

**NOTE: This determination
contains an order prohibiting
publication of certain
information at [10] and [11]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 101
3174086

BETWEEN

THERESE JAMES
Applicant

AND

TAURANGA BIRTHING
CENTRE LIMITED
Respondent

Member of Authority: Claire English

Representatives: Alex Hope, counsel for the Applicant
Stephen Langton, counsel for the Respondent

Investigation Meeting: 14 and 15 November 2023 in Tauranga

Submissions received: 5 December 2023, 5 January and 19 February 2024 from
Applicant
21 December 2023 from Respondent

Determination: 23 February 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Therese James, worked for the respondent Tauranga Birthing Centre Limited (Birthing Centre). Ms James was an experienced nurse and midwife, who had recently returned to New Zealand after spending time in Australia.

[2] On one particular occasion, Ms James was asked by a colleague to assist with a difficult birth. The mother later laid a complaint with the Birthing Centre about Ms

James, raising serious concerns against her saying among other things, that Ms James had carried out two medical procedures on her without her consent.

[3] The Birthing Centre called Ms James to a meeting to put the mother's complaint to her. Ms James was upset to be faced with such a serious complaint, and perceived that her job was in jeopardy. Ms James left the meeting believing she had been fired. Ms James' manager formed the view she had resigned.

[4] Ms James waited to be contacted by the Birthing Centre to be told what investigatory steps it would take. The Birthing Centre did not contact her.

[5] Ms James now raises claims of unjustified suspension and/or unjustified dismissal, and seeks remedies of lost remuneration, compensation for hurt and humiliation, and costs.

[6] The Birthing Centre says that Ms James was not dismissed, but that rather she resigned. It also says she was a casual employee, and as such it was under no obligation to offer her continuing work, and thus could not have fired her as a matter of law. In any event, it says that Ms James contributed to the situation she found herself in, and no remedies are properly owed.

The Authority's investigation

[7] For the Authority's investigation written witness statements were lodged from Ms James, and from her support person, Ms Rosaline McLaughlin. For the Birthing Centre, witness statements were lodged from Ms James' manager, Ms Alexandra Deas, Ms Traci Fricker, and Ms Bernice Higham. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[8] 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

[9] The issues requiring investigation and determination were:

- (a) Was Ms James a casual employee, or a permanent employee?

- (b) Was Ms James dismissed, or did she resign? Alternatively, was Ms James unjustifiably disadvantaged by being suspended without pay?
- (c) If the Birthing Centre's actions were not justified (in respect of disadvantage and/or dismissal), 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;
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms James that contributed to the situation giving rise to her grievance?
- (e) Should either party contribute to the costs of representation of the other party.

Other Matters

[10] The Birthing Centre has asked that orders be made that personal and medical details about the mother that made the complaint against Ms James be sealed, and that her name not be published. Ms James does not oppose this.

[11] The mother did not give evidence at the investigation meeting, although details of her complaint were provided to the Authority and discussed in evidence, as an integral part of the background that led to Ms James' personal grievance claim. There is no necessity for the mother's name or details of her complaint (which include her personal medical information) to be made public in this determination, and no public interest in the disclosure of this information. Accordingly, the mother's name and the name of her partner, as well as the complaint, are subject to a non-publication order, and the Authority's file may not be searched without further orders.

Background

[12] Ms James began work for the Birthing Centre on 21 July 2021 as a midwife. She had previously trained and worked as a registered nurse and a registered midwife since approximately 1990, both in New Zealand and in Australia.

[13] Ms James had recently returned from living in Australia and was required to undertake study to renew her midwifery registration in New Zealand. She contacted the Birthing Centre on the recommendation of a friend, Ms McLaughlin. The Birthing

Centre was looking to hire a midwife and they offered Ms James employment. Ms James did not have fixed hours or shifts. Rather, the Birthing Centre employed some permanent midwives who worked agreed hours. The Birthing Centre would create rosters up to two months in advance and populate the rosters with the agreed hours for their permanent staff. Other shifts would remain available for part-time and casual staff who would indicate which shifts they would work by writing their names in the appropriate spaces on the roster, on a “first come, first served” basis.

