

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 197
5350036

BETWEEN

SIMON BLUE
Applicant

A N D

GRAAMANS HEALTH
DEVELOPMENT LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Len Andersen, Counsel for Applicant
Michael Guest, Advocate for Respondent

Investigation Meeting 21 February 2012 at Dunedin

Application by respondent
for re-opening part of
evidence: 28 February 2012

Applicant's response and
opposition: 29 February 2012

Further information
provided: 5 March 2012

Submissions Received On the day

Date of Determination: 13 September 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Simon Blue was employed as a pharmacist by Graamans Health Development Limited from in or about August 2010 at the Meridian Mall pharmacy in Dunedin. Graamans Health Development Limited (Graamans Health) is a duly incorporated company having its registered office in Dunedin. It owns and operates the Meridian

Mall pharmacy and another pharmacy in North Otago. The two directors of Graamans Health are Adrian and Megan Graamans. Mr Graamans is a Pharmacist. Mrs Graamans' responsibilities include general management and administrative duties, communication, deliveries and payroll. Mr Blue entered into a written employment agreement with Graamans Health dated 12 December 2010.

[2] On 29 June 2011 Mr Blue attended a disciplinary meeting to discuss three matters that were set out in a letter inviting him to the meeting dated 22 June 2011:

- That as of 28 March 2011 Mr Blue had not completed and sent his application for his annual Practising Certificate that was due prior to 1 April 2011;
- That Mr Blue had not as part of his Recertification completed at least four outcome credits and that Mr Graamans had had to follow up three times with him about this over an eight week period and that Mr Blue had been given until 28 June 2011 to complete them;
- That Mr Blue was dishonest in completing s.5 of the Recertification Form where he declared he had completed the practise review and five credits.

[3] Mr Blue was advised on 30 June 2011 of a decision to terminate his employment effective on that day. He says that he was unjustifiably dismissed as there was no substantive justification for his dismissal. Mr Blue seeks reimbursement of lost wages, and reimbursement of expenses as a result of his having to relocate from Dunedin to Oamaru for a new role, compensation and a contribution towards his costs.

[4] Graamans Health does not accept that Mr Blue's dismissal was unjustified. It says that the dismissal was both substantively and procedurally justified and that Mr Blue is not entitled to any remedies whatsoever.

The test of justification

[5] Mr Blue was dismissed on 30 June 2011 after the amendment to the test of justification in s.103A of the Employment Relations Act 2000 came into effect on 1 April 2011. The test requires the Authority to determine on an objective basis

whether the decision of Graamans Health to dismiss Mr Blue and, how it reached that decision, was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. There are a number of procedural factors the Authority must specifically consider in s.103A (3) as well as any other factors that the Authority thinks appropriate. The Authority must not determine a dismissal to be unjustifiable solely because of defects in the process if they were minor and did not result in an employee being treated unfairly.

The issues

[6] The Authority is required to consider the following issues in this matter:

- Was there a full and fair investigation of the allegations at the end of which a fair and reasonable employer could have concluded there was misconduct on the part of Mr Blue;
- Could a fair and reasonable employer have decided to summarily dismiss Mr Blue;
- If the dismissal is not found to be justified then what remedies is Mr Blue entitled to and are there issues of contribution, mitigation and/or after discovered misconduct and should a letter after dismissal to the Pharmacy Council about Mr Blue have any bearing on the remedies awarded.

Was there a full and fair investigation of the allegations Mr Blue was facing at the end of which a fair and reasonable employer could have concluded there was misconduct on the part of Mr Blue?

[7] The Authority heard a considerable amount of evidence about the relationship between Mr Blue and Graamans Health prior to the matters that gave rise to the final disciplinary meeting and eventually the termination of Mr Blue's employment. I do not need to refer to all the evidence.

[8] There was reference in the letter of termination to *following on from the issue of a formal Verbal; Written and Final Written Warning for misconduct, this letter is confirmation of the decision to terminate your employment, effective today the 30th of*

June 2011 and I shall need to set out some of the evidence relating to previous disciplinary outcomes.

