

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 115
5328049

BETWEEN SIRAYA O'SULLIVAN
 Applicant

A N D MAORI HILL & BALMACEWEN
 PHARMACY LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Meghan Zetko, Counsel for Applicant
 Ravi Vohora for Respondent

Investigation Meeting 20 July 2011 at Dunedin

Date of Determination: 29 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms O'Sullivan) alleges that she was unjustifiably constructively dismissed by the respondent (the Pharmacy) and the Pharmacy resists that claim, alleging that the problem has been "*created by the employee ... (and that) the employee has acted in an erratic manner and has failed to perform and affirm her undertakings under the terms of the employment*". In essence, the Pharmacy says that Ms O'Sullivan abandoned her employment and then "*contrived a grievance*".

[2] Ms O'Sullivan was engaged by the Pharmacy to work as a trainee pharmacy technician at the rate of pay commensurate with a training position, that is a training wage within the terms of the regulations made under the Minimum Wage Act 1983. While the written employment agreement refers to the training nature of the position, it does not specify the rate of pay nor does it set out the responsibilities of the parties in respect of which party was responsible for enrolling Ms O'Sullivan in the requisite training programme. At the investigation meeting, it became clear that each party looked to the other to attend to the enrolment.

[3] Ms O'Sullivan says that she raised the enrolment issue (or more accurately the lack of it) with the Pharmacy on a number of occasions over the first three months of the employment, and having failed to elicit any response other than hostility, Ms O'Sullivan says that she referred the matter to a Labour Inspector from the Department of Labour. This step, Ms O'Sullivan points out, is consistent with her obligations under the employment agreement which sets out the process for dealing with an employment relationship problem and requires first for the matter to be directed to the employer and thence, if that fails, for further "outside" steps to be taken.

[4] At around the same time as Ms O'Sullivan contacted the Labour Department she received an enrolment form for the Open Polytechnic. There is dispute between the parties as to whether Ms O'Sullivan's referral of the dispute to the Labour Department prompted the Pharmacy to issue the enrolment form or whether the events were unconnected. In any event, it is clear that Ms O'Sullivan signed the form, as was required, but then returned it to the Pharmacy in order for the employer to complete its part of the enrolment documentation. On the evidence before the Authority, no enrolment was ever completed. Ms O'Sullivan told the Authority at the investigation meeting that, as the Pharmacy was paying for the tuition, she did not think it was "*her responsibility*" to complete the enrolment. In any event, Ms O'Sullivan was unsure what courses she should be enrolling for and relied on the Pharmacy for guidance in that regard.

[5] Ms O'Sullivan's evidence is that, once the Labour Inspector became involved, relationships between her and the Pharmacy became even more strained and that she was frightened of her employer. In particular, she confirmed to the Authority that she did not give "straight answers" to the employer because she was afraid. For the Pharmacy, Mr Vohora represented that it was a source of constant frustration to the employer that Ms O'Sullivan would not give "straight answers" to questions.

[6] A particular and important example of this missed communication happened around July 2009 when the Labour Inspector had become involved and the Pharmacy produced the application forms for the Open Polytechnic. The Pharmacy sought a commitment from Ms O'Sullivan that she would complete the enrolment and undertake the training (which was exactly what she wanted), but the Pharmacy made the stipulation that Ms O'Sullivan had to drop her complaint to the Labour Inspector.

Ms O'Sullivan declined to give the Pharmacy a straight answer to that request, but as a matter of fact, she did not drop the complaint.

[7] On 25 November 2009, Ms O'Sullivan was again asked by the Pharmacy to write to the Labour Inspector and drop her complaint and the same request was made by the Pharmacy on a number of other occasions. In a letter dated 23 April 2010, the Pharmacy purported to summarise the discussions between the parties but then included this observation:

There is an urgent need to surmount the deadlock in your training created by this issue. Unless there is resolution your continued employment and training at the Pharmacy does become problematical.

[8] There was a further memorandum from the Pharmacy to Ms O'Sullivan on 29 April 2010 which begins with this observation:

There continues a pressing and urgent need to resolve the deadlock relating to your training. Failure to resolve this deadlock would make your continued employment at our pharmacy untenable.

