

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
OFFICE**

**BETWEEN** Diane Harvey (Applicant)  
**AND** Milton Grange Pharmacy Limited (Respondent)  
**REPRESENTATIVES** Paul Brown, Advocate for the Applicant  
Rob Davidson, Counsel for the Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** Christchurch, Tuesday 23 January 2007  
**SUBMISSIONS RECEIVED** 7 February 2007  
5 February 2007  
**DATE OF DETERMINATION** 20 February 2007

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] The applicant (Ms Harvey) alleges that she was subjected to an unjustified action by the respondent (Milton Grange) to her disadvantage and that Milton Grange behaved in breach of its good faith obligations as well.

[2] Milton Grange says that there was no unjustified action to Ms Harvey's disadvantage and denies that there was any breach of good faith.

[3] Ms Harvey applied for a position with Milton Grange as a pharmacy technician. Milton Grange operated a pharmacy in the suburb of Waltham, Christchurch. The pharmacy was staffed by Mr Len May, a trained and experienced pharmacist who is the principal director and shareholder of Milton Grange together with one other staff member.

[4] The evidence given was that prior to the advertisement being placed in the newspaper which Ms Harvey had responded to, the Waltham Pharmacy had enjoyed the services of a Malaysian-trained pharmacist who worked with Mr May but who, because of her Malaysian rather than New Zealand training, was unable to obtain automatic registration in this country.

[5] In the result, while the Malaysian-trained pharmacist was in the process of establishing her professional bona fides in this country, her husband was transferred to Auckland and she followed him, thus creating the vacancy which Ms Harvey applied for.

[6] Ms Harvey was neither a qualified pharmacy technician nor a partially trained technician as the advertisement required but she had worked for 15 years in a pharmacy and some years before had commenced training as a dispensary technician.

[7] Ms Harvey contacted Mr May and asked him whether it was appropriate for her to apply for the position. Mr May encouraged Ms Harvey to apply.

[8] When Ms Harvey applied it is common ground that there was a brief and quite informal meeting between the two principal protagonists across the shop counter at the Waltham Pharmacy.

[9] In all but one significant respect, the matters traversed in this interview (for that is what it was) are agreed. The area of difference is around the question of whether Mr May told Ms Harvey that he had sold his business and that settlement of that sale was set down for 31 March 2006. Mr May is adamant that he told Ms Harvey that significant fact at the interview and Ms Harvey is equally adamant that Mr May did not impart that information. That dispute becomes absolutely central to the resolution of the employment relationship problem between the parties.

[10] In any event, Mr May indicated shortly after the interview that he wished to readvertise the position and it was not until that readvertising had been attended to that Mr May contacted Ms Harvey again to ask her if she would agree to a trial. Ms Harvey accepted the proposal for a trial and commenced her employment on 5 December 2005. After about a week, Ms Harvey was told by Mr May that the trial period was over and so she effectively became, from that point on, a permanent staff member working a span of hours from 10am through to 5pm each day.

[11] Ms Harvey's evidence is that at commencement she had no idea that the pharmacy had been sold and no idea that her working relationship with Mr May would shortly cease. She says these facts became clearer within a very short time of her completing the successful trial period.

[12] Sometime after 12 December 2005 Mrs Harvey says she *found out* that the pharmacy was sold and that settlement was to take place in the new year. Ms Harvey's evidence is that she found that out from a customer whom she overheard speaking to Mr May about his upcoming retirement.

[13] Mr May, of course, absolutely denied that this was the first occasion that Ms Harvey would have been aware of his change in circumstances because he was very clear that he mentioned this fact at the interview. He said in his evidence that they had not discussed the matter in any detail but that he had mentioned it.

[14] When the matter came up on this December occasion and Ms Harvey overheard a customer speaking to Mr May about his future, it is common ground that Mr May told Ms Harvey then that she would be all right because the new owner would take her on. Mr May, when challenged by me, was quite emphatic that he could see no reason why Mr Kerr would not take Ms Harvey on and he had always assumed that because Mr Kerr was interested in taking on the Malaysian-trained pharmacist, he would be equally interested in taking on that person's replacement (namely Ms Harvey).

[15] Mr May acknowledged, however, in response to questions during the investigation meeting, that there were differences between Ms Harvey's utility and the utility of the original staff member, particularly because the original staff member would eventually become a New Zealand-qualified pharmacist and Ms Harvey would only ever be a pharmacy technician, and then only when she completed her training.