[9] The relevant part of the employment agreement is clause 17 headed Termination of Employment. Within that clause there are references to conduct that could be considered serious misconduct. In relation to the matter of warnings, clause 17.1.3 provides that:

Where the Employer considers the Employee's performance to be unsatisfactory, notice of termination of employment may be given provided the Employer has:

- *discussed the unsatisfactory nature of the performance with the Employee on at least two occasions not less than one month apart; and*
- *given the Employee two written warnings setting out the unsatisfactory nature of the performance and specifying the required performance improvements;*
- *and the Employee has been given reasonable opportunity and resource to improve performance.*

Warnings

[10] The Authority heard from another pharmacist at the Meridian Pharmacy, Bridget Mark. She explained that she had raised some concerns with Mr and Mrs Graamans in or about November 2010. This was because Mr Blue arrived late one morning and played down the time of his arrival, there were some errors in dispensing and Mr Blue was avoiding responsibility by denials, and that he had been ringing another pharmacy where he had previously been employed for advice rather than ringing Mr Graamans. There were also some concerns about his behaviour impacting on the team environment.

[11] Mr Graamans and Mr Blue met and discussed these concerns in December 2010. It is likely from both reading the written statements of evidence and hearing from Mr Graamans that he formed a view that there had been conduct on the part of Mr Blue that was dishonest. He wanted Mr Blue to own up to his errors rather than being evasive. Mr Graamans said in his written statement of evidence that he wanted Mr Blue to know clearly by way of an oral warning that there was *no place for dishonesty or half truths as a pharmacist*.

[12] Mr Blue said that he had never been dishonest with Mr Graamans but that he found him to be volatile and was reluctant to upset him. Mr Blue had after the conclusion of his formal period of study worked as an intern pharmacist at another pharmacy in Dunedin but the position at the Meridian Mall pharmacy was his first registered pharmacist position.

[13] Mr Graamans view was that he was not volatile. I accept that he was available to provide assistance and did provide assistance to Mr Blue. I think it likely though having heard the evidence that Mr Blue had difficulty communicating confidently with Mr Graamans and was intimidated by him. Mr Graamans became quite dissatisfied with Mr Blue as an employee from a fairly early stage in the relationship and exasperated with Mr Blue on occasion. Mr Graamans accepted for example swearing at Mr Blue when he had asked him several times to sit in a specific chair in the Pharmacy but on returning to the Pharmacy, after a short period away, found that he was back in the other chair saying *Simon for fuck's sake sit in the chair*.

[14] He also accepted that he had yelled and sworn at Mr Blue at the start of a disciplinary meeting held to discuss an interaction with a customer about a boil on Sunday 27 February 2011. It is likely he told Mr Blue to *shut up and listen* and later to wear the *fucking white coat*. He said that he became frustrated because Mr Blue kept interrupting him and denied responsibility. Mr Graamans left the meeting because he had somewhere else to go. Mrs Graamans continued with the meeting. Following that meeting Mr and Mrs Graamans discussed the matter and decided to give Mr Blue a formal written warning. Mr Blue said that when he was given this letter dated 2 March 2011 by Mrs Graamans on or about 3 March 2011 he objected to the warning because he had not had sufficient time to give his side of the story. Mr Blue said that he gave the letter back to Mrs Graamans and heard nothing further about it.

[15] Having heard the evidence I find it more likely than not that Mr and Mrs Graamans, properly in my view, accepted the meeting had not gone particularly well and the warning was not following a fair process. This is supported by the evidence which I shall shortly set out. I do not find therefore, that if a first warning was given at all, it was given justifiably in terms of Mr Blue's employment agreement.

[16] There was an incident on 14 March 2011 about the timing of particular orders that Mr and Mrs Graamans wrote to Mr Blue about on 16 March 2011. Mr Blue's behaviour was again categorised as an issue of dishonesty. Within the letter there was reference to what Mr and Mrs Graamans believed to be a repeated pattern of dishonesty. There was reference to Mr Blue receiving verbal warnings on the inappropriateness of dishonesty with staff on two occasions. There was no reference in the letter to a first written warning.

