

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 311
3116535

BETWEEN

TAYLAH MILLEN
Applicant

AND

PUKEKOHE DENTAL LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Mark Nutsford, counsel for the Applicant
Ray Parmenter, counsel for the Respondent

Investigation Meeting: 9 July 2021

Submissions Received: 9 July 2021 from the Applicant
9 July 2021 from the Respondent

Date of Determination: 12 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Taylah Millen was employed by Pukekohe Dental Limited (PDL) as a full time dental assistant. Her employment commenced on 23 December 2019, although there was no written employment agreement. Ms Millen resigned from her employment on 7 August 2020 and claims that PDL constructively dismissed her because it gave her an ultimatum of a return to work in a lesser position or to resign with one month’s pay in lieu of notice. When Ms Millen raised her personal grievance, she says PDL replied in such a way that it destroyed trust and confidence which meant she could not return to her employment.

[2] Ms Millen says she was further disadvantaged by PDL’s refusal to allow her to return to work on a gradual return programme following an injury. She claims three months lost salary of \$12,080.50, holiday pay of \$961.48, holiday pay on lost wages and \$360.55 as a result

of a lost employer KiwiSaver contribution on salary. She also claims a sum of \$20,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, injury to feelings and loss of dignity.

[3] Finally, Ms Millen asks that the Authority impose a penalty on PDL for failing to provide her with an individual employment agreement. She asks that a portion of that penalty be paid to her.

[4] PDL rejects Ms Millen's claims saying:

- (a) There was no unjustifiable disadvantage created in PDL's refusal to allow a gradual return to employment following Ms Millen's injury;
- (b) There was no change proposed to Ms Millen's dental assistant position;
- (c) There was no dismissal (constructive or otherwise);
- (d) PDL accepts liability for the absence of an employment agreement, but says it has an explanation as to how that occurred. In any event, it says it paid a sum of \$500 to Ms Millen to compensate her for any loss arising from the absence of an employment agreement and to show its contrition.

Issues

[5] The issues to be determined by the Authority are:

- (1) Did PDL's action in refusing a gradual return to work breach the employment agreement and disadvantage Ms Millen?
- (2) Did PDL refuse to allow Ms Millen to return to the role she was undertaking prior to her concussion and accordingly breach the employment agreement resulting in a disadvantage?
- (3) Were the statements contained in PDL's 5 August response (through its solicitor) a repudiation of the employment relationship, effectively ending it?
- (4) If Ms Millen was disadvantaged in her employment and/or dismissed, what remedies should flow?
- (5) Should the lack of an employment agreement lead to a penalty against PDL?

The Authority's investigation

[6] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions but I do not record all the evidence or submissions received.

[7] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

[8] The Authority heard from a number of witnesses namely Ms Millen, her father, Joshua Millen, Leslea Eilenberg (a director of PDL), Richard Eilenberg (a director of PDL), Baley Gregory, Shereen Briggs and Teresa Moro. The witnesses all gave their evidence on oath or affirmation and then answered questions from the Authority. They were cross-examined in each case by either Mr Nutsford or Mr Parmenter, as the case may be.

What caused the employment relationship problem?

[9] Ms Millen started work with PDL as a full time dental/hygienist assistant for Ms Eilenberg, a director of PDL. She says she was told in her interview that she would start off assisting the hygienist and then progress on to assisting the dentists. After a period of time, she asked when she would receive an employment agreement. She says she was told she would get one in March, however this did not occur.

[10] When Ms Millen wanted to take out a bank loan some time in February, she asked for an agreement or something that would confirm for the bank that she indeed worked for PDL. She was given a letter confirming her position and hourly rate.

[11] On 11 July 2020, Ms Millen accidentally injured herself after being hit in the forehead and ended up with a mild haematoma. This was a non-workplace accident. On Monday 13 July, Ms Millen started developing a headache and felt dizzy. She was advised that she had mild concussion and she should stay home for the rest of the week. She was advised that there would be a review on Monday 20 July.

[12] On 20 July, Ms Millen explained to the doctor she was still feeling dizzy. As a result she was given the rest of the week off and also sent to Middlemore Hospital to get a CT scan which came back clear. She was advised to see her own GP on Friday 24 July to discuss clearance and concussion clinic treatment. PDL was kept informed.

