

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 499
3159342

BETWEEN RACHEL PATTERSON
Applicant

AND MANE HAIR DESIGN
LIMITED
First Respondent

LEANNE HAWLEY
Second Respondent

Member of Authority: Leon Robinson
Representatives: Danny Gelb, advocate for the Applicant
No appearance by the Respondents
Investigation Meeting: 11 August 2022 at Auckland
Determination: 4 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Rachel Patterson (Mrs Patterson) claims she was unjustifiably constructively dismissed from her employment and unjustifiably disadvantaged in her employment. She seeks to recover contractual entitlements, statutory entitlements, arrears of wages, compensation and penalties against the Respondents.

[2] The Respondents failed to lodge a statement in reply within the time prescribed for them to do so and they did not seek the Authority's leave to respond to Mrs Patterson's claims out of time.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mrs Patterson and her husband Gary Patterson (Mr Patterson). Both witnesses

answered questions under affirmation from me. Mr Gelb made oral closing submissions.

[4] The Second Respondent caused to be transmitted an email to the Authority late afternoon on 10 August 2022. That email advised the Authority that the Second Respondent would not attend the investigation meeting being unable to leave the business unattended. The Respondents have not sought the Authority's leave to respond to Mrs Patterson's application and I was not persuaded there was any good reason not to proceed with the scheduled investigation meeting. I proceeded with the investigation meeting to satisfy myself of the veracity of Mrs Patterson's unchallenged claims.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) did the employee resign?
- (b) was the resignation caused by a breach of duty on the part of the employer?
- (c) if it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach?
- (d) was the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer?
- (e) if the employer's actions were not justified, what remedies should be awarded, considering:
 - lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - compensation under s123(1)(c)(i) of the Act

- (f) if any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the employer that contributed to the situation giving rise to the employee's grievance?
- (g) is the employee entitled to recover arrears of wages in respect of hours of work not provided to the employee?
- (h) is the employee entitled to recover arrears of wages for holiday pay not paid at termination?
- (i) should there be a penalty imposed on the employer for its failure to pay outstanding holiday pay at termination and if so, in what amount?
- (j) should there be a penalty imposed on the Second Respondent for its failure to pay outstanding holiday pay at termination and if so, in what amount?
- (k) should either party contribute to the costs of representation of the other party?

The facts

[7] The Second Respondent Leanne Hawley (Ms Hawley) is the sole director and shareholder of the First Respondent limited liability company Mane Hair Design Limited (Mane). Ms Hawley was Mrs Patterson's hair stylist over some 5 – 6 years and their friendship developed out of that connection.

[8] Mrs Patterson was training in cosmetic tattooing. Ms Hawley was interested in cosmetic tattooing too and expressed a particular interest in scalp tattooing. Ms Hawley committed to supporting and facilitating Mrs Patterson's ongoing training. They both decided that they would enter into an employment relationship with a longer-term view of an eventual business partnership.

[9] Mrs Patterson was employed by Mane in the position of Permanent Makeup Artist, Salon Assistant and PA commencing from 6 April 2021. The terms of the employment were recorded in writing. These terms included that Mrs Patterson would be paid \$29.00 per hour for 40 hours per week paid weekly. Mrs Patterson was to provide her own equipment and would be paid 25% commission on all sales, paid monthly on the 20th of the month following.

[10] Mrs Patterson came to a view that Ms Hawley was "very light on real business operational understanding". However, she drew confidence from Mr Patterson's help

and guidance he provided to Ms Hawley. Mrs Patterson was also uncomfortable with Ms Hawley's desire that Mrs Patterson charge full price for cosmetic tattooing before what would be acceptable in the industry. The conventional training required Mrs Patterson to advise potential clients of her in-training status and to provide a concessional rate accordingly. Mrs Patterson required three months of ongoing practice before full cost charging was appropriate.

[11] Mrs Patterson had paid \$10,000.00 to complete training and for the purchase of equipment. She had also introduced clients from her own beauty business to Mane's business.

[12] As the weeks went by Mrs Patterson experienced indecisiveness and procrastination from Ms Hawley. Ms Hawley had no business plans, marketing plans, or sales plans, nor any budgets, or KPIs that were apparent to Mrs Patterson.

[13] Mrs Patterson had at the outset informed Ms Hawley she preferred authentic and face to face direct communication. While there were initially meetings, these became less frequent and eventually ceased. Mrs Patterson found it increasingly more difficult to get face to face time with Ms Hawley. Ms Hawley's preferred method of contact was by text message and she began texting Mrs Patterson in the evenings.

