

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 212
3139881

BETWEEN JOLENE HUMPHREY
Applicant

AND WHANARUA EDMONDS
T/A EXTREME BEAUTY
SALON
Respondent

Member of Authority: Peter Fuiava

Representatives: Fiona Dalziel, counsel or advocate for the Applicant
Marsella Edmonds for the Respondent

Investigation Meeting: 29 September 2022 and 31 January 2023

Submissions received: 1 February 2023 from the Applicant
31 January 2023 from the Respondent

Determination: 28 April 2023

DETERMINATION OF THE AUTHORITY

A. Whanarua Edmonds to pay Jolene Humphrey the following amounts no later than 4 pm Friday 12 May 2023:

- (i) \$3,337.32 in annual leave and public holiday arrears;**
- (ii) interest on the total sum of \$3,337.32 from 14 January 2021 to the date of payment (using the Ministry of Justice civil debt interest calculator to calculate interest;¹ and**
- (iii) reimbursement of the Authority filing fee of \$71.56.**

¹ www.justice.govt.nz/fines/civil-debt-interest-calculator

B. Ms Humphrey's claims for a penalty under the Employment Relations Act 2000 (the Act) and the Wages Protection Act 1983 (the WPA) are unsuccessful.

C. For the reasons given, Mr Edmonds' counter claim against Ms Humphrey is unsuccessful.

D. Costs are reserved.

What is the employment relationship problem?

[1] At its core, this employment relationship problem concerns a wage arrears claim by Jolene Humphrey against Whanarua Edmonds who operates a beauty salon clinic in Rotorua trading as Extreme Beauty Salon (EBS). Mr Edmonds has filed a counterclaim against Ms Humphrey alleging that she solicited clients from EBS and breached her duty of good faith and fidelity to her employer. Ms Humphrey resigned from EBS on 2 January 2021 and started trading on 11 January in the same city as Blink Beauty Specialist (BBS).

[2] For the reasons given, Ms Humphrey's wage arrears claim is successful and she has been granted her arrears together with interest for the loss of use of monies and reimbursement of the Authority filing fee. However, as will be seen, there was merit in Mr Edmonds' counterclaim that she did not act in good faith, but for reasons that follow, damages have not been awarded and the counterclaim has not succeeded.

What are the relevant facts?

[3] In October 2020, Mr Edmonds, who was 21 at the time, purchased EBS as a going concern from its previous owner. Assisting him with the business was his mother Marsella Edmonds who managed the day-to-day operations while Mr Edmonds attended to the accounts.

[4] At the time Mr Edmonds fully took over the business in November 2020, Ms Humphrey was a senior member of staff having been employed by the previous owner two years earlier as a beauty salon technician. Prior to her employment, Ms Humphrey had been working on her own account since 2012 as BBS and had clients of her own

which she brought over with her to EBS when she was employed by the previous owner in October 2018.

[5] In negotiating her contract with EBS, Ms Humphrey requested the restrictive covenants around restraint of trade and non-solicitation of customers be removed because she had her own following of customers that she wished to retain in the event that things did not work out for her at EBS. The clauses were duly removed by the previous owner and the agreement was signed by both parties.

[6] It was part of the sale and purchase of EBS that Mr Edmonds would re-employ the remaining staff including Ms Humphrey on the same terms and conditions each had with the previous owner. However, new written employment agreements were not provided until early 2021 by which time Ms Humphrey had departed. The delay was not of Mr Edmonds making but was due to a delay with the previous employer exiting her service agreement with an HR business.

[7] On 21 October 2020, the previous owner introduced Marsella and Mr Edmonds to the staff and it is understood that Marsella spoke to every employee individually including Ms Humphrey in order to reassure them about the transition to new management.

[8] On 9 November 2020, Mr Edmonds took full control over the business. It was Marsella's evidence that it had only been a week since taking over that she started to hear of concerns from other staff about Ms Humphrey's attitude at work.