[14] Ms James was happy to accept this, despite the possibility of variable hours of work and pay. She gave evidence that she preferred to work nights as this allowed her time to complete her study, and generally, night shifts were not as popular. Because of this she found she was always able to be rostered for the shifts and times she desired, and even picked up more work from time to time if there were short-term absences.

[15] Ms James was given a written individual employment agreement, which was signed by both parties. The letter of offer that accompanied the agreement stated that Ms James would be employed on a casual basis without elaborating. Schedule A to the agreement stated that her employment was “casual” and did not fix any hours of work. The agreement itself contained no mention of casual status, and contained provisions inconsistent with casual status, including a probationary period, provision for the accrual of annual leave (which occurred), redundancy, and a 4 week notice period.

[16] The Birthing Centre says that it meant to give Ms James a casual employment agreement, but that its permanent template was used by mistake. It says that Ms James’ status in the payroll system was “permanent” and her annual leave accrued rather than being paid out at the rate of 8% also by way of a mistake. It asks the Authority to determine that Ms James was a casual employee, despite these mistakes.

[17] No issues arose from any of this at any time during Ms James’ employment.

[18] On 3 November 2021, the Birthing Centre received the complaint from the mother already referred to. Ms Deas was very concerned by this. She interviewed another midwife who had been present on the night in question, took notes of what this midwife said, and asked the midwife to put her thoughts in writing.

[19] She then called Ms Fricker to ask for advice as to what to do next. Ms Fricker was the Operations Manager responsible for the Birthing Centre, among other entities

in the Centre's parent group. Ms Fricker called one of her colleagues who was employed to provide human resources support to the childcare arm of the group for advice, and then went back and discussed matters with Ms Deas.

[20] Ms Fricker and Ms Deas agreed that in their view, the complaint was so serious that the Birthing Centre was obliged to suspend Ms James. They came to the conclusion that this should be done immediately as Ms James was scheduled to work a shift the following evening. They also concluded that Ms Deas would need to carry out some sort of investigation.

[21] On 4 November 2021, Ms Deas called Ms James. She told Ms James that a complaint had been received about her, but did not give details of what that complaint was or who had made it. She did not mention suspension. Ms Deas asked Ms James to come in to meet with her as soon as possible, and that Ms James could bring a support person.

[22] Ms James was concerned about this, and asked Ms McLaughlin (who was also a midwife) to attend as her support person.

[23] The meeting was held in the afternoon of that same day, 4 November 2021. Ms Deas handed a copy of the mother's complaint to Ms James for her to read. Ms James did so, and was immediately upset by the tenor and seriousness of the allegations. She handed the complaint to Ms McLaughlin to read. Ms McLaughlin was only able to skim the complaint before Ms James and Ms Deas began discussing the detail of it.

[24] Ms James gave Ms Deas her version of events. She was upset and in tears. Ms James discussed this with Ms Deas and said that she would like to meet with the mother if she was agreeable, with a view to acknowledging her feelings and apologising.

[25] The meeting notes taken by Ms Higham and written up at a later point record that Ms James said to Ms Deas that she did not feel safe at the Birthing Centre, and was not planning on returning. Ms James disputes that she said this.

[26] The notes record that Ms Deas then said that, while the investigation was taking place, Ms James would be stood down from her duties, effective immediately.

Although the notes do not record this, those present at the meeting recall that Ms Deas referred to being stood down under or in accordance with the Vulnerable Children Act¹.

[27] The notes record that Ms James said she understood, and did not “plan to continue”. Ms James does not recall saying this. Ms Deas then said, “so you don’t plan to continue working at [the Birthing Centre]”? Ms James replied “no, I’m leaving”. Ms James said she recalls saying she felt unsafe, and saying that she wanted to go.