[9] Towards the end of the same memorandum, a bullet point is recorded as follows:

I also informed you (in a discussion on 26 April 2010) that failure to surmount this deadlock would make it necessary to terminate your employment.

[10] Ms O'Sullivan wrote to Mr Vohora on behalf of the Pharmacy on 2 May 2010 in the following terms:

I am more than happy to agree with doing the Polytech training on \$10 an hour but the complaint with the Department of Labour still stands as it is a whole different issue that Mr Henning [the Labour Inspector] with [sic] continue with.

I took on the position in the first place and agreed to \$10 an hour with the belief I would have been getting the recognised training, which I have now been waiting over a year for and is only been brought up recently because the Ministry of Health requested it be done.

I hope this can be sorted out soon.

[11] The reference to the Ministry of Health in Ms O'Sullivan's letter is a reference to a restriction which the Ministry of Health placed on her duties at the Pharmacy precisely because she was not undertaking training.

[12] Mr Vohora for the Pharmacy responded to Ms O'Sullivan in a memorandum dated 4 May 2010. That memorandum contains the following pertinent observations:

The delays and difficulties with respect to formalities of enrolment were created by your actions. I do not see any need or reason for me to accept responsibility for a situation clearly of your own making. ... To enable you to complete your training, you are welcome to continue your employment at this pharmacy with the following proviso, namely, you will need to acknowledge your firm acceptance of the agreed terms of employment for the entire duration since the commencement of your employment at this pharmacy.

Should you find this situation not acceptable, you are free to tender your resignation as indeed you have been from the time you first sought to have changes made to your terms of employment soon after commencement of your employment with us. ...

Accordingly please accept the welcome of continued employment as detailed above or else please feel free to tender your resignation. Should you see fit to tender your resignation, you should regard such resignation as a decision and a choice you made.

[13] In the correspondence from Mr Vohora, the reference to “changes” to the terms and conditions of the employment is a reference to Ms O'Sullivan's referral of her rate of pay to the Labour Inspector for examination. The essence of the Pharmacy's proposal to Ms O'Sullivan as contained in this letter is that she accept the rate of pay that she had been receiving (the so-called training wage) for the duration of the employment and the Pharmacy would then get on with organising her enrolment in the academic training.

[14] So far as Ms O'Sullivan was concerned, the receipt by her of the Pharmacy's letter of 4 May 2010 was “*the final straw*” and precipitated her resignation. The 4 May letter, to put it in its context, came after an exchange between Mr Vohora and Ms O'Sullivan the previous day in which Ms O'Sullivan understood Mr Vohora to be indicating that she would be given four weeks' notice to conclude her employment on 28 May 2010. When Ms O'Sullivan asked for clarification about that purported intention in a further discussion the following day (4 May), Mr Vohora clarified his intentions by saying that he had not in fact given her four weeks' notice of dismissal but he again commended to her the notion that she should resign. Mr Vohora told me that this remark, which he acknowledged making, was in the context of Ms O'Sullivan's continuing ill health and her long absences from the workplace. For Ms O'Sullivan, however, the explanation offered for the sick leave that she took, was the stress occasioned by work at the Pharmacy.

[15] In any event, Ms O'Sullivan resigned her position on 25 May 2010, having discovered the Pharmacy was advertising what she understood to be “her” job. Ms O'Sullivan told me that her resignation was made in the context of the continued observations by Mr Vohora that she would “*have to leave*”.

Issues

[16] When the matter came before the Authority, Ms O'Sullivan argued in the alternative that she was either actually dismissed when Mr Vohora gave her a finishing date and required her to withdraw her complaint with the Labour Inspector, or, in the alternative, that she was constructively dismissed by the Pharmacy through the Pharmacy's inappropriate conduct towards her. In order to reach a conclusion on the matter, it will be helpful if the Authority considers the following questions:

- (a) What were the terms of the employment?
- (b) Whose obligation was it to enrol for the training?
- (c) Did the Pharmacy put unreasonable pressure on Ms O'Sullivan concerning her complaint?

What were the terms of the employment?

[17] There is a written employment agreement but it is written in a discursive style which makes identifying particular provisions more difficult than it needs to be. While it plainly contemplates a training wage for the incumbent, it does not comply with the law in one significant regard and that is the specification of the rate of pay. It seems common ground that that information was conveyed to Ms O'Sullivan by Mr Vohora on a slip of paper independent of the employment agreement. Of course, the law requires that the employment agreement actually specify the rate of pay.