[13] By 24 July, Ms Millen had still not fully recovered and was referred to a concussion clinic. She was cleared to go back to work for four hours a day for a week starting the following Monday 27 July, with a further review scheduled for Friday 31 July.

[14] After Ms Millen advised PDL of the situation, she was asked to attend a meeting on 27 July at 7.30 am. She assumed it would be about a programmed return to work although the purpose of the meeting was not communicated to her.

[15] On Monday 27 July, Ms Millen duly attended the meeting which included Mr and Mrs Eilenberg. Mr Eilenberg also worked as a dentist at PDL. Ms Millen says she was told that she would be unable to return to work until she had 100 percent clearance but that when she did return, it wouldn't be to her existing full time role as an assistant. Instead she would be working in a different role, working in the sterilisation room with casual/part-time hours.

[16] She says at this point she was also given the choice of accepting a lesser position or leaving her job with one month's pay. Ms Millen says she was required to make her decision by Friday 31 July. She says at the meeting there were also comments made regarding her work not being up to standard prior to her injury. She says it was also explained to her that the practice felt that after working there for six months, Ms Millen was still not ready to step up to assisting the dentists. She felt that this was untrue and not fair.

[17] Ms Millen also says that in the leadup to the meeting she received text messages from Ms Eilenberg which accused her of attending parties, driving and posting on social media whilst on sick leave. She says a remark was made that this was against the Pukekohe dental policy, to which Ms Millen responded as she didn't have an agreement she knew nothing about this policy.

[18] Ms Millen felt that the practice's behaviour towards her changed drastically after her injury. Because she strongly felt that she had been disadvantaged in her employment she instructed her advocate and on 31 July 2020 raised a personal grievance for unjustified disadvantage.

[19] PDL instructed counsel to respond to the personal grievance which it did by letter dated 5 August 2020. Ms Millen took umbrage at the receipt of the lawyer's letter and as a result felt she could no longer work alongside Ms Eilenberg. She says that at that point she lost all respect

for her, and decided she had no option but to resign and raise a personal grievance for constructive dismissal.

[20] It was clear that the trigger for the resignation was PDL's response to Ms Millen's personal grievance forwarded through its counsel.

Evidence

[21] Ms Millen gave evidence that prior to raising her personal grievance for disadvantage, she sat in her car and cried. She was not sure what to do and was in shock. She said she had hoped the raising of the personal grievance would help settle matters down, however, the legal response was such that she felt she could not continue to work for the practice. She gave evidence of the effect her legal action had on her friendships. At the time of the investigation meeting she had been unemployed for some eight months. She had applied for work in different industries such as dental health and beauty, veterinary/animal care and tourism without success.

[22] Ms Millen acknowledged that PDL made an offer for her to return to PDL but felt the reasons were demeaning and rude and also did not address her view that PDL had lied about her time at work, humiliated her in front of friends, and caused her a six month wage lost at that point. Because she had lost all faith in PDL she felt she could no longer trust it to treat her fairly should she return.

[23] Mr Millen's evidence supported his daughter's to the extent Ms Millen turned up very upset on 27 July 2020 and informed him she had been given an ultimatum of either leaving or taking a lesser role. He said that his daughter's normal happy disposition quickly disappeared along with her confidence. Evidence given by Ms Briggs, Ms Moro and Ms Gregory was more on peripheral events and did not address either the disadvantage claims or Ms Millen's constructive dismissal claim.

[24] Mr Eilenberg's evidence essentially supported his wife's. He stated that most of the interaction with Ms Millen was through his wife and there was little he had first-hand knowledge of. He did say that when Ms Millen reported her accident, he and his wife were concerned because as health professionals who are both aware of the dangers (overt and hidden) of brain injury and felt Ms Millen's ongoing dizziness, unwellness and headaches were not an encouraging sign.

[25] He said he felt that if Ms Millen were unable to work full time it meant she still had to have a brain injury of some sort. His view was that a dental practice was a dangerous place where Ms Millen faced a risk of fainting or falling from dizziness in the surgery as a result of her concussion.

[26] He said from his perspective he and his wife wanted the best thing for Ms Millen which was to recover and come back to work. He viewed the discussions between the parties as being discussions simply about money.

