Hemmingson reasonably felt she had no option but to resign.

[35] I find that Mr Swan's approach to the situation was to make Ms Hemmingson feel that she was not welcome at work if she presented in accordance with the gender she identified with, but that she would be very welcome to continue working if she maintained her male persona.

[36] I find that when Ms Hemmingson told Mr Swan she was unable to continue acting as a man to attend work he asked her if she wanted to resign immediately or work out her notice. I consider this effectively gave Ms Hemmingson no choice but to leave work immediately.

[37] I do not accept Mr Swan's evidence that this is an example of Ms Hemmingson freely (albeit unexpectedly) resigning.

[38] Ms Hemmingson says she could not imagine regressing to her male façade to work out the notice period so she told Mr Swan she believed she had no option but to leave. If Mr Swan's evidence had been correct (and I do not accept that) then this was the point at which he should have corrected any apparent miscommunication or misunderstanding.

[39] Ms Hemmingson had approached Mr Swan asking him as her employer to support her transition. She was doing that because she wanted to continue working as normal. Mr Swan indicated that she had his support. It therefore did not make sense

for Ms Hemmingson to suddenly declare ten minutes into their discussion that she felt she had no option but to leave.

[40] I accept Ms Hemmingson's evidence that she wanted to remain employed and needed the income from her job. Ms Hemmingson had no reason to want to resign other than as a result of Mr Swan's fundamental breach.

[41] I find that the initiative for the ending of Ms Hemmingson's employment came from Mr Swan and not from her. Ms Hemmingson did not freely or voluntarily resign. But for Mr Swan's fundamental breach, the employment would not have ended.

[42] Ms Hemmingson believed that because she maintained her decision to live as a woman she was no longer welcome at work. I consider the post termination letter Mr Swan prepared shows that the initiative for ending the employment did not come from Ms Hemmingson.

[43] An employer does not have to use the words "*you are dismissed*" for there to be a dismissal in law. The situation Mr Swan created lead to Ms Hemmingson's employment ending.

[44] I consider it reasonably foreseeable that Ms Hemmingson would refuse to continue working in light of such a fundamental breach of trust and confidence by Mr Swan.

Was Ms Hemmingson's dismissal justified?

[45] Subsequent to Ms Hemmingson establishing that her employment ended because of a constructive dismissal, the onus passes to Mr Swan to establish, on the balance of probabilities, that her dismissal was procedurally and substantively justified.

[46] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act (the Act). This requires the Authority to objectively assess whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[47] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations in s.4 of the Act and the procedural fairness requirements in s.103A(3) of the Act. Failure to do so is likely to fundamentally undermine an employer's ability to justify a dismissal.

[48] I find that Mr Swan did not comply with the good faith requirements in the Act. He did not provide Ms Hemmingson with information relevant to his consideration of whether or not her employment would continue so she was therefore deprived of an opportunity to respond to that.

[49] I also find that Mr Swan did not comply with any of the four procedural fairness tests in s.103A(3) of the Act. Ms Hemmingson did not know that her ongoing employment was in jeopardy, she did not have an opportunity to take advice or to respond to the matters of concern which I find were not fully or fairly put to her by Mr Swan.

[50] A fair and proper process is more likely to lead to a substantively justified decision. However the lack of any process and the failure to comply with minimum good faith and procedural fairness obligations fundamentally undermines Mr Swan's ability to establish that he had a good reason, based on reasonable grounds, for dismissing Ms Hemmingson.

[51] I find that Mr Swan is unable to discharge the onus of establishing justification in accordance with the s.103A(3) justification test in the Act. I find that Ms Hemmingson's dismissal was unjustified.

What if any remedies should be awarded?

Mitigation

[52] Ms Hemmingson satisfied the Authority that she took appropriate steps to mitigate her loss. She obtained new employment as a hairdresser on 27 April 2015 but for less hours and at a lower rate of pay.

Lost remuneration

[53] Ms Hemmingson claims lost remuneration for the three months post her dismissal because her new role only paid her if she had clients. That meant that

although Ms Hemmingson was working she did not earn as much as she would have had she not been dismissed by Mr Swan.

[54] Ms Hemmingson is entitled to be compensated for that loss. I am satisfied that Ms Hemmingson has lost remuneration of \$3,248.00 as a result of her unjustified dismissal.

