

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 253  
5329621

BETWEEN            HILARY ANNE ROSS  
                                 Applicant  
  
AND                    MIDTOWN MEDICAL  
                                 LIMITED  
                                 Respondent

Member of Authority:    M B Loftus  
  
Representatives:        Damian Pine, Counsel for the Applicant  
                                 Janet Copeland, Counsel for the Respondent  
  
Investigation Meeting:    6 July 2011 at Queenstown  
  
Submissions Received:    At the investigation  
  
Determination:            22 November 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]    The applicant, Ms Hilary Ross, claims she was unjustifiably dismissed from the employ of the respondent, Midtown Medical Limited (Midtown), on or about 15 November 2010.

[2]    Ms Ross says Midtown was facing fiscal pressure which it attempted to address by unilaterally reducing her hours of work. She claims she rejected the proposed changes and Midtown responded by making her redundant. She claims the redundancy was unjustified given a lack of consultation.

[3]    Midtown denies dismissing Ms Ross, for redundancy or otherwise. It also denies trying to unilaterally vary Ms Ross's terms of employment. Its position, as enunciated in the statement in reply, is that its financial situation forced it to try to discuss Ms Ross's working hours and:

*The Respondent has genuinely attempted to consult with the Applicant regarding a temporary reduction in her working hours however in breach of her duty of good faith to be active and constructive, responsive and communicative the Applicant has refused to engage with the Respondent and has instead cried and become agitated.*

*The Respondent after several attempts to consult with the Applicant took a final decision to reduce the Applicants hours of a temporary basis to 10am to 3pm from 15 November 2010. This was a lawful and reasonable decision taken after consultation.*

*The Applicant was not made redundant.*

[4] Notwithstanding the above position Midtown adds, through its closing submissions, that should I conclude there was a dismissal, it was justified by reason of redundancy.

[5] Ms Ross also seeks payment of a bonus she believes she was entitled to, but which remains unpaid.

### **Background**

[6] Midtown came into being after a discussion between Mr Roberts (who also owns a Queenstown pharmacy and became Midtown's managing director) and Dr Bruce McKinnon who was, at the time, a local GP. It was Dr McKinnon who introduced Ms Ross to Mr Roberts as being suitable for the new practice given her experience at Queenstown Medical Centre and the fact her hours there had been reduced meant she was looking for extra work.

[7] The three met on 1 June 2010. They discussed the fact Ms Ross also worked for Pacific Blue as its Queenstown manager and that would restrict her availability. Ms Ross says she advised she would be available between 10am and 7pm Monday, Wednesday and Thursday, and 10am to 2pm Tuesday and Friday. She claims to have also advised she could commence full time hours on a Friday once the winter season finished at the end of August and she would then seek a replacement at Pacific Blue so as to allow unlimited availability on Tuesday as well.

[8] A further meeting occurred on 18 June at which terms and conditions were discussed. This resulted in the production of a written employment agreement but Ms Ross sought some changes. She says these were never discussed and she did not therefore sign the agreement. Notwithstanding that, she commenced as practice nurse/practice manager on 20 June 2010.

[9] The agreement provided Ms Ross would be paid \$30 an hour for work as a practice nurse. Remuneration for work as practice manager was to be in the form of a bonus with the sum of \$2,000 to be paid after three months of employment provided Midtown broke even. A further \$5,000 was payable after five months if Midtown was in profit. The (unsigned) agreement also contains an hours of work provision which states the hours shall be as specified in the second schedule though none are identified therein.

[10] Mr Roberts is adamant he told Ms Ross she should log all hours worked and would be paid for those worked. He goes on to say:

*Whilst we discussed the hours that Hilary would be available to work we never actually specified or agreed set hours that she would work nor a minimum number of weekly working hours for Hilary. We did however both agree that Hilary would be working the following hours:-*

- (i) Monday – 10am to 7pm (8 hrs)*
- (ii) Tuesday – 10am to 2pm (4 hrs)*
- (iii) Wednesday – 10am to 7pm (8 hrs)*
- (iv) Thursday – 10am to 7pm (8 hrs)*
- (v) Friday – 10am to 2pm (4 hrs)*
- Total 32 hours per week***

[11] A record of the hours actually worked shows these to have been the norm though there was some variation. On 6 August Mr Roberts asked whether Ms Ross would commence at 9.30am as opposed to 10am so as to cover for early phone appointments. She agreed. A further change was then agreed and the 7pm finish time came forward by half an hour.

[12] Mr Roberts denies Ms Ross raised the possibility she could leave Pacific Blue and commence full time at Midtown.

[13] Mr Roberts claims that without discussion, forewarning or explanation Ms Ross suddenly decided she would work 9 hour days as of Friday 17 September and proceeded to do. He goes on to say:

*At our staff meetings on September 22 2010 Dr Blanchard suggested that we change the nursing hours to allow more time for administration. I thought this was a curious suggestion as Shelly and I were doing all the administration. I was acting as the practice manager and not Hilary.*

[14] He says that discussion led to an agreement Ms Ross would once again change her hours and commence at 9.00 am. Notes of the meeting record *Nurses hours will*

now be 9am to 6.30pm to enable administration / phone work to be done before 10am opening.