[27] He portrayed the absence of an employment agreement as an error which he says the practice tried to make right by paying a sum of \$500 net of tax which he said hoped demonstrated PDL's contrition in a positive way.

[28] Ms Eilenberg explained that a dental assistant was an all-encompassing role where a person could be working for a dentist or a hygienist for sterilisation. She believed that Ms Millen was well informed about the role as she had shown her what was involved. She explained that Ms Millen had no experience in the sense, she had no dental experience. Concussion did not lend itself to a gradual return to work. In order to be safe in the workplace, one needed to be fully recovered first.

[29] When Ms Millen reported she was suffering from concussion, Ms Eilenberg said the practice was concerned. They were worried about health and safety but were trying to be supportive. She said she was concerned about Ms Millen's wellbeing and wanted her to get better and not take risks with her health.

[30] She confirmed there was an early morning meeting on 27 July 2020. Ms Eilenberg states that the first question asked of Ms Millen was how was she feeling. Ms Eilenberg says she and her husband were concerned when Ms Millen replied that she was still dizzy and feeling tired and suffering headaches. She states it was alarming for them that the accident was some 17 days ago and yet Ms Millen was still suffering from headaches, fatigue and dizziness.

[31] Ms Eilenberg explained that she had spoken to a doctor not so much about Ms Millen, but about concussion, and says that doctor agreed that the dental environment was high risk, in that if a person fainted or collapsed, they could well injure themselves and/or others.

[32] Ms Eilenberg felt that Ms Millen would have known that the discussion was to be about her returning and says there was no discussion about her returning to work in a different role. She stated that the practice was extremely busy and needed Ms Millen to return to work fit and healthy to resume her duties as a dental hygienist assistant and a sterilisation nurse which she had been doing since late February.

[33] She felt that Ms Millen had likely become confused when she told her that she was reducing her hygiene days because she and her husband had decided they were going to expand the practice with more practitioners working which would mean that Ms Eilenberg would do more administration. She says however she made it clear that this would not be immediate, and Ms Millen was assured there would be plenty of work for her role. Her evidence was that there was no such thing as a lesser position for Ms Millen and no such thing was offered.

[34] Ms Eilenberg explained, she felt Ms Millen may have wanted to work closer to where her boyfriend lived. He lived in Botany and she explained Ms Millen would drive from Botany to Pukekohe for work. Accordingly she says the practice was being supportive in giving her an option to leave if she wished to leave on agreed terms.

[35] Ms Eilenberg was of the view that once Ms Millen filed her personal grievance through her advocate, they needed to engage counsel which is what they did. She confirmed she approved the letter responding to the personal grievance and agreed with its contents.

[36] Ms Eilenberg said she did not accept Ms Millen's accusations that she had bullied her into resigning. She pointed out that at the time of resignation Ms Millen had an experienced advocate representing her and that communications were from the advocate to PDL's counsel. She says further that there was a job there for Ms Millen and that job would have had excellent prospects. She felt it should have been apparent to Ms Millen that she was liked and PDL wished her to be as successful as she could be.

Discussion and analysis

Was Ms Millen disadvantaged in her employment?

[37] Ms Millen makes two claims under this heading. First by being refused a gradual return to work programme in the first week of her return she was disadvantaged in her employment, and secondly, she was disadvantaged in her employment because following her accident she could not return to the role she had been undertaking before.

[38] It was clear that at the meeting of 27 July, the parties discussed the return to work. PDL held a genuine view that it could not guarantee a safe work space for Ms Millen while she was recovering from concussion. Under the circumstances that seems reasonable. Ms Millen was showing signs of the effects of concussion a considerable time after the event, although Ms Millen in part denies she made statements that she had headaches and was fatigued, it begs the question as to why her medical advice was not to return full-time straight away. On the balance of probabilities, I prefer PDL's explanation that it was genuinely worried about Ms Millen and worried about providing a safe work environment. Under the circumstances, it was open to PDL to insist that Ms Millen had an absolute medical clearance prior to her return to work. It is especially so in case of a condition such as concussion.

