

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 151
5595375

BETWEEN JARAH McLAREN
 Applicant

A N D STEPHEN MARR HAIR
 DESIGN NEWMARKET
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Paul Pa'u, Advocate for Applicant
 Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 19 April and 9 May 2016 at Auckland

Date of Determination: 19 May 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr McLaren) alleges that he has been disadvantaged by unjustifiable actions of his employer (Stephen Marr) and has suffered a personal grievance as a consequence and that Stephen Marr has breached his good faith obligations to Mr McLaren as well, and that a penalty ought to be imposed for that.

[2] When the statement of problem was filed on 15 January 2016, there was also a claim for unpaid statutory and sick leave but those payments, by common consent, have now been made although Mr McLaren perseveres with a claim for interest in respect of those sums.

[3] Mr McLaren was employed by Stephen Marr in his Newmarket salon as a senior stylist. The respondent employer also operated two other salons in Auckland, one in Ponsonby and the other in Takapuna, but Mr Irvine, the governing director of

Stephen Marr, based himself at the Newmarket salon where Mr McLaren worked from 2007 until his resignation on 9 February 2016.

[4] It is common cause that Mr McLaren was, during the employment, friendly with another employee, Mobeen Bhikoo. Mr Bhikoo was both an employee of Stephen Marr and a shareholder and director. Unhappy differences developed between Mr Bhikoo and Stephen Marr which resulted in Mr Bhikoo leaving the employment and concluding his commercial relationship with Stephen Marr as well.

[5] There were legal proceedings between those protagonists which culminated in a decision of the Employment Court issued on 6 April 2016 as [2016] NZEmpC 32. I have had the benefit of reading the judgment of His Honour Judge Perkins.

[6] Before Mr Bhikoo left the Newmarket salon of Stephen Marr, he made it plain that he was going to establish a competing hair salon and Mr McLaren's friendship with Mr Bhikoo made it more likely than not that Mr McLaren would ultimately seek to work for Mr Bhikoo although Mr McLaren's evidence is equivocal about his intentions in that regard. For example in cross-examination he denied a proposition that it was common knowledge that he was going to work for Mr Bhikoo and further denied that he told staff and clients that he was intending to move to Mr Bhikoo's salon as well.

[7] Whatever Mr McLaren's intentions at the time, as a matter of fact, after Mr McLaren left the employ of Stephen Marr, he commenced employment with Mr Bhikoo.

[8] The importance of this context is simple. Mr Irvine's evidence, which was unshaken in cross-examination, was that Mr McLaren's co-workers were very clear that he would leave Stephen Marr's employment to work for Mr Bhikoo and that staff had told Mr Irvine what they had heard from Mr McLaren (or overheard of Mr McLaren talking to clients), in so many words.

[9] I am satisfied on the evidence I heard that it was because of Stephen Marr's conviction that Mr McLaren's departure was, if not imminent, certainly inevitable that prompted the initiation of one of the central events which Mr McLaren says form the basis of his claim for a disadvantage grievance.

[10] This was a meeting initiated by Mr Irvine on 8 September 2015 wherein, according to Mr Irvine, he broached the subject of Mr McLaren's apparent unhappiness in the workplace, given what he had been told by other staff, and then proposed an arrangement whereby Mr McLaren could leave the employment and work for Mr Bhikoo without being in breach of his restraint clause in his employment agreement.

[11] I interpose at this point to observe that no signed employment agreement was presented to me in respect of Mr McLaren's employment. The evidence for Stephen Marr was to the effect that there would have been a signed employment agreement at the point at which Mr McLaren was employed but that no copy of that signed agreement had been found.

[12] It was also clear from the evidence that Stephen Marr had gone to some trouble over the succeeding years to get a signed employment agreement between itself and Mr McLaren but still been unsuccessful.

[13] Mr McLaren told me that he objected to the restraint clause in particular, said that he was not comfortable signing the agreement unless the clause was removed and because of Stephen Marr's refusal to contemplate removal, the employment agreement was never signed.

[14] But Stephen Marr says that the version of the employment agreement which Mr McLaren spoke of in his evidence as being presented to him in late 2014 was an exact copy of the employment agreement it maintained Mr McLaren would have been presented with on his engagement and would have been asked to sign.

[15] That said, it is still apparent that no signed agreement was provided to me although Mr McLaren quite properly conceded in answer to a question from me that it was common in the hairdressing industry for restraints of trade to be imposed although he maintained that the particular terms of the restraint proposed by Stephen Marr went further than the law would countenance.