[14] Mrs Patterson became increasingly more frustrated and dissatisfied because there was no planning, business plans, sales plans or marketing plans. She found Ms Hawley's decision making erratic. As well, there were no weekly meetings, business cards, marketing events and Mrs Patterson's commissions were not being paid. The communication by text was ineffective, confusing and difficult to understand. Mrs Patterson regarded Ms Hawley's mood, leadership and communication as inconsistent. Mrs Patterson experienced Ms Hawley as operating in a completely chaotic way and she was consistently late, indecisive and absent. It was frustrating for Mrs Patterson too, that Ms Hawley would not permit her to devise or commence marketing activities including establishing a social media presence.

[15] On 16 August 2021 it appeared to Mrs Patterson that Ms Hawley was unhappy. At the end of the business day as Mrs Patterson was leaving, Ms Hawley blurted out in an aggressive way and in the presence of customers that Mrs Patterson had cost her over \$40,000.00. Ms Patterson did not engage considering it inappropriate to do so in the presence of customers. She excused herself accordingly.

[16] There was then a lockdown and Mrs Patterson was unable to make contact with Ms Hawley. Her many voice messages for Ms Hawley to call her went unanswered. Ms Hawley communicated only by brief vague and cryptic text messages. For the most part she responded she was too busy to deal with Mrs Patterson.

[17] Mrs Patterson became stressed by the lack of contact and direction from her employer. She elected to do online courses and took the initiative to upskill herself. As the lockdowns began to ease, Mrs Patterson continued to call, email and text Ms Hawley. Ms Hawley failed to engage in any meaningful way.

[18] In late November Ms Patterson reflected on the situation. The complete lack of engagement from her employer was unsatisfactory and the cause of considerable stress for her. After discussing the situation with her husband, Mrs Patterson resolved that she had lost trust and confidence in Ms Hawley by reason of the way she had treated her over the preceding months. Mrs Patterson felt that due to Ms Hawley's actions she had no other alternative other than to resign her employment. Mrs Patterson wrote a resignation email at 7.58am on 25 November 2021:-

Dear Leanne

Please accept this as my formal resignation from Mane/Inked Couture effective from today, Thursday 26th of November 2021. I am providing one weeks' notice (5 working days) as per our agreement meaning my last employment day will be Wednesday 1st of December 2021. As we are still under Covid restrictions preventing me from operating and performing my duties, my resignation will be worked out from home.

I am providing authority to my husband Gary Patterson to work with you to finalise all outstanding wages, annual leave and commission payments etc which are owed to me under the provision of our agreement. Gary will forward an email today to follow up on these and other matters.

I wish you all the best.

Regards,

Rachel Patterson

[19] At 11.58am that same day on 25 November 2021 Gary Patterson wrote relevantly by email to Ms Hawley:-

Dear Leanne,

Rachel has instructed me and provided authority to act on her behalf to complete the negotiations relating to settling her exit, final wages, annual leave owing, and commissions as set out in the employment agreements dated 2nd March 2021. All correspondence relating to this matter is to be directed solely to me and I will then relay to Rachel for her review and consideration. There is to be no direct contact with Rachel from this point forward, unless agreed by Rachel. I do stress at this time Rachel is seeking fair and just compensation for her time and efforts

and would like this matter completed in a quick, amicable, and professional manner.

Below are some points we would raise regarding Rachel's employment.

- a) There are some concerns with the employment documentation, namely there seem to be two agreements which have been signed by Rachel, but we have no countersigned contracts returned from you.
- b) There has been no formal or documented review process completed post the 90-day trial period.
- c) Rachel has received no verbal communication from you and very little of any constructive written communication from you during the entire Covid lockdown period commencing August 17th, 2021. This has created a huge amount of anxiety, uncertainty, and concern for her during this time, particularly as she has endeavoured to communicate to you via phone, email and as a last resort texting. At all times she has requested a return phone call to discuss what is going on and what she could do to assist. As of today, there have been no phone calls. Effectively you have abandoned Rachel as her employer. We have all the call logs, emails, and text messages on file to validate.
- d) Whilst Rachel was trying to communicate with you, we do acknowledge the receipt of some rather cryptic and confusing texts. One such text message on the 5th of October 2021 (note this is a full 2 months since the lockdown commenced) simply says "hi..I've a lot on at present...I'll come back to you in a few days" or words to that effect. We are now at 25th of November 2021 and still no verbal communication. The distressing part here is your complete disregard for your employee and her well-being. As her employer you have an obligation to communicate effectively at all times with your employee, and more so when we are in a crisis point with a pandemic. The other part of this which is a concern and must be questioned, what exactly were you so busy doing with Mane that you couldn't make any time to call your one and only PAYE employee? Given Mane is a hairdressing salon and legally you cannot operate during a Covid lockdown, what exactly was so time consuming during the entire 4+ months that prevented you from making a 5 minute call to your staff member? We know you were in contact with Mane contractors during this time. This made absolutely no sense unless you were busy operating illegally from home.
- e) During the lockdown period Rachel has been forced to chase you for regular weekly wages payments. This has been distressing. Again, we have all the emails and text messages to validate.
- f) She has requested pay slips to understand her annual leave entitlements in order to plan for annual leave during Xmas annual holiday period. These have not been provided. Under NZ Employment Law, as an employer you are legally required to provide full pay slips upon request from an employee.