[17] After obtaining some advice from Kate Logan, a Human Resource Consultant, Mr and Mrs Graamans on 21 March 2011 wrote a further letter to Mr Blue formally inviting him to a disciplinary meeting on 24 March 2011. In the letter it described, amongst other matters the meeting's purpose; *to discuss the behaviour noted in this letter [16 March 2011] which we believe to be impacting on your performance in your role and the level of trust... and we would like to continue our discussion in regards to the incident relating to professional dishonesty when giving advice to a customer.* That part could only relate to the boil incident and in my view confirmed beyond any doubt there had been no disciplinary outcome in terms of that matter.

[18] Mr Blue attended the formal disciplinary meeting on 24 March 2011 at 6.30pm with his father as a support person. Mr and Mrs Graamans attended the meeting with Ms Logan. Ms Logan took some notes.

[19] Mr Blue tabled a letter at the start of the meeting acknowledging some shortcomings with respect to the boil incident and the order on 14 March. He apologised for contacting early on another pharmacist and said he would like fortnightly meetings to discuss work issues, future business plans, and constructive criticism and staff issues. He stated if given another chance he would strive for excellence. Many of the earlier issues were traversed at the meeting. There was discussion about the lateness issue, the boil issue, the ringing of the other Pharmacist issue as well as the new order issue.

[20] Following the meeting on 24 March 2011 Mr Blue received a *final written warning* dated 29 March 2011 that referred to the meeting having traversed a list of concerns. It provided that whilst the incidents themselves were not significant (although the boil incident was viewed as serious misconduct) the key area of concern for Mr and Mrs Graamans was that in each situation Mr Blue had attempted to cover up or deceive them about the incident. There was specific reference in the final

written warning about the boil incident where the concern was expressed that Mr Blue was allegedly dishonest in his professional capacity. The letter provided that Mr and Mrs Graamans were prepared to give Mr Blue another opportunity and issued a final written warning. Towards the end of the final written warning it provided that *if there are any further proven incidents of dishonesty; further disciplinary action including dismissal could result.*

[21] After that Mr Blue said that he made an effort to be straightforward and truthful with Mr Graamans and not to *fudge* any matters. He considered that he performed his tasks appropriately after 24 March 2011 and the only error that he was aware of was one involving prescribing an ointment that was not raised by Mr Graamans until after his dismissal.

[22] I am left with some reservations about the justification of this final warning. The list of concerns for which the warning was issued included historical matters already been dealt with by a verbal warning. The only matter referred to as significant of itself, the boil incident, which had some weeks earlier a disciplinary outcome of a first warning. I shall move on to the dismissal itself and return to this matter if I need to.

The meeting leading to dismissal

[23] On 22 June 2011 Mr Blue was invited by letter to a further disciplinary meeting with respect to the completion of the renewal of his annual practising certificate. By way of background Mr Blue was required to renew his annual practising certificate which he paid for himself. As part of his certificate re-certification he was required to complete what is known as credits. Credits are papers that are required to be prepared in a specific format regarding matters relevant to a pharmacist's work. The credits are not provided to the Pharmacy Council but retained by the pharmacist to be shown if audited.

[24] Mr Blue attended the disciplinary meeting on 29 June 2011 with his sister Brooke Blue and Mr Andersen. Mr Graamans attended with Ms Logan. Mr Graamans accepted in his evidence there were three matters at the meeting for Mr Blue to answer and these had been outlined in the letter of 22 June 2011.

[25] The first issue was that it was not acceptable that Mr Blue had been asked on 28 March 2011 if he had completed and sent his application for his annual practising

certificate renewal and he had not when it was due prior to 1 April. Mr Blue did send his application in on 1 April and his annual practising certificate was renewed for the year 1 April 2011 – 31 March 2012.

[26] The second issue was that Mr Graamans had had to follow up over an eight week period three times to ask if Mr Blue had completed his professional development requirements and he had been given a final two week period to complete them ending 28 June 2011. Mr Andersen advised that Mr Blue had completed the credits and had them with him so he had met the requirements to complete them by the deadline. He maintained that this was a complete answer. Mr Blue provided Mr Graamans with the completed credits at the disciplinary meeting but said something to the effect they were really for his own benefit and records and it was not something he needed Mr Graamans to have. Mr Graamans agreed under questioning at the time of dismissal he accepted the credits were completed. The evidence supported that it was very clear to Mr Blue when he was given the deadline of 28 June 2011 that he had to meet it or his employment would end. Mr Blue said that Mr Graamans made a throat slashing gesture at the time he was given until 28 June 2011 to complete the credits. Mr Graamans did not accept he made a throat slashing motion and said he made a lot of hand gestures and was more likely him pointing toward the door. In any event Mr Blue had been left in no doubt about his fate if he did not complete his credits by 28 June 2011.