[16] In any event, nothing turns on whether there was a signed employment agreement or not. Put shortly, the offer that Mr Irvine made to Mr McLaren was that he could finish up with Stephen Marr, agree not to work for any competing salon until Mr Bhikoo's salon had opened and then be employed by Mr Bhikoo without in any way breaching his obligations to Stephen Marr.

[17] Mr McLaren's evidence is that he asked for time to think about the proposal and it is evident on what I heard from the two protagonists that there was a measure of misunderstanding between them about what was in prospect because Mr Irvine's evidence is very clear that he understood from the 8 September 2015 meeting that Mr McLaren either had accepted the offer or was intending to accept the offer.

[18] Mr Irvine struck me as a sensible and practical businessman and it seems altogether implausible that he would behave in the way that he subsequently did unless Mr McLaren had given him some reason to believe that the deal either was accepted or would be accepted shortly.

[19] I formed this view because on the following day, Mr Irvine caused messages to be sent to the Newmarket salon to indicate that Mr McLaren was not coming to work that day and floor managers were instructed to tell staff that Mr McLaren had resigned. His clients for that day were rescheduled.

[20] I do not accept that Mr Irvine would have taken those steps if he believed that Mr McLaren was simply thinking about the proposal; Mr Irvine's actions are inconsistent with Mr McLaren's contention that he never committed to the proposal. It seems inconceivable to me that Mr Irvine would have taken the steps he did simply to put pressure on Mr McLaren. There was no reason for him to do that. He was convinced that Mr McLaren was intent upon leaving. The purpose of his offer of 8 September 2015 was simply to facilitate that.

[21] There were only the two principal protagonists at this meeting and there are no notes of the meeting available from either of them. While Mr Irvine is clear that he thought there was an understanding between them, and for reasons I have just advanced I accept that evidence at face value, Mr McLaren's evidence is that he asked for time to think about the offer, asked for it in writing, and never at any stage committed to accepting it.

[22] Certainly it is true that there is no documentary basis on which an independent third party looking at the evidence could form a view that Mr McLaren had committed to the offer, but as I have already observed, that excludes the obvious point that no independent witness is available for the initial meeting where I am satisfied on the balance of probabilities, Mr Irvine must have been told something by Mr McLaren

which made him think that Mr McLaren was intent upon accepting the proposal. Unless that happened, as I have already noted, Mr Irvine's behaviour is inexplicable.

[23] As a matter of fact, the matter was brought to a conclusion by a text message from Mr McLaren to Mr Irvine indicating that he wished to continue working for Stephen Marr.

[24] On 9 September 2015, Mr McLaren was asked to attend a meeting at the Ponsonby salon and, on the basis that he had committed to continuing to work for Stephen Marr, the employer sought to engage with him again about the execution of his employment agreement.

[25] I heard very clear evidence about that meeting from Lucy Vincent who is a director of Stephen Marr and the estranged wife of Mr Irvine. She was present at the 9 September 2015 meeting and appears to have taken a leading role.

[26] Ms Vincent was as clear as can be that she did not want Mr McLaren to feel pressured to sign the agreement and she told me that she was "*quite shocked*" that Mr McLaren would maintain that she had been part of an attempt to pressure him into signing the employment agreement. She said that she thought she had a good relationship with Mr McLaren and was pleased that he was going to continue working for the salon but she said:

I told him to take it (the contract) away and get some advice on signing it. I definitely did not tell him to sign the contract then and there.

[27] Mr McLaren's evidence is different but for the avoidance of doubt I preferred the evidence of Ms Vincent.

[28] Mr McLaren returned to the workplace the following day, 10 September 2015, and continued to work for Stephen Marr until his resignation and at no time during that period did he ever return the employment agreement signed.

[29] The second building block for the alleged disadvantage grievance is a meeting that took place between Mr Irvine and Mr McLaren on 6 November 2015. It is common cause that there was an intemperate outburst from Mr Irvine involving the use of swear words; Mr Irvine says that he was frustrated and certainly his evidence was that he was "*just sounding off*" and that he did not swear at Mr McLaren but swore for emphasis because of his frustration.

[30] The particular crystallising event for that frustration, according to Mr Irvine, was the fact that he discovered a client waiting for Mr McLaren for 10 minutes while Mr McLaren was in the back of the salon doing nothing and Mr Irvine confronted Mr McLaren about this. Clearly the issue around the unsigned employment agreement also impacted on Mr Irvine's feelings of frustration.