[18] There is nothing in the employment agreement to identify the theoretical parts of the requisite training or indeed who is to provide that aspect. Indeed, it might be possible to derive the mistaken impression from the employment agreement that there was no requirement for academic learning for a person aspiring to be a pharmacy technician. That of course is not the position; the Pharmacy Industry Training Organisation (PITO) which provides the regulatory framework for the training of pharmacy technicians, requires first an enrolment with the PITO itself followed by an

enrolment at the Open Polytechnic which provides the requisite theoretical training to fit in with the supervision provided in a dispensary by a professional pharmacist. It is self-evident from the regulatory regime imposed by PITO that progression to completing the qualification for pharmacy technician requires both an academic aspect (provided by the Open Polytechnic) and a practical hands-on aspect provided in house by the pharmacist. There is no process for completing training as a pharmacy technician exclusively by practical training under the guidance of a pharmacist or exclusively by the Open Polytechnic's academic training modules.

[19] My considered view then is that the employment agreement is fundamentally deficient in its failure to identify the requisite elements of the training for Ms O'Sullivan in her new role.

Whose obligation was it to complete the enrolment arrangements?

[20] I found Ms O'Sullivan's evidence on this point compelling. She told me that she did not think it was her responsibility to enrol in the requisite course because there was a part of the enrolment documentation which was required to be completed by the supervising pharmacist and, perhaps more importantly, because it is common ground between the parties that the Pharmacy was to pay for the course fees. That being the case, it is difficult to see how Ms O'Sullivan can be expected to bear the responsibility for completing the enrolment protocols when this is her first job, she has never had full time ongoing employment before, and she is being supervised by a pharmacist who, by his own admission, has a wealth of experience amounting to over three decades in the profession.

[21] In addition to that, there is a technical point which Ms O'Sullivan could not possibly be expected to know and which the Pharmacy either knew or ought to have known. Under the terms of the PITO regulations, training for a pharmacy technician preceded first by enrolment not with the Open Polytechnic, but with the PITO itself. Once that enrolment was complete, then enrolment with the Open Polytechnic could be undertaken.

Did the Pharmacy put Ms O'Sullivan under unreasonable pressure?

[22] The Pharmacy of course denies that there was any unreasonable pressure placed by it on Ms O'Sullivan. It simply says that its various attempts at communicating with her were designed to clarify her intentions. It maintains that she

did not give it a straight answer (which she accepts), and that she did not give it a straight answer at a number of critical times during the employment relationship (again accepted by Ms O'Sullivan). However, she says that she was frightened of Mr Vohora and that she found it easier not to engage with him one-to-one.

[23] For its part, the Pharmacy says it simply wanted to resolve the issue in dispute before completing the enrolment. Mr Vohora told me in his evidence:

I said to Ms O'Sullivan that until the matter was resolved I would not complete the enrolment.

[24] Clearly there had been, from the Pharmacy's standpoint, a degree of frustration about the involvement of the Labour Inspector. Mr Vohora was adamant that on the various occasions that he raised the matter with Ms O'Sullivan, she always assured him that the matter of the complaint to the Labour Inspector had been resolved. Mr Vohora referred me especially to his letter to Ms O'Sullivan dated 25 September 2009 in which he recited the various discussions that the two of them allegedly had in which he recorded that Ms O'Sullivan had confirmed that the Department of Labour matter could "*now be regarded as resolved*".

[25] In that context then, Mr Vohora was somewhat perplexed when, at a telephone conference convened by the Authority some months later, the Pharmacy was advised that the complaint was still alive.

[26] So it seems that what happened was that Ms O'Sullivan made a complaint to the Labour Inspector about the absence of formal training after endeavouring to get a straight answer from the Pharmacy on the matter, and that when asked immediately after lodging the complaint whether the matter was resolved or not, she was not heard to say that the matter was still being progressed but in fact she had taken no steps to withdraw the complaint because she was still dissatisfied with the position but was afraid to tell Mr Vohora because of her anxiety about the way that he might treat her thereafter.