[16] The legal position in relation to pharmacy operations is that there must be a pharmacist on duty when a pharmacy is open for business and that makes a trained pharmacist very useful to the owners of such businesses.

[17] However, notwithstanding this difference, Mr May maintained his stance that he was most surprised by Mr Kerr's apparent reluctance to take Ms Harvey on and he was equally sure that his behaviour in making the assumption that Mr Kerr would take Ms Harvey on was responsible and reasonable.

[18] For her part, Ms Harvey thought that Mr May *took it for granted* that Mr Kerr would employ her and that by not checking to make sure that Mr Kerr would indeed take Ms Harvey into his employment, Mr May was in breach of his good faith obligations as well as acting in an unjustified way to her disadvantage.

[19] One of the most attractive aspects of the job from Ms Harvey's perspective was the opportunity to complete her training as a dispensary technician and Ms Harvey says that Mr May was very encouraging about her desire to complete the qualification which she had started a number of years previously. That being the position, Ms Harvey applied to the Pharmacy Industry Training Organisation to get the necessary information to enable her to access the training that she required. By letter dated 23 December 2005, the Pharmacy Industry Training Organisation responded to Ms Harvey's request and provided a body of information to enable Ms Harvey to apply for the requisite training.

[20] One significant part of this material was a document which required to be signed by the pharmacist that the student was working with. Ms Harvey sought to have Mr May sign this document so that she could commence her training. Mr May appeared reluctant to execute the document. Ms Harvey thought he was being evasive. Mr May's evidence was that he was simply anxious about making a commitment in circumstances where he was not going to be in the business for a great deal longer. Mr May's view was that the pharmacist who had purchased the business was the appropriate person to sign Ms Harvey's training document.

[21] When Mr May declined to sign the training documents, on the basis that the new owner might be the more appropriate person to sign them, Ms Harvey questioned Mr May about her future and Mr May seems to have given her reason at this point (which on her evidence was early January 2006) to become a little anxious about her future.

[22] Ms Harvey then decided that she should talk to the new owner, Mr Kerr.

[23] Mr Kerr, according to Ms Harvey, indicated that he did not wish to take Ms Harvey on and that he had sufficient staff from his other pharmacy to cover the requirements of the Waltham Pharmacy.

[24] Having had this discussion with Mr Kerr, and notwithstanding the really negative outcome of the conversation, Ms Harvey immediately returned to work the next day and did not confront Mr May. Mr May's evidence was that when Ms Harvey eventually told him about the result of her discussion with Mr Kerr, he took the matter up with Mr Kerr and tried to get Mr Kerr to change his mind. He was unsuccessful.

[25] Mr May said that he was surprised by Mr Kerr's attitude. Mr May acknowledged that he had not spoken to Mr Kerr before taking Ms Harvey on and that he had just assumed that Mr Kerr would want to take Ms Harvey on as part of his staff team. Mr May's evidence was that the Waltham Pharmacy ran with two staff (himself and one other person) and that that was a minimum requirement.

[26] After Ms Harvey had established from Mr Kerr that there was no position for her after the change in business ownership on 31 March, she immediately took steps to find an alternative position and she resigned her position with Milton Grange on 17 February 2006.

[27] The parties attended mediation in an endeavour to resolve their employment relationship problem but were not successful.

**Issues:**

[28] The only issue of significance in relation to this employment relationship problem is when Ms Harvey found out about the sale of the business (and the consequent effects, or potential effects, on her job security).

[29] It is helpful to address that issue by addressing two questions.

**What happened pre-employment?**

[30] Mr May is adamant that he told Ms Harvey that he had sold his business and he says that he did this at her job interview which was conducted in the Waltham Pharmacy.

[31] Ms Harvey, for her part, is equally adamant that Mr May did not tell her that he had sold his business during that job interview and that the first that she knew of the changed circumstances was when she overheard a comment from a customer in the pharmacy some time after she had commenced employment, perhaps within the first two weeks of her employment.

[32] Mr May says that he made no secret of his having sold his business and he cannot imagine why he would not have told Ms Harvey. He makes the point that the subject of the sale of the business was, as he remembers it, not a major topic of discussion at the interview but he is very clear that he mentioned it.