[27] The third issue was that Mr Blue had been dishonest in completing a section of the recertification form where he had declared that he had completed the practice review and 5 credits. Mr Andersen explained that Mr Blue had made a mistake in filling out that part of the form as it was not something he had previously completed. Mr Graamans asked Mr Blue at the disciplinary meeting if he had completed the practice review against the 7 competency standards using the approved ENHANCE practice review booklet. Mr Blue said he had not but then later in the meeting said he was wrong and that he had completed them and had misunderstood the question. Mr Graamans concluded in the letter of termination about that that he could not trust whether Mr Blue was telling the truth or not about that matter.

[28] Mr Graamans said that he took the rest of the day and the next morning to think about the outcome and also called the Pharmacy Council to talk about the dishonesty in the application and Mr Blue's position. He decided to dismiss Mr Blue.

[29] Mr Blue attended a further pre-arranged meeting at midday on 30 June 2011 with Mr Andersen. Mr Graamans attended with Ms Logan. Mr Graamans said that although it was intended to read the letter of termination out Mr Andersen advised that *we could not do this and anyone could see it was wrong*. The letter was then simply handed over and the meeting only took a few minutes. Although Mr Blue was required to leave his employment that day he was paid for two weeks in lieu of notice.

Conclusion

[30] The Authority in applying the test of justification must consider both the substantive decision made to dismiss and the process of how the decision was arrived at. In this matter I start with the substance of the allegations Mr Blue was facing before turning to the process.

[31] I asked Mr Graamans about the reasons for Mr Blue's dismissal. Mr Graamans said that he had invited Mr Blue to the meeting that took place on 29 June 2011 and expected him to accept responsibility but that he did not and was not upfront and continued to make excuses. He explained that he expected Mr Blue to be honest and remorseful at the meeting but that it went a different way. He said that the trust had been destroyed in the relationship. Mr Graamans used similar words in the letter of termination dated 30 June 2011 when he said amongst other matters; *Unfortunately Simon you have let yourself and me down again. You also did not show any remorse or acknowledgment for your actions or lack of them, in the disciplinary meeting.*

[32] There was criticism of Mr Andersen's approach at the meeting. Mr Andersen was instructed to represent Mr Blue and answer on his behalf the allegations in the letter of 22 June 2011. Mr Blue, the evidence supports, said very little. I understand Mr Graamans' point that Mr Blue whilst just meeting deadlines did not acknowledge with any regret the time it had taken to do so. He did not therefore indicate that he understood the issues from Mr Graamans perspective. Mr Blue was however facing the possibility of dismissal. It was not simply a meeting about tardiness. His job was on the line. In those circumstances it is not surprising that Mr Andersen took a robust approach to the defence of Mr Blue about the allegations. He was entitled to do so and that is the role of a representative.

[33] I turn now to the three allegations and whether a fair and reasonable employer could have concluded at the end of the 29 June 2011 meeting there was misconduct.

[34] The first allegation was the reminding of Mr Blue about the practising certificate completion. Mr Graamans was concerned that the application for a practising certificate was not sent in by Mr Blue until the last moment after he reminded him. The application was submitted on time and this was acknowledged in the letter of termination. Mr Graamans knew from late March 2011 that he had to remind Mr Blue about the completion of the form but this was not raised as a concern until 22 June 2011. A fair and reasonable employer could not have concluded following the disciplinary meeting that there was misconduct let alone serious misconduct on the part of Mr Blue with respect to that matter.

[35] The second allegation was about the credits. Mr Graamans in the letter of termination was critical of the defence advanced by Mr Andersen that it was irrelevant he had had to remind Mr Blue three times to complete the required credits and Practice Review. He said in the letter that Mr Blue indicated he had completed these by 28 June 2011 and that he turned up to the disciplinary meeting on 29 June with the documentation. He concluded that *that did not give him any confidence that he understood the importance of a very basic part of the requirement to be a member of the Pharmacy Council of New Zealand*. Mr Graamans had set the deadline of 28 June 2011. Mr Graamans did not conclude other than that Mr Blue had met the deadline. If the misconduct alleged then changed to something else regarding the credits then that was never put to Mr Blue as an allegation to be answered. The fact Mr Blue was not, for example, remorseful and apologetic about the time taken to complete the credits at the meeting by way of answer to the allegation does not mean a fair and reasonable employer could conclude there was misconduct when the deadline set had been met. I do not find that a fair and reasonable employer at the end of the disciplinary meeting could conclude misconduct in terms of the credits as Mr Blue had met the deadline.

[36] The third allegation was about the false declaration. Mr Blue acknowledged that he had made a mistake when he filed in the application form and said he had undertaken the credits. Mr Graamans concluded in the letter of termination that *we will never know whether you did or did not knowingly make a false declaration. The fact is you did. You did not take the required care and attention to ensure you knew*

neither what you were signing nor what was required to complete your credits or practice review. Mr Graamans was not able to and did not conclude that there was knowingly a false declaration as opposed to carelessness. Importantly Mr Graamans knew that the form had been incorrectly filled out from 10 April 2011 regarding the credits and to fix the situation gave Mr Blue time to complete the credits and resolve the situation by 28 June 2011. He did not suggest at that early time dishonesty rather than a mistake in the completion of the form. That deadline was met for the credits and a fair and reasonable employer could not have concluded that conduct in incorrectly or carelessly filling out the form was dishonest misconduct let alone serious misconduct justifying dismissal when a solution to the known conduct had been agreed to some weeks prior and undertaken.

[37] I shall only briefly refer to the procedural factors in s 103(3) of the Act. I turn firstly to the adequacy of the investigation. This was a small business but human resource advice was obtained. Given my conclusion above with respect to the substance of the allegations then I am not satisfied that there was a sufficient investigation of the allegations and explanations before Mr Blue was dismissed and/or that there was a genuine consideration of the explanations advanced. Objectively assessed if there had been, then the conclusions would not have been arrived at. Mr Blue did know the concerns that Mr Graamans had with him as set out in the letter of 22 June and he and his representative were given an opportunity to, and indeed did, answer them. The concerns changed during the meeting and there was focus on Mr Blue's attitude at the disciplinary meeting.

[38] For the reasons set out above I do not find that a fair and reasonable employer after end of its investigation of the three allegations could have concluded misconduct on the part of Mr Blue in all the circumstances at the time. A fair and reasonable employer could not have concluded that there was conduct that enabled it to rely on the contents of the earlier warning. I have also concluded there was some procedural unfairness. I find on the balance of probabilities the conduct relied on for dismissal was not the allegations in the letter of 22 June 2011 but Mr Blue not being remorseful or acknowledging his actions at the disciplinary meeting.

Could a fair and reasonable employer have decided to summarily dismiss Mr Blue?

[39] In light of my findings that there was no misconduct that would justify dismissal then I do not find that a fair and reasonable employer could have dismissed Mr Blue. I find that Mr Blue was unjustifiably dismissed. He has made out his personal grievance and is entitled to remedies.

Remedies

Lost wages

[40] Mr Blue attempted to mitigate his loss by looking for other work. For the first two weeks he had no work but after that did five weeks of part-time work in a pharmacy and then six further weeks of full time locum work.

[41] He then obtained a full time position in a pharmacy in Oamaru away from his home town of Dunedin commencing on 3 October 2011. Mr Blue did not provide any details of lost wages. He would not have suffered loss for the first two weeks he was without employment as he had been paid two weeks from Graamans Health in lieu of notice. He would probably have suffered a loss in wages for the next five weeks. Mr Andersen and Mr Guest may be able to resolve this matter failing which I reserve leave for Mr Andersen to come back to the Authority for the quantum of the lost wages to be fixed.

