

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 22  
5401291

BETWEEN

JALEACE ORMSBY  
Applicant

A N D

EFFEX HAIR AND BEAUTY  
SALON LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Michelle Thum, Advocate for Applicant  
Ria Chapman, Advocate for Respondent

Investigation meeting: 14 January 2013 at Auckland

Date of Determination: 23 January 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Ms Ormsby) alleges she was unjustifiably dismissed and has incurred wage arrears. Those claims are resisted by the respondent (Effex).

[2] Ms Ormsby was employed as a hairdresser by Effex in January 2012, originally at an hourly rate of \$25 per hour but this was reduced by agreement to \$18 per hour within a week of the employment commencing. This was because Ms Ormsby was not sufficiently experienced to justify the higher rate.

[3] Effex says that Ms Ormsby began to lose focus in the job quite early into the employment. They say she turned up to work late on a regular basis, regularly asked for wage advances because of cash flow problems, took extensive sick leave, and took advantage of her co-workers.

[4] In the latter regard, Effex say that Ms Ormsby's relationship with other staff became increasingly problematical with co-workers complaining about Ms Ormsby taking advantage of them financially. An example of this behaviour was Ms Ormsby's apparent unwillingness to contribute to petrol money when she was transported to work by colleagues.

[5] In July 2012, Ms Chapman, Effex's Manageress, cancelled her family holiday because Ms Ormsby represented that her brother was dangerously ill in Wellington and she (Ms Ormsby) needed to be by his side. There was dispute between the parties as to whether Ms Ormsby accurately represented the position, or not, concerning her brother. In particular, Ms Chapman maintains that Ms Ormsby does not have the brother Ms Ormsby spoke of during the relevant conversation; Ms Ormsby denies that and says that her family can attest to her brother's existence. Either way, Ms Chapman told the Authority that Ms Ormsby had represented that her brother was *at death's door* and that she (Ms Chapman) now doubts that was the position at all.

[6] On Ms Ormsby's return from that period of leave in Wellington, there was a meeting between her and Ms Chapman during which the parties agreed to a further reduction in wage rate to \$13.50 per hour because of continuing deficits in Ms Ormsby's performance.

[7] That discussion took place on Wednesday 1 August 2012 and immediately thereafter the evidence is that Ms Ormsby departed the workplace and did not return until the following week. In doing so, she was effectively away from the job for two and half days. Effex says that she made no contact with the firm during her absence; Ms Ormsby says that she spoke with the receptionist but Effex says the receptionist has no memory of such a discussion.

[8] On Friday 3 August 2012, Ms Chapman spoke with her husband about the matter, having not heard from Ms Ormsby since her sudden departure from the business, and between them Ms Chapman and her husband determined that the employment relationship was unable to be saved and that Ms Ormsby should be dismissed for misconduct.

[9] That decision was conveyed to Ms Ormsby the following Tuesday night (7 August 2012) at about 11.30pm by text message. Ms Ormsby had worked Monday 6 August 2012 and Tuesday 7 August 2012 and had no idea that her employment was

in jeopardy. Nor was she given any opportunity to answer the employer's concerns. A letter of termination was also apparently prepared although Ms Chapman told the Authority that she was *unable to bring herself to give it to Ms Ormsby*.

[10] When, post dismissal, the final pay was made up, Ms Ormsby alleged it was deficient in a number of respects.

### **Issues**

[11] There are only two issues for the Authority to determine, namely:

- (a) Was Ms Ormsby unjustifiably dismissed? And
- (b) Is Ms Ormsby owed wages?

### **Was Ms Ormsby unjustifiably dismissed?**

[12] The Authority considers Ms Ormsby was unjustifiably dismissed. A dismissal by text message, whatever the circumstances, will always be difficult to justify. The Authority is satisfied that Ms Ormsby had no idea that her behaviour had got to the stage where dismissal was in prospect and of course, in consequence, she had no opportunity to defend herself or respond to any particular concerns the employer had. She was simply told electronically that there was no longer work for her.

[13] Ms Chapman seemed to acknowledge that there might have been a less than satisfactory dismissal process when she told the Authority about the existence of the dismissal letter that she had had prepared but that she could not face giving that letter to Ms Ormsby. Clearly what happened was that the employment relationship had simply become so much of a burden for Ms Chapman that she wanted shot of it. While her frustrations may be understandable, they do not excuse the complete absence of any proper process.

[14] The importance of the process the law requires is not simply arid formalism. The law mandates a particular process in cases of disciplinary action against employees to try to ensure fairness as between the parties to the employment relationship. Looked at simplistically, the law seeks to impose a standard on employers which they would find acceptable where they were the recipient.

[15] This dismissal was, on the evidence heard by the Authority, made without Ms Ormsby having any input into the matter whatever. She was not given an opportunity to sit down with the employer and discuss the employer's concerns so that for instance she might improve her behaviour and become the talented young hairdresser that the employer maintained she was.

[16] Despite the employer's claims, the evidence that Ms Ormsby was subjected to disciplinary warnings is thin indeed. There was one document provided to the Authority which is effectively the notes of a staff meeting which took place on 27 March 2012 which seems to have been a response to a business function which Effex had on the previous Saturday, 24 March 2012. The evidence suggests that Ms Ormsby did not behave in a manner acceptable to Effex at that function and that Effex also had concerns about the behaviour of Ms Ormsby's partner.