[55] Accordingly, Mr Swan is ordered to pay Ms Hemmingson \$3,248.00 under s.128(2) of the Act.

Distress compensation

[56] Ms Hemmingson gave evidence to the Authority about the considerable distress and humiliation she has suffered as a result of her unjustified dismissal. She explained how although she had obtained alternative employment soon after her dismissal she still struggled to come to terms with the reasons for her dismissal.

[57] Ms Hemmingson said that she found herself questioning her identity and started to view herself as undesirable in light of the information communicated by Mr Swan that her living as a woman was unacceptable to his clientele.

[58] Ms Hemmingson said that she had devoted herself to hairdressing and it had been a very important part of her life. She told the Authority that it hurt her deeply to be told she did not fit in to her chosen career as a hairdresser.

[59] Ms Hemmingson explained how that made her feel like she could not fit in anywhere because if the hairdressing community (which she had been a part of for so long) did not accept her transition it made her feel that she did not fit in anywhere. That gave her considerable anxiety.

[60] Ms Hemmingson's new employer supported her with her transition and there were no issues from her new colleagues or clients or from any other clients who attended the hairsalon she worked in after her dismissal. However notwithstanding that, Ms Hemmingson says she became extremely concerned about what people would think of her.

[61] Ms Hemmingson says she felt worthless and that she didn't have the right to be who she was because it would make people feel uncomfortable if she expressed it. This created inner tension because she felt she didn't have a choice about who she is.

[62] Ms Hemmingson's evidence was that she became increasingly anxious in the months following her dismissal to the extent that she experienced severe anxiety attacks and even attempted to harm herself. After approximately five months it got to the point where Ms Hemmingson was unable to continuing working due to her anxiety.

[63] Ms Hemmingson says she had not experienced these types of serious health issues before so attributes them to her unjustified dismissal which she believes destroyed her sense of self-worth and value.

[64] Ms Hemmingson's serious health issues got to the point where she became debilitated and required the intervention of specialist medical support and medication, which remains ongoing.

[65] Ms Hemmingson became agoraphobic and was too scared to leave her home for fear of what people would think of her because she felt that she would not be accepted everywhere. She found using public transport stressful because she was worried about what other passengers would think of her. Ms Hemmingson attributes such fears to what Mr Swan said to her on 14 April.

[66] Mr Swan is ordered to pay Ms Hemmingson \$11,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she has suffered as a result of her unjustified dismissal.

Costs

[67] Ms Hemmingson as the successful party is entitled to a contribution towards her actual costs. Mr Santesso produced evidence that establishes that Ms Hemmingson has currently incurred costs up to a maximum of \$5,000. She is therefore entitled to be reimbursed for some of these actual costs.

[68] The Authority adopts its usual notional daily tariff based approach to costs. The current notional daily tariff is \$3,500. The notional daily tariff (on a pro-rated basis) must then be adjusted by the Authority to reflect the particular circumstances of this case.

[69] This matter involved two determinations. The first involved an investigation meeting on 05 April regarding the identity of Ms Hemmingson's employer.

[70] Mr Swan unsuccessfully claimed that Men's Grooming Limited was the entity which had employed Ms Hemmingson. Ms Hemmingson was a successful party in respect of those proceedings and so she is entitled to a contribution towards her actual costs for that matter.

[71] The second determination relates to her substantive claim which she has also succeeded on.

[72] Mr Swan is therefore ordered to pay Ms Hemmingson \$5,000 towards her actual legal costs. Although this is less than the notional daily tariff a party may only receive a contribution towards their actual legal costs, they cannot be awarded more legal costs than they have actually incurred.

[73] Mr Swan is also ordered to pay Ms Hemmingson \$71.56 to reimburse her for her filing fee.

Outcome

[74] I find that:

- (a) Mr Swan constructively dismissed Ms Hemmingson;
- (b) Mr Swan's dismissal of Ms Hemmingson was unjustified.

Orders

[75] Within 28 days of the date of this determination Mr Swan is ordered to pay Ms Hemmingson:

- (i) \$3,248.00 lost remuneration;
- (ii) \$11,000 distress compensation;
- (iii) \$5,000 towards her legal costs; and
- (iv) \$71.56 to reimburse her the filing fee.

Rachel Larmer
Member of the Employment Relations Authority