...

Kind regards,

Gary Patterson

[20] Ms Hawley responded with emails thereafter which included false accusations against Mrs Patterson of stealing, an allegation she had entered premises without authority, accusations she had tampered with equipment and that she had behaved fraudulently. There were threats that she would go to the Police, force a disciplinary meeting, and lodge a claim with the Disputes Tribunal.

[21] On the final day of Mrs Patterson's notice period, the employer's property was returned by courier and signed as received by Ms Hawley herself.

[22] Ms Hawley responded by sending an abusive and nasty email to Mrs Patterson. Mr Patterson intercepted it and has refused to allow his wife to see it.

[23] Despite receiving the tools of trade from Mrs Patterson, Ms Hawley lodged proceedings in the Dispute Tribunal seeking to recover the property from Mrs Patterson. Ms Hawley did not attend the Disputes Tribunal hearing and the case was dismissed.

[24] Similarly too, the Police contacted Mrs Patterson about the employer property she had returned to Ms Hawley. Mr Patterson explained the situation to the Police and thereafter no further action was taken.

An unjustifiable constructive dismissal

[25] Mrs Patterson resigned by email dated 25 November 2021. The thought of having return to work after four months of no communication from her employer made Mrs Patterson physically sick. In the interests of her health and wellbeing, Mrs Patterson felt she had no option but to tender her resignation.

[26] I have no doubt that Mrs Patterson's resignation came at the instigation of her employer. She resigned because her employer did not communicate with her. It ignored her emails, calls, text messages when she sought to engage with it. She asked for direction. She desired engagement so that she could continue her work, complete duties expected of her and receive instruction for further assignments and tasks. She earnestly sought information about what she was to do during various levels of lockdown. Her employer largely ignored her and wholly failed to engage. Mrs Patterson was anxious, concerned and stressed by the uncertainty. The employer ignored her.

[27] As well, her employer failed to pay her the wages it had contracted to pay her. Mrs Patterson was forced to make repeated enquiries about her pay and made requests for it to pay her what she was due.

[28] The employer failed to provide her with a signed employment agreement. It failed to engage with her after the expiration of a purported 90 day trial period. As a result of that failure, Mrs Patterson was denied the confirmation that she had completed the trial period successfully and her employment was thereafter unencumbered.

[29] I find that the employer breached its duty of good faith owed to Mrs Patterson. It failed to be active, communicative and responsive with her. It also breached the duty not to do anything calculated or likely to undermine or destroy the relationship of trust and confidence.

[30] I find that Mrs Patterson resigned. I find that Mrs Patterson's resignation was caused by a breach of duty on the part of her employer. I find too that a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach.

[31] I find that Mrs Patterson was unjustifiably constructively dismissed.

[32] Mrs Patterson gave evidence that her resignation brought about at the instigation of her employer, had a dramatic impact on her life. She said that during the first few weeks of lockdown she was waking up most days in a high level of anxiety. She said that as a result of suffering this higher level of anxiety and stress she had at least four migraine attacks. She described how she would cry wondering what to do and worrying about losing her job and finding alternative work.

[33] I accept that when Mrs Patterson resigned, Ms Hawley responded with highly abusive texts and emails containing threats and defamatory accusations against Mrs Patterson. The mental stress was too much for Mrs Patterson. Mr Patterson took over the communications with Ms Hawley in an effort to shield her from the distress she was experiencing. Apparently, Ms Hawley did not respect Mrs Patterson's instruction that she communicate with Mr Patterson and this triggered a further onset of migraines for Mrs Patterson.

[34] Ms Hawley sent an email dated 3 December 2021. The language and content of this email caused Mr Patterson to keep it from Mrs Patterson.

[35] Mrs Patterson regarded Ms Hawley very unpredictable and she remains very concerned about the slanderous statements Ms Hawley has made about her. The prospect of encountering Ms Hawley in the street disturbs Mrs Patterson. She fears that Ms Hawley would abuse her verbally and physically.

[36] Ms Patterson continues to experience panic attacks as a result of the way her employment ended and Ms Hawley's refusal to return her personal property.

[37] I find that there was no blameworthy conduct on Mrs Patterson's part that would require a reduction for contribution in either or both of the nature and the extent of any remedies to be provided to her.

Unjustifiable disadvantage

[38] I am not persuaded that Mrs Patterson suffered any unjustifiable disadvantage separate and distinct from her claim of unjustifiable constructive dismissal. I have a clear view that the resolution of this employment relationship problem is correctly confined to resolving the unjustifiable constructive dismissal I have found.

Penalties

[39] Mrs Patterson seeks a penalty against Mane in the amount of \$20,000.00 for its failure to pay holiday pay. She also seeks a penalty against Ms Hawley in the amount of \$10,000.00 for inciting, aiding and abetting the failure to pay holiday pay. The law permits only a Labour Inspector to recover a penalty against a person involved in a breach¹.

[40] Mrs Patterson seeks to recover default in payment of wages against Ms Hawley as a person involved in the breach. I am satisfied that there has been a default in wages due to Mrs Patterson, that the default is due to a breach of employment standards, and that Ms Hawley is a person involved in the breach as that term is defined in the *Employment Relations Act 2000*. I grant leave to Mrs Patterson to recover arrears in wages against Ms Hawley as a person involved in the breach.

Recovery of arrears of wages

[41] I accept that Mrs Patterson was not provided the 40 hours of work that she was contractually entitled to. The First Respondent failed to provide that work to her. I have sighted a calculation of the gross amount due to Mrs Patterson each week and a schedule of the amounts she was actually paid each week. I am satisfied that Mrs Patterson is owed the gross sum of \$8,013.91 as arrears of outstanding wages. I order Mane Hair Design Limited and to the extent that it is unable to pay, I order Leanne Hawley to pay to Rachel Patterson the gross sum of \$8,013.91 (Eight thousand and thirteen dollars and ninety-one cents) and to do so within 28 days of the date of this determination.

¹ Section 142X(2) *Employment Relations Act 2000*.

[42] I am further satisfied that Mrs Patterson is owed arrears of wages in respect of outstanding holiday pay due to her at termination. I calculate that gross sum to be \$3,155.20 (Three thousand one hundred and fifty-five dollars and twenty cents). I order Mane Hair Design Limited and to the extent that it is unable to pay, I order Leanne Hawley to pay to Rachel Patterson the gross sum of \$3,155.20 (Three thousand one hundred and fifty-five dollars and twenty cents) and to do so within 28 days of the date of this determination.

[43] As Mrs Patterson has stood out of the monies due to her on 1 December 2021, I consider it appropriate that interest be awarded on the judgment sums at paragraphs [41] and [42] above. The Authority has the power to award interest under clause 11 of the 2nd Schedule of the Act.

[44] Mane Hair Design Limited is ordered to calculate and pay interest within 28 days of the date of this determination on the judgment sums at [41] and [42] above. Interest is to be calculated from 1 December 2021 until the judgment sums at [41] and [42] above are paid in full.

[45] Interest is payable in accordance with Schedule 2 of the *Interest on Money Claims Act 2016*. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.

Reimbursement

[46] I accept that Mrs Patterson has lost income as a result of the unjustifiable constructive dismissal I have found.

[47] Prior to commencing her employment with Mane, Mrs Patterson had a part-time business called Vogue Management providing beauty treatments to friends, family and the community. Mrs Patterson revived this business from mid December 2021 and is now self-employed running it. I am satisfied that Mrs Patterson has taken steps to mitigate her losses.

[48] I consider that three months wages are an appropriate award of reimbursement for Mrs Patterson in the particular circumstances of this case.

[49] I order Mane Hair Design Limited to pay to Rachel Patterson the gross sum of \$13,920.00 (Thirteen thousand nine hundred and twenty dollars) as reimbursement and to do so within 28 days of the date of this determination.

Compensation

[50] I am satisfied that Mrs Patterson has suffered hurt and humiliation, embarrassment, loss of dignity and injury to her feelings for which she is entitled to an award of compensation.

[51] Having regard to Mrs Patterson's evidence, the nature of the personal grievance and the particular circumstances of this case, I consider an award of \$15,000.00 appropriate. I order Mane Hair Design Limited to pay to Rachel Patterson the sum of \$15,000.00 (Fifteen thousand dollars) as compensation and to do so within 28 days of the date of this determination.

Penalties

[52] I am satisfied that it is appropriate to impose a penalty on Mane for its failure to pay holiday pay and outstanding wages. I consider the sum of \$5,000.00 is an appropriate penalty in respect of the breaches to impose in the particular circumstances of this case. I order Mane Hair Design Limited to pay a penalty to the Crown of \$5,000.00 (Five thousand dollars) and to do so within 28 days of the date of this determination.

Costs

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between them. If they are unable to do so and an Authority determination is required, Mr Gelb is to lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Ms Hawley will have 14 days to lodge and serve any reply memorandum. Costs will not be considered outside this timeframe without prior leave.

Leon Robinson
Member of the Employment Relations Authority