[33] Ms Harvey, for her part, says that she would not have accepted the position if she had understood that the position was in effect only a short term one. Her contention was that the fact that she accepted the position, contemplated further training to enable her to obtain a qualification and purchased uniforms for use in the pharmacy, all support the view that she was not told before employment that there was to be a change in the employer.

[34] Mr May, while contending that he had told Ms Harvey that there was to be a change of employer shortly, also maintained that in any event it had always been his conviction that there was a position in the business for Ms Harvey. Mr May formed that view because he had spoken with Mr Kerr (the purchaser) about Mr Kerr continuing to employ Ms Harvey's predecessor and Mr May believed that because Mr Kerr was happy to employ Ms Harvey's predecessor, he would be equally happy to employ Ms Harvey.

[35] As was pointed out by Ms Harvey's representative during the investigation meeting however, there was a distinct difference between Ms Harvey and her predecessor. Ms Harvey's predecessor was an overseas-trained pharmacist who, after further study in this country, would have been able to be accredited as a pharmacist in New Zealand. Ms Harvey, on the other hand, would never have been in that category; she was an experienced pharmacy worker who aspired to be a pharmacy technician. In order for her to become a pharmacy technician, she would have needed to complete the relevant training requirements. That was the training that she was proposing to undertake when she commenced employment with Mr May's firm.

[36] I have reached the conclusion, that Mr May may have thought he told Ms Harvey that the business had been sold, but I am equally satisfied that Ms Harvey did not hear that statement (if made) and her behaviour is, in my opinion, consistent with her not having heard such information.

[37] I am also satisfied on the balance of probabilities that Mr May had developed a belief that Ms Harvey would have been taken on by Mr Kerr and that Mr May was genuinely surprised by Mr Kerr's refusal to take Ms Harvey on, which refusal was only communicated after Ms Harvey had entered into employment with Mr May.

[38] Mr May had, I conclude, reached the conclusion before recruiting Ms Harvey that her position was secure because Mr Kerr had intimated that he would provide employment for Ms Harvey's predecessor. I do not think that Mr May had turned his mind to the signal difference between Ms Harvey's qualifications and experience on the one hand and her predecessor's on the other. I accept Mr May's evidence that he believed that Ms Harvey's position was secure, although of course, as a matter of fact, it plainly was not.

### **What happened after the employment commenced?**

[39] It is common ground that when Ms Harvey inquired about the job from Mr May, she indicated her enthusiasm for completing training which she had started some years before. The effect of completing that training would have been to fully qualify her as a dispensary technician.

[40] Both Mr May and Ms Harvey acknowledge that Mr May was supportive of Ms Harvey completing this qualification and encouraged her to do so.

[41] Within the first few days of her employment by Milton Grange, Ms Harvey had contacted the Pharmacy Industry Training Organisation, advised them of her circumstances and asked them for advice as to how she might go about completing her training and what the requirements would be.

[42] As has already been established, Ms Harvey received a written response from the Pharmacy Industry Training Organisation dated 23 December 2005. This included a form which was required to be signed by the pharmacist who would be supervising the student. Ms Harvey says that she brought that material in to Mr May at work on 12 January 2006 and asked him to sign the document that was required to be signed by her supervising pharmacist. Ms Harvey says that Mr May was *evasive*. Mr May, for his part, says that he was busy at that time of year and, in any event, felt that given his imminent departure, it may not be appropriate for him to sign the document.

[43] Mr May says that he referred Ms Harvey to Mr Kerr, the purchaser of the business. Ms Harvey went to see Mr Kerr in mid-January 2006 and Mr Kerr confirmed that he had no position for Ms Harvey and in consequence there was no prospect of her commencing her training with him as effectively a professional sponsor. That view was subsequently confirmed for the purposes of the Authority's investigation by a written statement from Mr Kerr.

[44] Having established from Ms Harvey that Mr Kerr was not committed to Ms Harvey continuing in the employment, Mr May indicated in his oral evidence that he went to see Mr Kerr and tried to persuade him that Ms Harvey should continue to be employed, but he was unsuccessful.

[45] The issue of Ms Harvey's training is significant because it is the pursuit of the training option which enabled Ms Harvey to establish the insecurity of her position. There is conflict in the parties' evidence over whether Mr May told Ms Harvey about the sale of the business when he interviewed her. However, the evidence is clear that, once Ms Harvey knew unquestionably that the business had been sold (the occasion when she overheard a customer talking to Mr May in mid December 2005) Mr May re-assured her that her position was secure. However, within a month a later exchange between the two principal protagonists over Ms Harvey's training clearly made her very anxious indeed. Mr May declined to sponsor Ms Harvey's study and referred her to Mr Kerr who subsequently confirmed that Ms Harvey had no position after the sale and thus no prospect of training either.