[9] On 23 December 2020, Marsella had an informal discussion with Ms Humphrey. It was Marsella's evidence that, in addition to discussing existing concerns about her attitude, a new concern had arisen that Ms Humphrey was planning to leave EBS to start her own beauty business and that she had spoken to customers and another staff member about following her. In addition, Marsella referred to a Facebook business page in which Ms Humphrey referred to herself as the "owner of Extreme Beauty." She was asked to remove the reference immediately.

[10] During the same conversation on 23 December 2020, Marsella stated that Ms Humphrey denied that she was starting her own business and that it was nature of the

beauty industry to have “gossiping women who talk s... .” Ms Humphrey further stated that she intended to return to EBS in the New Year.

[11] On 24 December 2020, EBS closed its doors for the Christmas and New Year holiday period.

[12] On 31 December 2020, Marsella emailed Ms Humphrey a letter dated 27 December 2020 in which she set out the conversation she had with her on the 23rd. In her letter, which Marsella had written on behalf of Mr Edmonds, it was made clear to Ms Humphrey that while she was on leave, she was not permitted to make contact with any client of EBS unless it was for the purpose of making appointments with other members of staff. There is evidence that Ms Humphrey accessed EBS’ appointment booking system on 3 January 2021. Ms Humphrey says that she did so to check whether a client appointment on 6 January had been rescheduled as her leave had been extended.

[13] Ms Humphrey stated in evidence that working with Marsella was difficult and that she had become unhappy at work as a result. When she received Marsella’s email of 31 December 2020 (New Year’s Eve), she considered it “the last straw” and after speaking with her partner Steven Jenkins, decided it was time to leave. On 2 January 2021, Ms Humphrey wrote a letter of resignation to Marsella in which she sought to negotiate a notice period with EBS because she had not been provided with an employment agreement. Marsella accepted Ms Humphrey’s resignation later that same day and advised in writing that her resignation would be effective from 9 January 2021 and that she would receive her final pay on 14 January. However, the payment was never made.

[14] Initially, the reason given for the non-payment was due to Ms Humphrey’s store key not being returned however it was returned by Mr Jenkins whose evidence was that he had forgotten to return the key but had slipped it under the front door. During the investigation meeting, Marsella clarified that Ms Humphrey’s final pay was being withheld because of the financial losses EBS had sustained as a result of nine of Ms Humphrey’s clients cancelling their appointments after she left the business.

[15] Mr Edmonds and Marsella say that Ms Humphrey had solicited those clients, which in the three months after her departure has resulted in a financial loss of \$9,278.

While acknowledging the validity of Ms Humphrey's wage arrears claim, Mr Edmonds says that he has withheld payment until a decision on his counterclaim is made by the Authority.

How has the Authority investigated?

[16] The applicant's case comprised written and oral evidence from Ms Humphrey and Mr Jenkins. For the respondent, while written statements from five witnesses were provided to the Authority, only three witnesses (Mr Edmonds, Marsella, and Rochelle Dahl, a senior nail technician at EBS) appeared at the investigation meeting. The two other witnesses are no longer employed by EBS. All witnesses answered questions under oath or affirmation from myself and the parties' representatives.

[17] Ms Humphrey's Statement of Problem originally included two respondents: Mr Edmonds and Marsella. This was because it was not clear who her employer was as she had not been provided with an employment agreement. However, this issue was resolved shortly after a case management conference in February 2022. Mr Edmonds was confirmed as the employer and Marsella was removed from the proceedings as a second respondent.

[18] Scheduled originally for two days, the investigation meeting took one full day. In early October 2022, I requested further information from the parties which included information of Ms Humphrey's Facebook page and a list of calls made to customers by Ms Dahl. The requested information was provided. In late January 2023, closing oral submissions were heard by audio-visual link via Zoom. The parties' written closing submissions were lodged shortly thereafter.