[31] In any event, Mr McLaren continued to work the balance of the day although he maintained that his clients and staff were concerned about his demeanour and he attended at work the following day making it clear to the salon manager that he did not want anything done about the incident (his evidence) but after seeing his doctor on Monday, 9 November 2015, Mr McLaren took sick leave for the balance of the week. Subsequently he took annual leave and eventually returned to work on 4 December 2015 by which time he had notified an employment relationship problem to his employer. As I have already noted, the employment then continued until Mr McLaren's resignation on 9 February 2016.

The issues

[32] The only issue for determination here is whether the events complained of constituted disadvantages to Mr McLaren and were themselves unjustified actions of Stephen Marr.

[33] In order to consider that question it will be convenient if I refer to each of the central planks of Mr McLaren's claim followed by an examination of the other ancillary matters that he refers to obliquely in his evidence.

The events of 8 and 9 September 2015

[34] I have already set out in some detail what actually happened over these two days. I do not propose to repeat that. I am not persuaded that there has been any unjustified disadvantage of the sort that would ground a personal grievance respecting the events of those two days.

[35] I reach this conclusion because first it is difficult to identify any disadvantage to Mr McLaren from the events of those two days and second, I am at a loss to understand what is unjustified about Stephen Marr's conduct over the period in question.

[36] Dealing first with the question of disadvantage, the purpose of the 8 September 2015 meeting was to provide Mr McLaren with the option of leaving the employment and moving on to another employment. Stephen Marr was satisfied Mr McLaren sought to do just that and the whole point of the offer was to give Mr McLaren some confidence that he could make the change that he self-evidently wanted to make without incurring legal risk as a consequence of a breach of the restraint provision which Stephen Marr would contend applied to Mr McLaren's situation. This is so notwithstanding that there did not appear to be a signed employment agreement containing the relevant restraint clause.

[37] It is difficult to see how such an offer, which in effect creates a benefit to Mr McLaren, can be seen as a disadvantage. Acceptance of the offer would have given Mr McLaren a benefit which he did not have without that offer. Moreover, despite Mr McLaren's efforts to persuade me otherwise, he was not required to accept the offer but simply given the option to accept it and the fact there was a misunderstanding about what his intentions were is neither here nor there. The short point is that, once it became clear to Stephen Marr that Mr McLaren did not wish to take up the offer, the effects of that misunderstanding were quickly unravelled and Mr McLaren went back to the employment without any deficit whatever.

[38] Even if there were a disadvantage from the misunderstanding aspect, that is if Mr McLaren could contend that because his co-workers and his clients were first told that he was resigning and then told that he was not (and I do not accept that argument at all), it is still difficult to see how what the employer offered Mr McLaren could somehow justify an unjustified action of the employer. It must be possible for an employer to make offers to an employee which augment the benefits in an employment agreement or change those benefits in some way and that is all that happened in this case. Stephen Marr, knowing that Mr McLaren wished to leave the employment and work somewhere else, gave him an offer which would have facilitated that arrangement. Such behaviour of the employer cannot, in my judgment, constitute an unjustified action.

[39] I reach the same conclusion in respect of the events of the following day, 9 September 2015, where Mr McLaren's evidence is that he was pressured to sign the employment agreement because he had now committed to continuing in the employment with Stephen Marr. As I have already noted, I prefer the evidence of

Ms Vincent about what happened at the 9 September 2015 meeting and think that her evidence is more consistent with the fact that Mr McLaren continued in the employment for some months after 9 September 2015 and never had a signed employment agreement (certainly on his evidence anyway).

[40] So, preferring Ms Vincent's evidence, I cannot accept that there is any disadvantage to Mr McLaren in being asked to take away the proposed employment agreement, get advice about it and consider signing it. Nor does it seem to me that there is anything unjustified about the actions of an employer which seeks to promote certainty in its business affairs by having its employees enter into written employment agreements, as the law prescribes.

[41] So again, I have not been persuaded that there is either a disadvantage to Mr McLaren by the events of 9 September 2015 or an unjustified action by his employer so that part of the claim also fails.

The events of 6 November 2015

[42] It is evident on the observations I have already made about this meeting between the two principal protagonists that Mr Irvine's comments were intemperate and inappropriate and no amount of frustration, however caused, ought to entitle a party to an employment relationship to speak disrespectfully to the other party of that relationship.

[43] However, disrespectful or intemperate comments are part of the human condition and there can be no council of perfection in this employment relationship or indeed in any other relationship. Mr Irvine says that the genesis of his frustration was not the unsatisfactory recent history of the employment relationship, with the certainty that Mr McLaren was going to depart in the short future, but rather the failure of Mr McLaren to do what he was paid for and deal with his clients in a professional and timely fashion.