[28] The meeting ended on this basis. Ms James left with Ms McLaughin, who recalls that Ms James was distressed, and her hands were shaking. Ms McLaughin felt Ms James was in no condition to drive, and so drove her home.

[29] Ms James gave very clear evidence at the investigation meeting as to what she understood had occurred at this meeting. She recalled that Ms Deas had said she was stood down. Ms James understood this to mean that she was not to work, or return to work at the Birthing Centre, and that she had been fired.

[30] Ms James was very clear in her belief that she had been fired at the conclusion of this meeting. When asked how she could be sure when the evidence suggested Ms Deas had only used the words “stood down”, Ms James said that the intent of Ms Deas’ words was that she not work any longer at the Birthing Centre and that she thought Ms Deas has used those words (rather than “you’re fired”) as a way of being kinder. Ms James pointed out she had never been fired before and had no expectations as to what words might be used to express this.

[31] Ms Deas’ evidence was that Ms James had resigned at the meeting, by saying that she “did not feel safe” working at the Birthing Centre, was “not planning on returning”, and by saying “no, I’m leaving”. Ms Deas said she “confirmed” that Ms James meant to resign, by saying to her: “so you don’t plan to continue working”, immediately after Ms Deas had said that she was stood down from her duties, effective immediately. According to Ms Deas, Ms James replied “no, I’m leaving”. Ms James recalls she said “I want to go”.

¹ Although this act was re-named the Children’s Act 2014 in 2018, witnesses for the Birthing Centre consistently referred to the Vulnerable Children Act. Witnesses were not able to clearly explain how this Act was relevant, and I was not much assisted by these discussions.

[32] About half an hour after this meeting ended, Ms Deas emailed Ms James. Ms Deas said her purpose in doing so was to clarify that Ms James had resigned at the meeting, and to create a record of this. The email was short, and can be set out in its entirety:

Thank you for meeting with Bonni and I today, to discuss the complaint.

As stated in the meeting, due to the facility's obligations under the Vulnerable Children's Act [sic] your employment is now suspended until the conclusion of the investigation.

However, you Therese, stated that you wish to stand down from your casual position at Bethlehem Birthing Centre. I will liase with the client to arrange a mediation meeting as requested by you and let you know date and time next week.

[33] Ms James replied just over an hour later. She said "Thanks".

[34] Ms James explained that when she received this email, she took it as confirmation of what Ms Deas had already told her in the meeting, that is, that her employment was at an end. She says she replied "thanks", as the last sentence in the email referred to Ms Deas setting up a meeting which Ms James wanted, and she was saying thank you to Ms Deas for arranging that.

[35] Ms James says that she thought about replying to, in some way, indicate she had not agreed to what had happened at the meeting, but she was feeling very overwhelmed, and was expecting to be contacted next week about a further meeting in any case. So she said nothing.

[36] Ms James heard nothing further from the Birthing Centre, or Ms Deas.

[37] Ms Deas met with the mother, and provided her with an apology on the part of the Birthing Centre. Ms Deas gives evidence that she considered what the mother told her, as well as what she had been told by another midwife who was on duty with Ms James at the relevant time, and a student midwife who had been on duty at the start of Ms James' shift only. Ms Deas personally concluded that the mother's complaint was "substantiated", explaining that she preferred the mother's account of events to what Ms James had told her in the 4 November meeting.

[38] Ms Deas filed a Notice of Concern about Ms James' conduct with the Midwifery Council of New Zealand on 25 November 2021. This in turn was referred to the Health

and Disability Commissioner. I record that Ms James participated in their processes, and the outcome was a recommendation that Ms James complete certain training courses as part of her professional development. Ms James promptly did so.

[39] On 19 December 2021, Ms James received a payment into her account from the Birthing Centre. She was not communicated with in any other way. Ms Fricker explained that payroll had provided her with a list of midwives, as part of the work the Birthing Centre was required to do to comply with the vaccination requirements for health workers. Ms Fricker saw that Ms James had outstanding annual leave payments, and, as Ms James was no longer employed by the Birthing Centre, asked payroll to pay this out.