[19] As permitted by s 174E of 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

[20] As it is not in dispute that Ms Humphrey's final pay with EBS remains owing to her, it is necessary that Mr Edmonds' counterclaim be dealt with first as this was the reason for the non-payment. The issues for investigation and determination are as follows:

- (a) Did Ms Humphrey take advantage of EBS's good will by setting up a Facebook page and describing herself as its owner?
- (b) Did Ms Humphrey set up in competition with EBS while she was still an employee?
- (c) Did Ms Humphrey solicit clients and staff while still employed by EBS?
- (d) Did Ms Humphrey fail to advise EBS of her intentions to leave and set up in competition with the business thereby preventing EBS from being able to take steps to mitigate the impact of her actions?
- (e) Did the applicant use EBS's confidential information for her own purposes and in a way that was detrimental to the business?

Did Ms Humphrey take advantage of EBS's good will by setting up a Facebook page and describing herself as its owner?

[21] Marsella's email of 31 December 2020 to Ms Humphrey makes reference to her Facebook page and it was alleged that she had described herself as the owner of Extreme Beauty. However, a screen shot of the Facebook page does not say this. In fact, the page states "Owner at Jo Humphrey – Extreme Beauty." The reference to "owner" is to Ms Humphrey being the owner of the page rather than EBS.

[22] The additional Facebook information provided to the Authority by Ms Humphrey shows that she created a business page for "Blink Beauty Specialist" on 14 June 2012 which was then amended on 31 July 2018 to "Jo Humphrey – Extreme Beauty". The next change occurred on 31 December 2020 with the amendment simply being "Jo Humphrey." Finally, on 11 January 2021, the page was changed to "Blink Beauty Specialist."

[23] Based on the information and evidence before me, I am satisfied that Ms Humphrey did not set up a Facebook page describing herself as the owner of Extreme Beauty. Instead, the page was originally created in 2012 some six years before she became a full-time employee of EBS.

Did Ms Humphrey set up in competition with EBS while she was still an employee?

[24] Ms Dahl gave evidence in support of Mr Edmonds' counterclaim. On 18 December 2020, Ms Humphrey said to her in confidence during a lunch break that she had signed a lease agreement for a new property she would operate her business from. It was Ms Dahl's evidence that she had been offered employment by Ms Humphrey who denied it stating that she did not have any staff at BBS and had no space for another person to work with her.

[25] I found Ms Dahl a credible witness. Having received information from a work friend in confidence, she was in the unenviable position of keeping that information to herself while knowing that Ms Humphrey had not been completely honest with Marsella about her future plans. In the end, it was Ms Dahl's partner, a close friend of the previous owner, who persuaded her to do the right thing and she disclosed her conversation with Ms Humphrey to Marsella on 5/6 January 2021.

[26] It is noted that when Marcella spoke with Ms Humphrey on 23 December 2020, she was asked whether she was planning on leaving EBS. During cross-examination and re-examination, Ms Humphrey stated that she could not recall having this discussion with Marcella. I find Ms Humphrey's response to be evasive particularly when Marcella's letter of 31 December sets out in great detail all the matters that were discussed between the pair on 23 December 2020. Had there been no discussion about Ms Humphrey planning to leave EBS, I would have expected her to have said so.

[27] It is further noted that, at no stage during the conversation above, did Ms Humphrey disclose to Marsella that she had already signed a lease agreement on 18 December 2020, five days earlier. I find that Ms Humphrey was not honest with Marcella which is a requirement of cl 4.2 of her agreement with the previous owner of EBS, which continued to apply. Even so, Ms Humphrey's preparatory steps were not well advanced. It was her evidence that the new premises needed work and while she had a lease holiday until March 2021, she was dependent on her wages from EBS for the time being. I am satisfied that Ms Humphrey was genuine when she stated that she intended to return to EBS in the New Year but for not much longer after that.

Did Ms Humphrey solicit clients and staff while still employed by EBS?

[28] Mr Edmonds provided a list of former clients of EBS who were called by a witness who did not give evidence at the investigation meeting. The list contains the names of eight customers who are understood to have followed Ms Humphrey to BBS. Even if the witness in question was available for questioning, the calling list does not record responses to the effect that the clients were solicited or poached by Ms Humphrey. Given the personal attention given to clients by beauty technicians, there is a real chance of customers following the technician when they change employment.