[27] When it became clear to Mr Vohora subsequently via the Employment Relations Authority's telephone conference that the matter was still alive, he then proceeded to take steps to try to address the issue by seeking to have Ms O'Sullivan withdraw the complaint and by that act acknowledging "*... your firm acceptance of the agreed terms of employment for the entire duration since the commencement of*

your employment at this pharmacy". I am satisfied that what Mr Vohora means by that phrase is that Ms O'Sullivan is to confirm that she is happy to be paid at the training rate from the point at which she commenced employment and that she will continue to accept that rate of pay until the completion of her training, inclusive of the training provided by the Open Polytechnic.

[28] For Ms O'Sullivan's part, she was afraid to tell Mr Vohora that she had not withdrawn the complaint and she had not withdrawn it because she thought it was unfair that she should be paid the training rate when, as a matter of law, she was not being trained. I say as a matter of law because the Minimum Wage Act makes it very clear that the training wage only applies where the trainee is receiving training equivalent to 60 credits per year. Without even a bare enrolment in an appropriate course of study, those credits simply are not in place and so the training wage cannot be justified by reason of the legal prerequisites for its payment. The correct rate of pay, as the Labour Inspector maintained throughout, was the minimum wage.

[29] It is clear then that what Mr Vohora meant when he told me that he would not progress the enrolment of Ms O'Sullivan "*until the matter was resolved*" was that Ms O'Sullivan had to accept the training rate from the beginning of her employment with the Pharmacy which the Pharmacy was illegally imposing upon her in breach of its obligations under the Minimum Wage Act 1983. There is no evidence in the correspondence between the parties or the oral evidence given by the two protagonists that the Pharmacy had any intention of compromising its position. After all, if the Pharmacy had fulfilled its obligations under the PITO and pursuant to statute law within the first short period of Ms O'Sullivan's employment, the employment relationship problem would never have happened because the Pharmacy would have fulfilled its obligations and Ms O'Sullivan would have fulfilled hers. However, because the Pharmacy adopted what might be called a Catch 22 position and refused to progress the enrolment until Ms O'Sullivan withdrew her wages complaint, the matter was never satisfactorily dealt with because Ms O'Sullivan was quite right to maintain the position she did, if only because the law supported her.

[30] Even when the Pharmacy was given the option by Ms O'Sullivan's counsel to agree to pay the minimum wage to Ms O'Sullivan from the commencement of her employment down to the date at which the training enrolment was actually arranged,

it failed to take the option and continued to maintain that Ms O'Sullivan must accept the lower rate of pay for the whole of the period of the employment.

Determination

[31] I do not think on the facts before the Authority this matter can be categorised as an ordinary dismissal. Where there is a resignation by the employee it is difficult to analyse the events as a common dismissal. This is, I find, a constructive dismissal. There could be no clearer case of an employer putting unreasonable pressure on an employee to withdraw a claim for moneys to which she was entitled as a matter of law. In so doing, the Pharmacy continued on a course of action which had either the dominant purpose of bringing the employment to an end (via the numerous requests or reminders that she might resign), and/or the Pharmacy's behaviour was so grave as to create fundamental breaches of its duty as a good and fair employer.

[32] Having concluded that Ms O'Sullivan has proved her personal grievance for unjustified constructive dismissal, I must now consider whether her behaviour contributed in any way to the circumstances giving rise to the grievance. I hold that there is no element of contribution; I do not accept the Pharmacy's claim that Ms O'Sullivan ought to have furthered her enrolment herself.

[33] Having concluded that there is no contribution, it follows that Ms O'Sullivan is entitled to remedies. Ms O'Sullivan gave ample testimony of the effect of the employment on her and the consequences of her being driven out of her job. Not only was she unable to commence her training and effectively had that postponed for fully 12 months, but the emotional consequences of the way that she was treated entitle me to consider an award of compensation under s.123(1)(c)(i) of the Act.

[34] In addition, Ms O'Sullivan seeks a contribution to lost wages as a consequence of not being able to find alternative employment quickly after the dismissal.

[35] I direct that the Pharmacy is to pay to Ms O'Sullivan the sum of \$5,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 together with \$3,000 gross as a contribution to wages lost as a consequence of the dismissal before Ms O'Sullivan was able to get fresh employment and the sum of \$71.56 as the Authority's filing fee.

Costs

[36] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority