

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 569
3208259

BETWEEN

JOHANNA LESCURE
Applicant

AND

HOKI DENTAL LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Ruth Pettengell, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 29 September 2023 at Hokitika

Written Record Issued: 2 October 2023

DETERMINATION OF THE AUTHORITY

This determination is a written record of an oral indication delivered on 29 September 2023.

Employment relationship problem

[1] Hoki Dental Limited operates a dental practice in Hokitika. Angelo Ioanides is the company's director.

[2] Mr Ioanides offered Johanna Lescure a permanent position as a dental assistant. Ms Lescure says she accepted the offer. Shortly after the offer but before Ms Lescure started work, Mr Ioanides sent Ms Lescure an email saying that as things had changed they were unable to offer anything more than a casual contract, as the position they had offered would no longer exist. Ms Lescure did not agree to the casual contract.

[3] Ms Lescure raised a personal grievance claim of unjustified dismissal and seeks compensation and reimbursement of lost remuneration.

[4] Hoki Dental Limited says that it withdrew its offer of permanent employment before it had been accepted, so Ms Lescure was not an employee and could not have been dismissed. Alternatively, Hoki Dental Limited says that if there was an employment agreement, it had become frustrated and could be terminated under s 60 of the Contract and Commercial Law Act 2017. Hoki Dental Limited also says that its decision was justified.

[5] Despite mediation, matters were not resolved.

The Authority's investigation

[6] The exchanges that gave rise to the problem were largely by email. The parties provided printed copies with the statement of problem and statement in reply.

[7] Ms Lescure provided a statement, gave evidence on oath and answered questions. Ms Lescure's partner, Mr Storrie, similarly gave evidence.

[8] Hoki Dental Limited provided several sets of material but did not appear to give evidence or attend the investigation meeting.

[9] It was apparent from the file that the respondent had notice of the investigation meeting. At my direction, an Authority Officer rang Hoki Dental Limited to speak to Mr Ioanides but the person who answered declined to put the call through to Mr Ioanides. A message was left that the investigation meeting would proceed.

[10] A personal grievance includes a claim by an employee against their former employer that the employee has been unjustifiably dismissed. Ms Lescure must show she was an employee as defined in the Employment Relations Act 2000 for the Authority to consider whether she has a personal grievance.

[11] The issues are:

- (a) Was Ms Lescure a person intending to work?

- (b) If yes, was the employment agreement frustrated?
- (c) Or was Ms Lescure dismissed?
- (d) If Ms Lescure was dismissed, was it justified?
- (e) If not justified, what remedies should be ordered?

[12] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

Was Ms Lescure a person intending to work?

[13] The definition of employee in the Employment Relations Act 2000 includes a person intending to work. A person intending to work means a person who has been offered, and accepted, work as an employee.¹

[14] On 9 June 2022, Mr Ioanides sent Ms Lescure an email under the subject header “Hoki Dental position” to ask if she was still interested in a position with the company. Mr Ioanides had kept Ms Lescure’s contact details after her earlier contact to inquire about a job. The email was followed by an in-person interview on Saturday 11 June.

[15] The interview went well and Mr Ioanides said they would offer employment to Ms Lescure.

Hoki Dental Limited offers work as an employee to Ms Lescure

[16] On 12 June 2022, Mr Ioanides sent Ms Lescure a “draft employment contract” for her to consider.

[17] This was followed by an email from Mr Ioanides as follows:

We forgot to mention that should you come on board at the beginning of July, you would be working full time for the first 5 weeks due to you covering a staff member on leave.

¹ Employment Relations Act 2000 s 5.

[18] Based on these exchanges, I find that Hoki Dental Limited offered Ms Lescure work as an employee to work fulltime for the first 5 weeks. I note that the draft employment provided for at least 60 hours per fortnight.

Ms Lescure accepts the offer

[19] I also find that Ms Lescure accepted work as an employee for the following reasons.

[20] On 16 June Ms Lescure sent Mr Ioanides an email to say that she has read the contract and had a few questions. The first question concerned uniforms and footwear, the second question was about whether she could take some leave at Christmas and her third question was whether they would like her to start Monday 4 July 2022. Ms Lescure asked about the date because the “draft employment contract” included “June 4, 2022” as the commencement date, which predated the offer.

[21] Mr Ioanides answered the questions by email on 16 June 2022. Regarding the start date he said “we would be looking at July 11”.

[22] Ms Lescure replied on 22 June as follows:

Hi Angelo,
everything looks perfect 😊
Could we say the 4th for the start date? Would like to start fresh and not at the end
of the week.
Thank you,
Johanna

[23] Hoki Dental Limited’s offer did not specify any particular mode by which it could be accepted. It is quite common for employment relationships to be formed without the formality of a signature. The first line of Ms Lescure’s reply unequivocally conveyed her acceptance of the offer of work.

[24] Ms Lescure’s request to start on 4 July rather than 11 July did not undermine her acceptance of the offer of work as an employee. Again, it is reasonably common for an employee or employer to discuss the starting date, without the formation of the employment relationship turning on that point.

[25] Hoki Dental Limited says that Ms Lescure had to sign and return the employment agreement to accept its offer and become a person intending to work. I am referred to s 64(6) and s 65(1)(a) of the Employment Relations Act 2000.²

[26] Section 64(6) of the Act does not require employment agreements to be signed in order to be binding. The declaratory nature of s 64(6) simply reflects that an “intended agreement” becomes the employee’s employment agreement only if it is signed by the employee, or if the employee has in some other way “agreed” to the terms and conditions in it. Section 64(6)(b) would not be necessary if an “intended agreement” had to be signed to become an employee’s employment agreement.

[27] Section 65 of the Act requires employment agreements to be in writing, but does not require the employment agreement to be signed in order to be effective.

[28] By 11.54am on 22 June 2022 Ms Lescure was a person intending to work and within the definition of employee in the Employment Relations Act 2000.

Was the employment agreement frustrated?

[29] Both in the statement in reply and in the other material produced to the Authority, Hoki Dental Limited asserts as an alternative defence that any employment agreement was frustrated. I am referred to s 60 of the Contract and Commercial Law Act 2017.

[30] Section 60 of that Act applies if a contract has become impossible to perform or has otherwise been frustrated. The sub-part of the Act introduced by s 60 regulates the effect on the parties.

[31] I take from the material in evidence that the event relied on by Hoki Dental Limited is that one of its dentists apparently had changed her mind and would probably leave to return to a former position when mandates ended. That affected Hoki Dental Limited’s need for a dental assistant, Ms Lescure’s role.

² See the statement dated 6th September 2023 paragraphs [6], [10] and [11] and the statement in reply paragraph 3.1.

[32] Such a circumstance did not make the performance of the employment agreement between Hoki Dental Limited and Ms Lescure impossible or otherwise incapable of being performed. Even if that circumstance made Ms Lescure's position surplus to Hoki Dental Limited's requirements, it was able to exercise rights under the agreement to terminate Ms Lescure's employment on notice following consultation with her.

[33] I find that the doctrine of frustration does not apply.

Was Ms Lescure dismissed?

[34] Dismissal is a sending away by the employer.

[35] On 22 June 2022, Hoki Dental Limited told Ms Lescure that the position "we offered you would no longer exist" and it could now offer her no more than "a casual contract".

[36] Ms Lescure objected to this as "simply not good enough". Mr Ioanides apologised and offered a small amount of money as a gift. Ms Lescure did not accept the alternative offer of casual work or the offer of money.

[37] I find that the 22 June 2022 message from Hoki Dental Limited amounted to a dismissal of Ms Lescure, because Hoki Dental Limited made it clear it would not meet its obligations under the employment agreement with Ms Lescure.

Was the dismissal justified?

[38] The dismissal was unjustified.

[39] Hoki Dental Limited did not raise its concerns with Ms Lescure, did not give her an opportunity to respond and did not consider any response from her before it dismissed her. Hoki Dental Limited did nothing to investigate matters with Ms Lescure before the dismissal. A fair and reasonable employer could not have acted in that manner in all the circumstances at the time.

[40] Hoki Dental Limited claims in material provided to the Authority before the investigation meeting that its offer of casual employment "can be deemed" what a fair and reasonable employer could have done in the circumstances at the time. I take this as a

reference to the dentist who apparently told it she would leave. For present purposes, I will assume this was proven in evidence.

[41] Consideration of alternative positions might be the action of a fair and reasonable employer as part of dealing with a surplus staffing situation. However, no fair and reasonable employer could dismiss the employee without first consulting them about whether or not their position was surplus to the employer's requirements.

[42] Ms Lescure was unjustifiably dismissed and has a personal grievance.

What remedies should be ordered?

[43] There is a claim for reimbursement of lost remuneration.

[44] Ms Lescure's evidence, which I accept, is that she secured replacement employment starting 15 August 2022. The replacement employment was fulltime, paid at a higher rate. I also accept Ms Lescure's evidence that she attempted to mitigate her loss beforehand, but was not able to secure any income from paid employment until 15 August 2022.

[45] It is accepted that 11 July 2022 was the starting date for Ms Lescure's employment with Hoki Dental Limited, as the company did not agree to the earlier start date she requested. I find that Ms Lescure lost remuneration between 11 July to 12 August 2022. The loss was 40 hours per week at \$25.00 per hour over that period, based on Mr Ioanides' statement that she would be working full time for the first 5 weeks. Ms Lescure lost \$5,000.00 (gross) and is entitled to be reimbursed the whole of that sum.

[46] There is a claim for \$15,000.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. I accept the evidence of Ms Lescure about the significant emotion impact she suffered as a result of the unexpected dismissal. It undermined her trust in employers and caused her to question her own judgment. Ms Lescure had turned down an alternative employment offer because she considered that Mr Ioanides was trustworthy, based on the exchanges with him before she accepted his offer. The alternative offer was no longer available when Ms Lescure inquired, after her dismissal. The dismissal caused financial insecurity for Ms Lescure.

[47] I accept Mr Storrie's evidence about the effects suffered by Ms Lescure because of the dismissal.

[48] \$15,000.00 is a modest claim to remedy the proven effects. It will be ordered in full.

[49] Ms Lescure did not contribute to the circumstances giving rise to her personal grievance.

Summary

[50] Ms Lescure was unjustifiably dismissed and has a personal grievance against Hoki Dental Limited.

[51] To settle the personal grievance, Hoki Dental Limited is to pay Johanna Lescure the following amounts immediately:

- (a) Reimbursement of \$5,000.00 (gross); and
- (b) Compensation of \$15,000.00 (without deduction).

[52] Costs are reserved. If the parties cannot agree on costs, the applicant may lodge and serve a memorandum on costs within 14 days of the date of this determination. The respondent will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum. I will determine costs having regard to those submissions and the Authority's standard practice on costs.

Philip Cheyne
Member of the Employment Relations Authority