[29] As for whether there is evidence of solicitation of staff by Ms Humphrey, having found Ms Dahl to be a credible witness, I accept that she was offered a job by her friend and former colleague. However, there is no loss to Mr Edmonds as Ms Dahl declined the offer and has remained an employee of EBS.

Did Ms Humphrey fail to advise EBS of her intentions to leave and set up in competition with the business thereby preventing EBS from being able to take steps to mitigate the impact of her actions?

[30] As discussed above, Marsella had, on 23 December 2020, asked Ms Humphrey whether she was planning to establish her own business in the New Year or continue working with EBS. As stated, I found Ms Humphrey's evidence to be evasive and unreliable and I am satisfied that she was not honest and did not deal with her employer in good faith as required by her employment agreement with the previous employer which continued to apply.

[31] However, I do not award damages to Mr Edmonds who has not established a causal link between the loss of clients and Ms Humphrey's departure and setting up business on her own. Further, Mr Edmonds has not sufficiently mitigated his loss which is largely due to his being new to EBS and his relative lack of experience with the business. Both he and Marsella appeared not to have checked whether Ms Humphrey's existing employment agreement contained a restraint of trade and/or non-solicitation clause especially when there were red flags about her almost immediately after he took full control of the business. There was ample opportunity for her employment agreement to have been checked well before the year came to a close.

[32] Moreover, when Ms Humphrey sought to negotiate her notice period, this was the opportunity for EBS to have her serve a longer notice period or negotiate a period of garden leave for her. It was Marsella's evidence that they were following Ms Humphrey's employment agreement with the previous owner which required one weeks' notice. However, the agreement provides for two weeks' notice and not one. Additional time was what EBS required to meet the competition and to find a suitable replacement for Ms Humphrey. This was a further missed opportunity by the respondent.

Did the applicant use EBS's confidential information for her own purposes and in a way that was detrimental to the business?

[33] This issue relates to Ms Humphrey accessing EBS's online appointment booking system while she was away on annual leave. However, it was Marsella's evidence that the database does not capture what information may have been accessed at the time by Ms Humphrey who says that she was checking that a client's appointment had been rescheduled when her annual leave was extended. As there is no digital footprint that establishes what else may have been accessed (if any), this issue cannot be taken any further.

Outcome

[34] Ms Humphrey is entitled to be paid her wage arrears. There was no basis for it to have been withheld when Mr Edmonds could have taken steps that would have sufficiently mitigated his loss. Ms Humphrey provided the Authority with a calculation of her outstanding annual leave and holiday pay amounting to \$3,337.32. The calculus is not disputed by Mr Edmonds.

[35] The Authority has the power under cl 11 of the Second Schedule to the Act to award interest if it thinks fit to do so. This is an appropriate case for the award of interest as Ms Humphrey has been deprived of the use of this money for the last two years. Mr Edmonds is ordered to pay interest on \$3,337.32 from 14 January 2021 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator noted above.

No penalties awarded

[36] Ms Humphrey has sought a penalty against Mr Edmonds under s 5A of the WPA for an alleged unlawful deduction from her wages. However, it was not until the investigation meeting that it was discovered that there had been no deduction from Ms Humphrey's wages but that it been withheld pending the outcome of the counterclaim which for the reasons given is unsuccessful. That said there is no basis to grant a penalty under the WPA as there has been no deduction of wages.

[37] Ms Humphrey seeks a penalty for not being provided with a written employment agreement as required by s 65 of the Act. I decline to do so as Ms Humphrey would have understood from a meet and greet organised by the previous owner of EBS that Mr Edmonds was her new employer and the terms and conditions of her employment would continue. Further, this was not a case of an employer being obstinate or difficult but who had been delayed by the previous owner's exiting from an agreement with an HR service provider.

[38] Given the outcome of this investigation in which Ms Humphrey has been successful, it is appropriate that Mr Edmonds reimburse her the filing fee of \$71.56 which she paid in order to bring her employment relationship problem to the Authority.

Costs

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Humphrey may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter.

[40] From the date of service of that memorandum Mr Edmonds would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[41] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Peter Fuiava
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108]. See also www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.