[39] The facts regarding Ms Millen's claim that she was offered an ultimatum of resigning on one month's pay in lieu of notice, or accepting a lesser role is more problematic. I accept PDL's evidence that it made the offer for the employment to end, and payment to be made, but only if Ms Millen accepted the offer. It is clear from the evidence that the parties had a different view regarding the scope of the dental assistant position. Whilst I accept that perhaps that confusion would have been avoided if Ms Millen had been provided with a written employment agreement, I do not see how that disadvantaged Ms Millen in her employment bearing in mind that immediately following the meeting she took legal advice and raised her grievances. Once she received the response, she resigned.

Constructive dismissal

[40] The legal principles relating to claims of constructive dismissal are well settled. In *Auckland Shop Employees IUOW v Woolworths (NZ) Limited* the Court described three non-exhaustive situations where constructive dismissals might occur:¹

- (a) When the employee is given a choice of resigning or being dismissed;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads an employee to resign.

[41] Ms Millen's evidence made it clear that the reason and trigger for her resignation was PDL's response to her personal grievance raised on 31 July 2020. The response by PDL's

¹ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374.

counsel, dated 5 August 2020 was such that Ms Millen took exception to it. The response was directed at her representative.

[42] Whilst the letter provided a robust rebuttal of the personal grievance, I do not find it fits any of the tests for constructive dismissal. Further, the letter was in response to Ms Millen's personal grievance letter written by her advocate dated 31 July 2020. It could also be said it was robust. I imply no criticism of either letter, but do note the grievance letter was written prior to Ms Millen's resignation. It is also noted that the resignation occurred whilst Ms Millen was able to access legal advice.

[43] Section 121 of the Act provides that statements made or information given in the course of raising a personal grievance or in the course of attempting to resolve the grievance, or in the course of any matter relating to a personal grievance are absolutely privileged. It follows therefore that it is difficult to find PDL's written response to Ms Millen's personal grievances based on disadvantage as leading to a finding of constructive dismissal.

Penalty

[44] Ms Millen seeks penalty against PDL for its breach in not providing her with a written employment agreement. She further asks that a portion of that penalty be paid to her.

[45] I'm not inclined to impose a penalty on this occasion. Although not providing an employment agreement, it is a breach of a fundamental requirement of the Act, nonetheless when this was brought to PDL's attention they were immediately contrite and indeed made a payment to Ms Millen of \$500 net of tax in an attempt to mitigate the effect this may have had on her.

Conclusion

[46] Ms Millen was not disadvantaged in her employment by the actions of Pukekohe Dental Limited. This is because the first claimed disadvantage, namely that she was not allowed to return part-time following her concussion, was a reasonable step, that Pukekohe Dental Limited was entitled to take. Further, in explaining to Ms Millen how the practice intended to operate upon her return, was not a change to her terms and conditions of employment. In any event, no change was implemented because Ms Millen left the meeting, raised her personal grievances, and then ultimately resigned following receipt of counsel's letter of 5 August 2020.

I accept that Ms Millen was very upset because she believed she was accepting a lesser role, however I do not accept the meeting gave grounds to a disadvantage grievance.

[47] Whilst I have found the employer was entitled under these circumstances not to allow Ms Millen to return to work until she had a 100 percent medical clearance in respect of her concussion, Ms Millen was also very upset because she believed she was accepting a lesser role. I accept that that was not the case, however Ms Millen would have perhaps understood that better if she had a written employment agreement which set out a proper job description.

[48] Ms Millen was not constructively dismissed. Her evidence was clear as I have set out above, that the trigger for her resignation was PDL's legal response to Ms Millen's personal grievance letter. As I have said earlier, all statements made in the course of raising a personal grievance or in the course of attempting to resolve the grievance or in the course of any matter relating to a personal grievance are absolutely privileged in terms of s 121 of the Act. That aside, I would never have accepted in any event that the legal response to the personal grievance would create any of the grounds as outlined in the *Woolworths* case cited above.

Summary

[49] Ms Millen's claims of unjustified disadvantage and unjustified dismissal fail. She has not succeeded in making out her claims of personal grievances.

Costs

[50] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Pukekohe Dental Limited may lodge and then should serve a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum, Ms Millen will 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.

Geoff O'Sullivan
Member of the Employment Relations Authority