[40] Ms James was severely impacted by what had happened. She gives evidence that she was very distressed, found it difficult to do anything, and lost a considerable amount of weight, and sought advice from her doctor about this. She sought EAP support, both for the loss of her job and because the complaint and allegations made against her had brought up a specific incident of past trauma for her.

[41] Ms James was left without income. After a month, she needed to move to Hamilton to live with her brother and his wife, as she could not afford to pay rent. She began seeing a few clients on an independent basis. She explains that she no longer feels confident or safe to work with woman who were not known to her, or to work in a hospital setting. She now sees a handful of clients independently, and continues to slowly recover her confidence, even some two years after the events.

[42] Ms McLaughlin has known Ms James for many years. She emphasises that Ms James has truly lost her confidence as a result, both personal and professional, and in her view, is not the person she once was.

Analysis

[43] I will first consider whether Ms James' employment was "casual" in nature, as the Birthing Centre suggests that this means it was under no obligation to offer Ms James further work following the 4 November 2021 meeting.

[44] Ms James' employment agreement is a permanent employment agreement. There is no provision in that agreement stating that the employment is "casual", or on an as-required basis. The agreement contains provisions which are fundamentally

inconsistent with such a status, including the provision of annual leave on an accrual basis, a probationary period, a notice period of 4 weeks, and redundancy and confidentiality provisions.

[45] In saying that Ms James was a casual employee, the Birthing Centre relies on a prior conversation Ms Deas says she had with Ms James explaining that casual employment will be offered, as well as a statement in the letter of offer that “This is a casual position”, and finally a line in Schedule A of the agreement. The schedule was headed: “Schedule “A” to Permanent Employment Agreement”. Options were provided under the heading “employment status” for permanent full time, permanent part time, casual, and fixed term. The options for permanent full time, permanent part time, and fixed term had been struck out, and the number of hours to be worked in a fortnight was left blank.

[46] The Birthing Centre is asking that I read into the employment agreement a provision to the effect that Ms James was employed on an “as required” basis where one does not exist. Such a term would be inconsistent with the agreement itself, and inconsistent with the way Ms James’ employment status was recorded and administered in the Birthing Centre’s own payroll system. I am not persuaded that this is a “mistake” as the Birthing Centre witnesses suggest. The short answer is that it was within the Birthing Centre’s control to offer to Ms James a casual employment agreement, if it had wished to do so. It did not do this. It was also within the Birthing Centre’s control how Ms James’ employment was described in the payroll system, and how she was treated as regards to holiday and leave entitlements. In these matters again, the Birthing Centre recorded and treated Ms James as a permanent employee. The record of hours worked supports her claim to be a permanent part-time employee, working flexible hours.

[47] The matter of her employment status has now been raised as a defence to Ms James’ personal grievance claim. I am not persuaded that there is any good reason for me to read an additional and inconsistent term into Ms James’ employment agreement under these circumstances.

The Ending of Ms James' Employment

[48] A dismissal occurs when the initiative for the ending of the employment comes from the employer, or as is sometimes expressed, the employee is sent away by the employer.

[49] Ms James believed that her employment was at an end, and that the Birthing Centre would not have her continue work whether she wanted to or not. This was caused by the imprecise wording used by Ms Deas.

[50] Ms Deas spoke with and then emailed Ms James saying that Ms James had been "suspended" and "stood down". The Birthing Centre never explained to Ms James what was meant by the reference to either "suspension" or being "stood down".

[51] The Birthing Centre then ceased contact with Ms James until providing her with her final pay. In all respects, the Birthing Centre acted as if Ms James' employment had come to an end, by ceasing all contact with her and paying out her final pay.

[52] Ms Deas states that she believed Ms James had resigned. However, Ms Deas never put this to Ms James, or used the word "resignation" either during their in-person meeting or in her follow-up email.