[17] There are warnings obliquely referred to in the notes of this meeting but it is not clear precisely what the conduct complained of is, nor what Ms Ormsby is supposed to do to remedy the default nor even if this is meant to be a formal written warning or the documentation of an oral warning.

[18] Effex told the Authority that the termination was for serious misconduct and they relied upon clause 13.3 of the operative written employment agreement. That agreement contemplates serious misconduct including *serious or repeated failure to follow a reasonable instruction* and *actions which seriously damage the employer's reputation*. Both of those just referred to provisions are relied upon by Effex.

[19] But given the complete absence of any proper process, any engagement at all with Ms Ormsby about her deficiencies, any opportunity for her to have an appropriate opportunity to respond to what she is alleged to have done and to have a reasonable time to put things right, the basis on which Effex seeks to terminate the employment is neither here nor there. The dismissal must be unjustified because of the completely unfair way in which it was effected.

### **Is Ms Ormsby owed wages?**

[20] The operative employment agreement describes the applicable hourly rate as \$18 per hour. However, that agreement also provides for variation of its terms with the following provision:

*The clauses in this agreement may be varied or updated by agreement between the parties at any time.*

[21] Nothing in that provision requires a written agreement between the parties about such a variation and the Authority is satisfied on the evidence it heard that the hourly rate at the time of the dismissal was \$13.50 per hour. It follows that from the point at which the hourly rate was further reduced to \$13.50 per hour, that is the figure that Ms Ormsby's wages should be calculated at.

[22] However, Ms Ormsby is not entitled to two weeks notice as she claimed. She was summarily dismissed and accordingly, in terms of the relevant provision in her employment agreement, she is not entitled to notice.

[23] Next, Ms Ormsby claims that she was not given any holiday pay in the final pay. Whether she is entitled to any holiday pay or not will depend on the holiday leave that she took during the employment. Given Effex's apparent confusion about wage and time records in relation to Ms Ormsby the Authority is unable to make a determination on the issue.

[24] Third, Ms Ormsby claims she is entitled to sick leave. She says she is owed five days sick pay but again, that would need to be verified against the employer's records. The employment agreement entitles her to five days sick leave for each 12 months of service but only after six months employment.

[25] Finally under this head, Ms Ormsby is concerned about whether Effex properly accounted to the Inland Revenue Department for PAYE on her wages. Ms Ormsby's evidence is that those deductions were claimed by Effex but she remains uncertain as to whether those sums have been accounted for to the Inland Revenue Department.

[26] Ms Chapman told the Authority that she intended to endeavour to reconcile the wage and time records in relation to Ms Ormsby as a matter of urgency, and on the footing that she intended to do that, the Authority indicated it would defer issuing a determination to enable that to happen and to have the Authority advised of the position. In the result, nothing has happened and accordingly the Authority must deal with the position in the absence of any corrective action from Effex.

**Determination**

[27] The Authority is satisfied that Ms Ormsby has been unjustifiably dismissed because of a complete want of proper process. However, the Authority must now consider whether Ms Ormsby has contributed in any way to the circumstances giving rise to her dismissal: s.124 Employment Relations Act 2000 applied.

[28] The Authority considers that Ms Ormsby has contributed materially to the circumstances giving rise to her grievance and on that basis, the Authority thinks the proper course is to reduce the remedies that would otherwise apply by a figure of 50%. This reduction reflects some allowance for the unsatisfactory behaviour which Ms Ormsby did not deny in the Authority's investigation meeting, in particular persistent lateness, and the Authority's finding that Ms Ormsby demonstrated during the employment, that there were issues with her truthfulness.

[29] The Authority is unable to make any awards other than in respect of compensation because of the employer's failure to deal adequately with the time and wage records for Ms Ormsby. In the statement in reply, Effex admit that their wage and time keeping is deficient but say that they are now on top of the problem. The Authority has seen no evidence of this to date. Furthermore, the Authority heard evidence from Ms Ormsby that she had kept her own record of the times that she worked in a note book which had been left in a drawer at the workplace. Ms Chapman undertook to find that document and urgently communicate with the Authority about its contents in order that that could inform the Authority's conclusions in respect to wage entitlements. That has not happened and on that footing, all the Authority can do is require the parties to engage with each other (in Ms Ormsby's case through Ms Thum) with a view to identifying what wage entitlements Ms Ormsby has.

[30] In attending to that task, the parties are to rely upon the clear provisions of the operative and executed employment agreement and the Authority's finding that the wage rate for the period from 1 August 2012 onwards was \$13.50 per hour together with the Authority's finding that no notice can be payable because of the effect of the employment agreement.

[31] In terms of compensation, the Authority awards Ms Ormsby the sum of \$500 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000, the sum

reflecting the Authority's conviction that she has contributed to the circumstances giving rise to her dismissal to the extent of 50%.

[32] Leave is reserved for either party to come back to the Authority for further orders in respect to the arrears of wages claim, if the matter is unable to be resolved by agreement. In the meantime, the Authority will refer a copy of this determination to the Inland Revenue Department.

### **Costs**

[33] The parties are urged to try and resolve costs themselves. They should be aware that the unsuccessful party (in this case Effex) typically contributes to the costs of the successful party (Ms Ormsby). If the parties are unable to agree costs between them, leave is reserved for either party to revert to the Authority and costs will be fixed by the Authority.

James Crichton  
Member of the Employment Relations Authority