[44] I am satisfied a good and fair employer could speak to an employee in Mr McLaren's position about the latter's failure to engage promptly with a client so the action itself is not unjustified. That said, the intemperate language is inappropriate although on the evidence I heard from Mr Irvine (unchallenged by Mr McLaren), the conversation lasted no more than 30 seconds. Mr Irvine maintained that he was not swearing at Mr McLaren but "*just sounding off*" and "*swearing for emphasis*". I do

not think that the short length of the conversation or the fact that the swearing was not directed at Mr McLaren justifies the way that Mr Irvine spoke to Mr McLaren.

[45] But as I say, the purpose of the exchange was, I am satisfied, something that a good and fair employer could have done even if the mode of delivery was unsatisfactory and it follows that, while there must be reservations about how Mr Irvine spoke, there can be no reasonable basis on which an employer cannot remonstrate with an employee in the circumstances so the actions of the employer cannot be unjustified.

[46] That being my conclusion, it is immaterial if the consequence of the 6 November 2015 conversation disadvantages Mr McLaren because I am satisfied that the precipitating event is not an unjustifiable action of the employer.

[47] It is apparent that Mr McLaren subsequently took sick leave for a period and raised an employment relationship problem referring specifically to the 6 November 2015 episode, amongst other things. While it is clear that he remained on pay during his absence, that was a consequence of first using his outstanding sick leave and then using annual leave to remain on pay while away from the workplace.

[48] It is also clear that during that period, Mr McLaren sought medical assistance and counselling assistance. Not all of that can be attributed exclusively to the 6 November 2015 conversation but that aspect is referred to in all the correspondence from Mr McLaren's advocate and so it presumably forms a part of the factual matrix which supports Mr McLaren's position.

[49] Accordingly, it may be that Mr McLaren has suffered a disadvantage as a consequence of the 6 November 2015 conversation but I am satisfied it is not a disadvantage that is actionable at law because the conversation initiated by Mr Irvine, while intemperate, was not an unjustified action of the employer and therefore there is no actionable basis on which Mr McLaren can rely.

Other ancillary matters

[50] While the response to Mr McLaren's claim proceeded essentially on the two meetings that I have dwelt on in this determination, because that was the basis on which the personal grievance was pleaded, Mr McLaren maintained that these were effectively just examples of other conduct which was referred to generally and

without specificity. As such, it is difficult for me to take matters any further except to observe that if parties want to rely on particular conduct, they need to provide the particulars of the conduct in order for that to be investigated by the Authority.

[51] For instance, Mr McLaren claims a breach of good faith by Stephen Marr but there is no evidence to support that and I decline to take that aspect any further or indeed to award the penalties claimed.

[52] Also, Mr McLaren maintains that Mr Irvine followed him around the salon on the final day of his work, in effect shadowing him, and that that also might constitute an unjustified disadvantage. No doubt it might if there was evidence that that was what happened, but the evidence was no more than Mr McLaren's bare assertion which was stoutly denied by Mr Irvine. Lest the matter be in any doubt, I prefer Mr Irvine's evidence on this point to Mr McLaren's.

[53] Despite the resolution of Mr McLaren's claims for unpaid wages prior to the investigation meeting, he has persevered with his claim for interest. Given the wages claims have been dealt with prior to the Authority's investigation meeting, I decline to award interest.

[54] I also decline to make recommendations which are sought in the statement of problem but not otherwise referred to in the evidence and I decline to reinstate annual or sick leave, even assuming there was a statutory basis for me so to do. Mr McLaren says that he used sick leave and/or annual leave in order to maintain his income while he was away from the workplace, but that is presumably entirely appropriate. He says that he was ill and therefore sick leave would be the appropriate leave to take until that leave is extinguished, at which point he would go onto sick leave without pay unless he chose to use his annual leave which again is precisely what he did.

[55] Given that he has chosen to use his annual leave rather than go off pay, it is difficult to see why he is entitled to have that reinstated, certainly in circumstances where I have not found that his fundamental claim of personal grievance is made out.

Determination

[56] Mr McLaren's claim in personal grievance and for other remedies fails in its entirety for the reasons I have set out in this determination.

Costs

[57] Costs are reserved but the representatives are urged to engage with each other with a view to try and resolve costs on their own terms. If that should prove impossible, the successful respondent can file and serve a claim to have costs fixed in the Authority and Mr McLaren can respond to that within 14 days.

James Crichton
Chief of the Employment Relations Authority