[42] Mr Blue also said as part of his claim that he had to rent his home out in Dunedin and rent in Oamaru when he obtained his new role. He had to pay two weeks rent in advance of \$720 and a \$360 bond. He was also faced with removal costs of \$500 and had to buy a fridge and a bed. Mr Blue was met with unexpected up front costs in terms of accommodation but will get the bond back if he leaves and will have the benefit of rent paid in advance. There was a cost of moving and that would not have been money Mr Blue would have had to spend had it not been for the unjustified dismissal. I accept he looked hard for a full time role in Dunedin as a pharmacist but to no avail. I find that Mr Blue is entitled to be reimbursed for the cost of moving to Oamaru in the sum of \$500.00. I do not find that Graamans Health should be liable for the cost of new furniture.

[43] I order Graamans Health Development Limited pay to Mr Blue the sum of \$500 towards his moving costs.

Compensation

[44] Mr Blue said that he felt very upset to be dismissed. He said that he had worked hard since the warning in March 2011 and had no opportunity to tell his side of the story before he was dismissed. He said it was really upsetting to be dismissed from his first role as a registered pharmacist. Mr Blue said that after mediation Mr Graamans made a complaint to the Pharmacy Council on 28 July 2011 that suggested he had been dismissed for reasons relating to his competence and some other matters that he considered were not the truth.

[45] The evidence supports that Mr Blue found the situation relating to his dismissal to be humiliating and stressful. He said in his written evidence that he met the deadline for his credits and was still dismissed. The stress and loss of dignity was exacerbated by a letter Mr Graamans sent to the Pharmacy Council which did not portray accurately the reasons for the dismissal in particular as well as some other matters. The letter did suggest that Mr Blue was dismissed for reasons relating to competence and that was not the reason in the letter of termination. It is concerning that there is mention in the letter of a first warning being issued in terms of the boil incident when that same boil incident was relied on in the issue of a final written warning. It is concerning that the letter suggests Mr Blue would not show his Enhance Credits when they were, it was accepted, tabled albeit not for an extended period at the disciplinary meeting.

[46] I think it likely that there was a link between a suggestion to Mr Andersen that the personal grievance be withdrawn in a letter of 19 July 2011 and the letter of 28 July 2011 to the Pharmacy Council. This letter being separate to the *chloramphenicol incident* separately advised to the Council about which Mr Blue takes no issue. Under this head I only take into account the distress the letter caused to Mr Blue as it did not accurately reflect the reason for dismissal and other matters at that time. In all the circumstances I find that there should be an award of compensation that recognises the distress Mr Blue has suffered because of his dismissal of \$10,000.

[47] I order Graamans Health Development Limited to pay to Simon Blue the sum of \$10,000 without deduction being compensation under s. 123 (1)(c) (i) of the Employment Relations Act 2000.

Contribution

[48] I must consider the extent, if any, to which Mr Blue contributed to the personal grievance of unjustified dismissal and if I consider his actions did contribute then I must reduce any awards made. I have found no substantive justification for Mr Blue's dismissal. I am not satisfied that there was dishonesty on his part in the filling out of the application form. He was somewhat slow in completing his credits but I am satisfied did so within the timeframe set by Mr Graamans and I accept his evidence that he was busy and tired over some of that period. I make no reduction for contribution. I make no adjustment to the awards made for the later discovered chloramphenicol incident.

Costs

[49] I reserve the issue of costs. The parties may be able to come to an agreement failing which Mr Andersen has until 4 October 2012 to lodge and serve submissions as to costs and Mr Guest has until 25 October 2012 to lodge and serve submissions in reply.

Summary of findings and orders made

- I have found that Mr Blue was unjustifiably dismissed.
- I have reserved leave for Mr Andersen to return to the Authority with respect to the quantum of any lost wages if agreement cannot be reached with Mr Guest.
- I have made an award for the subsequently incurred costs of moving of \$500 but no other award under that head of claim.
- I have ordered Graamans Health Development Limited to pay to Simon Blue the sum of \$10,000 without deduction being compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000.

- I have not found Mr Blue contributed to his personal grievance.
- I have reserved costs and have timetabled for an exchange of submissions if agreement cannot be reached.

Helen Doyle
Member of the Employment Relations Authority