[53] It is not accurate to say that Ms James resigned in those circumstances. Ms James was told by her manager that a serious complaint had been made against her, and that she would be "stood down" from her job. Ms James understood this to mean the ending of her employment. At the time, her support person records she was in tears, and physically shaking. The Birthing Centre cannot explain why it did not clarify to Ms James what was meant by the words "suspension" and "stood down" or how this would impact her employment so as to avoid this confusion.

[54] In addition, Ms Deas cannot explain why her subsequent email to Ms James did not in fact set out what she says was her belief that Ms James had resigned, or do what she had said was her intention, to clarify that Ms James had resigned. If Ms Deas had intended to confirm that Ms James had resigned, she could either have asked her that question directly, or stated that a resignation occurred so that Ms James could respond. Ms Deas did neither, and cannot explain why.

[55] It is not enough for the Birthing Centre to rely on an assumption by Ms Deas that Ms James had resigned when this had never been discussed. Relying on a general comment from an employee who was visibly in distress to the effect that she “wanted to go” or “wanted to leave” is not enough. Ms James says she wanted to leave the distressing meeting, which is entirely plausible. Ms James believed she had been sent away. The Birthing Centre acted in a way that supported her assumption.

[56] The initiative for the ending of Ms James’ employment came from the Birthing Centre. Ms James was dismissed.

[57] It is apparent from the comments I have already made that this dismissal does not meet the test of justification set out in section 103A of the Act. The Birthing Centre never discussed the ending of employment with Ms James prior to acting on their assumption that employment had ended. Ms James was not provided with any opportunity to respond to the assumption made by Ms Deas or to put forward her views. It is also significant that the Birthing Centre told Ms James in the follow up email that they would be back in touch “next week” to arrange a meeting, yet this never happened. The actions of the Birthing Centre are unjustified.

[58] It is also pleaded for Ms James by way of alternative that she was unjustifiably suspended on 4 November either during that meeting, or afterwards by way of Ms Deas’ confirming email. As set out above, my view is that Ms James was not in fact suspended, she was instead dismissed. It is worth noting that although Ms James’ employment agreement provides for suspension, this is expressed to be suspension with pay. The Birthing Centre made no attempt to pay Ms James once she had left the workplace on 4 November, reinforcing the conclusion that her employment ended that day regardless of the contrary reference to suspension in Ms Deas’ email. Given my finding that what occurred was an unjustified dismissal, there is no need to make findings on this claim.

Remedies

[59] Ms James has a personal grievance for unjustified dismissal, and is entitled to remedies accordingly. Ms James seeks remedies of lost remuneration, compensation for hurt and humiliation, and costs.

Lost Remuneration

[60] Section 128 of the Act provides that where an employee has a personal grievance and has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration. Ms James has a personal grievance for unjustified dismissal. Her evidence is that she lost remuneration, as despite being on a roster immediately prior to the ending of her employment on 4 November, she had already been rostered on to work up until 30 December. Ms James calculates the monetary value of those shifts as \$12,944.60 gross.

[61] In addition, Ms James sets out that her average weekly earnings over the period of her employment were \$1,607.18 gross per week.

[62] Ms James has calculated her lost wages up to the date of the investigation meeting over a period of 105.42 weeks. However, I am not minded to make an award of lost remuneration for this duration. Ms James' evidence was that she found work relatively promptly albeit on a more limited basis by or after Christmas. She has also provided evidence of earnings starting in the first week of January consistent with her in-person evidence. Although she decided to limit the scope of her practice which also limits her earnings, this is not as a result of any limitations on her professional certification, but rather based on work she feels comfortable doing.

[63] In these circumstances, my view is that the amount of remuneration Ms James has lost is the sum of \$12,944.60 for her rostered shifts up to the end of December. She found new work after this time, albeit at a reduced rate as noted above. Orders are made accordingly.