## Determination

[46] I am satisfied, on the balance of probabilities, that Mr May did not take sufficient steps to ensure that Ms Harvey understood that he had sold his business. He was bound to establish clearly with her what the terms of her engagement were and he failed to do that. Even if it was not clear at the beginning of the engagement that there was confusion, it became very clear soon after the employment commenced that something more than reassurance was required.

[47] Further, Milton Grange failed to provide Ms Harvey with an employment agreement. That failure I think is significant because, had that agreement been provided, as the law requires, it would of necessity have forced the parties to recognise the nature and extent of the employment relationship contemplated by each of them to the other.

[48] Given that finding, I am disposed to award a penalty against Milton Grange of \$750 for the failure to provide an individual employment agreement in accordance with the law.

[49] I consider that, on the balance of probabilities, Ms Harvey has made out her claim of an unjustified action to her disadvantage. By all accounts it was very clear very quickly that Ms Harvey was operating on a misconception about the nature of her relationship with Milton Grange. Milton Grange either knew the relationship was short term or failed to take proper steps to ascertain its term.

[50] This misconception would have become absolutely plain to both parties around the issue of Ms Harvey's desire to improve her qualifications. I think Mr May was quite genuine that he believed Mr Kerr would employ Ms Harvey (because Mr Kerr had given him to understand that Ms Harvey's predecessor would be employed), but I do not think Mr May took into account the difference in the professional background of Ms Harvey and her predecessor. I think that was an error of judgement which, with the benefit of 20/20 hindsight, no doubt Mr May, who struck me as an honourable and decent man, would have wanted to revisit. Clearly, Mr May should have checked with Mr Kerr and did not. That failure is, in my view, the unjustified action which grounds Ms Harvey's claim of disadvantage.

[51] I think what Milton Grange ought to have done, as soon as it became clear that Ms Harvey was not going to continue in her employment, was to promptly enter into negotiations with Ms Harvey with a view to providing her with a severance arrangement which both compensated her for the loss that she suffered, both in terms of the emotional harm and the loss of opportunity, and perhaps also provided appropriate assistance to her to relocate to another suitable position, hopefully within the pharmacy industry, and hopefully in circumstances where she might have continued to pursue her training.

[52] As none of that happened, Mr May says because Ms Harvey resigned (and Ms Harvey says because there was no sense that any such arrangement was on offer), matters were left in a thoroughly unsatisfactory state and it is left to the Authority to try, after the passage of significant time, to replicate what the parties might have agreed had they had that opportunity.

[53] I think it appropriate for Milton Grange Limited to pay to Ms Harvey the sum of \$7,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[54] There is nothing the Authority can now do to try to assist Ms Harvey back into the industry in which she clearly had such an affinity, but I think that a combination of the compensatory payment I award and the penalty of \$750 for the failure to provide an employment agreement, which I direct is also to be paid to Ms Harvey, may go some way towards repairing the damage done by this situation. I heard evidence of Ms Harvey's distress at losing her job, distress which was exacerbated by her genuine desire to return to this particular industry. I accept Ms Harvey's evidence that she would not have accepted the position if she had known it was short-term; the very fact the job lasted such a short time made the hurt worse.

[55] As I am required to do by the effect of s123 of the Employment relations Act, I have considered whether there is any evidence of contributory fault by Ms Harvey. I find none.

[56] I am also required to consider the question of whether there has been a breach of the good faith obligation, as is claimed by Ms Harvey. I find no evidence of a breach of good faith. I consider Mr May (for Milton Grange) genuinely believed he was engaging Ms Harvey for continuing employment, first with Milton Grange and then with Mr Kerr. I find, on the balance of probabilities, that Mr May's failure to ascertain that Mr Kerr would continue with Ms Harvey's employment was a genuine and honest mistake and not an action of an employer cavalier about its obligations. However, as I have already indicated, that failure of Mr May grounds Ms Harvey's disadvantage claim and I have already determined that Ms Harvey should be compensated for that failure. A further award of compensation for the same facts would be unjust.

### **Costs**

[57] Costs are reserved.

James Crichton  
Member of Employment Relations Authority