Compensation

[64] Ms James also claims compensation for humiliation, loss of dignity, and injury to feelings. Ms James gave evidence of impact on her, as set out above. These events have changed the way she practices and impacted how she lives and earns. I accept her evidence of the impacts on her, which she explained openly, and was supported by someone who knew her.

[65] The Birthing Centre submits that it is important to separate out the impact of conduct attributable to the Birthing Centre itself, and the impact of the complaint which was not from the Birthing Centre. There is no doubt that Ms James was distressed by both the contents of the complaint, and by the way in which the Birthing Centre conducted itself towards her. Some allowance should properly be made to account for the distress caused by the complaint itself, which is separate from the actions of the Birthing Centre.

[66] However, the actions of the Birthing Centre in how it ended Ms James' employment fell far short of what was required of a responsible employer, and have caused on-going distress and financial impacts for Ms James which should never have occurred. Taking into account Ms James' short tenure, the separate impact of the complaint itself, and other current awards, my view is that a compensatory award of \$17,000 is appropriate. Orders are made accordingly.

Contribution

[67] Section 124 of the Act requires me to consider the extent to which any actions by Ms James contributed towards the situation that gave rise to the personal grievance, and whether such actions require a reduction in remedies.

[68] The Birthing Centre submits that there was contributory conduct by Ms James, in that she failed to correct the misconception that she had resigned at the 4 November meeting, including by responding to the 4 November email from Ms Deas with the single word "thanks". It is submitted that this denied the Birthing Centre of the opportunity to say there had been no dismissal and carry out its investigation of the complaint, therefore Ms James contribution to her dismissal should be assessed at 100% with no remedies awarded.

[69] The difficulty with this submission is that the confusion in this situation was caused by Ms Deas, not Ms James. Ms Deas never said to Ms James, either in person at the conclusion of the meeting, or in the follow-up email, that she believed Ms James had resigned. Ms James cannot be criticised for failing to correct Ms Deas' misconception that she had resigned, when Ms Deas had not put this to Ms James for response. In addition, the Birthing Centre exacerbated this problem by telling Ms James in email that it would contact her next week to set up a meeting, but then never doing

so. Again, a potential opportunity for clarification was lost, but not through the actions of Ms James.

[70] In a similar manner, the Birthing Centre also submits that Ms James could not have understood the phrase “stand down” or “stood down” as being a dismissal. Ms James’ evidence is that she did so understand it, and her confusion on this point was shared by Ms Deas, who even at the investigation meeting, was unable to clearly explain to me what she meant by the two different phrases she used of “stand down” and “suspension”. If Ms Deas could not clearly or accurately express what she meant by those words and did not explain to Ms James what this meant in terms of her employment, it is not unreasonable that Ms James understood them to mean a dismissal.

[71] As to the suggestion that the Birthing Centre was denied the opportunity to carry out its investigation of the complaint by Ms James’ failure to correct the misconception that she had resigned, this is not supported by Ms Deas’ evidence that she, in Ms James absence, met with the complainant and concluded that she preferred her evidence and that the complaint was “substantiated”.

[72] Returning to the requirements of section 124 of the Act, I find that there were no actions by Ms James that contributed to her personal grievance. Accordingly, no reductions in remedies are required.

Orders

[73] The Birthing Centre Limited is orders to pay to Theresa James within 28 days of the date of this determination:

- a. The sum of \$12,944.60 gross, being lost remuneration;
- b. The sum of \$17,000 without deduction as compensation for humiliation, loss of dignity, and injury to feelings.

Costs

[74] I note that Ms James is legally aided. Her submissions as to costs are effectively set out in the reply submissions dated 5 January 2024.

[75] As the respondent has not yet had an opportunity to respond on this point, costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[76] If they are not able to do so and an Authority determination on costs is needed, the applicant may (if she wishes to add to what has been already filed) lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter, or advise the Authority that no further submissions will be filed. From this date, the Birthing Centre 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, but if needed, leave should be sought.

[77] 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

Claire English
Member of the Employment Relations Authority

² Please note the Authority's Practice Note on costs, available at <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>