[15] Regrettably the practice did not perform at the level hoped and cash flow was poor. Mr Roberts says he started providing staff with regular financial updates so they were aware of the difficulties faced. That led to an emergency meeting on 6 October. About that, Mr Roberts says:

*At that meeting I set out details of our cash flow problems and explained that the company was not generating the projected income that we had hoped for. I explained that we needed to make savings if the business was to continue and that the situation was grim. All staff had access to the appointments template being our computer system for patient bookings and were therefore aware of the workload we were completing and how much those patients were paying. There were insufficient patients coming through the practice.*

[16] Ms Ross claims Mr Roberts approached her on 13 October and advised she would have to cease work at 3pm as the practice was quiet. She states she protested but was still sent home early on each of the remaining days that week. She claims she continued to protest and asked that they discuss her working hours immediately. Ms Ross was then absent for a week as a result of having had surgery.

[17] Mr Roberts recollection of the meeting is as follows:

*Because of our financial situation I felt that I had to meet with Hilary ... to discuss her unilateral increase in her Friday work hours. As I have said, she decided to increase her Friday hours from 3.5 to 4 hours to 9 hours and we simply couldn't afford this.*

*... I was not attempting to unilaterally reduce Hilary's hours. The truth is that Hilary had independently and without reference to me, increased her hours. We couldn't afford it, hadn't agreed and needed to restore her hours back to what was originally agreed. We did not have the patient load needed to fund such additional hours.*

[18] Mr Robert's contemporaneous notes record the conversation remained incomplete as Ms Ross was crying and would not communicate.

[19] Ms Ross says that on either 26 or 27 October Mr Roberts came into her office and stated she would have to finish early. She says she was feeling particularly fragile after the surgery and became upset. She left immediately.

[20] Mr Roberts claims the meeting Ms Ross refers to as having occurred on 26 or 27 October was actually on 29 October. Notes taken by Mr Roberts at the time tend to confirm this. They read:

*Today I tried to broach the subject of reducing Hilary's hours again. Hilary became agitated and began crying. I advised her that maybe she should get a representative so that we could have a proper discussion. Hilary replied that she did not need a representative she could handle it on her own and that she doesn't usually cry. She then said - I'm out of here, I can't face this, this better not be going on when I come back from holiday.*

[21] Ms Ross's left at about 12.45pm on 29 October and Mr Roberts asked another employee to return from sick leave to cover the unexpected departure. Ms Ross returned from leave on 9 November and claims Mr Roberts approached that day and advised he was unable to pay for the hours she had been working and her hours would have to reduce. She says she responded by saying she was under financial pressure due to the recent *chopping and changing of hours* and needed the position clarified.

[22] Mr Roberts says the discussion occurred on 10 November. It occurred as the financial situation of the practice was not improving and, as a result, he still sought a discussion with Ms Ross about a proposal to reduce her hours of work. Again his contemporaneous notes would appear to confirm the date. They read:

*Today I once again tried to talk to Hilary about reducing her hours to 10am to 3pm each day until we get busier. I explained to Hilary that we had started a free ACC clinic to try and generate some more work for the Nurse. Hilary threw the papers off her desk and stormed out of the office. She came back in crying and told me that I was naïve to not have had enough money to keep a Nurse on the hours that she required. Hilary did not speak to me for the remainder of the day, leaving work at 5.30pm.*

[23] On 11 November, Midtown sent Ms Ross a letter requesting a formal meeting regarding her hours of work. She responded in writing advising she was happy to attend but would not accept a unilateral reduction in her hours.

[24] Midtown's letter notes:

*I would like you to bring along a representative to this meeting so that we can discuss and resolve this issue in a professional manner. As you are aware I have tried to discuss the issue of your working hours on three previous occasions. In all of these meetings you have become emotionally distressed and no resolution has been reached. This is an unacceptable situation.*

*This meeting is not in expectation of dismissal or disciplinary in any way, it is merely to bring a result to the issue I have been trying to resolve with you for the past 4 weeks.*

...

*In the meantime could you please limit your appointment template to reflect your current working hours. These are Monday to Friday from 10am until 3pm excluding today and the agreed meeting time.*

[25] Ms Ross' response reads:

*Further to your letter 11 November 2010 where you have advised me of your intention to reduce my hours from 0900 - 1800 to 1000 - 1500. As I have said to you at our previous discussions on this matter I find this unacceptable.*

*Whilst I understand your financial position, my contract with you is for full time employment and I am unable to accept reduced hours of this nature for an indeterminate period and without negotiation.*

*I am happy to meet with you as requested ...*

[26] The meeting took place on 15 November and was attended by Mr Roberts, Ms Ross and Dr Margaret Blanshard assisting Ms Ross.

[27] About the meeting, Ms Ross states:

*... Mr Roberts made it clear that the practice was losing money and that his desire was to have a part-time nurse on call to come in when appointments were booked, in a similar manner to how other practises operated.*

*I reminded the Respondent that I had been employed on the basis of an expected number of hours to be worked. I asked what other options were available for discussion and was told by Mr Roberts there were no options.*

*Mr Roberts then went on to say that "We don't need a full-time nurse, it's legally called redundancy". I asked Mr Roberts "What does that mean, how does that work with notice, when does the redundancy apply from?"*

*Mr Roberts informed me that "it applies from now".*

[28] Ms Ross says Mr Roberts then advised her final pay would include the \$2,000 bonus.

[29] Mr Roberts says he expressed a view Ms Ross' job was never full time and the practice could not afford a full time nurse. He says he asked Ms Ross to reduce her

hours to suit the appointment template. Meetings notes taken by Mr Roberts record his statements as:

*You have not worked full time an average of 33 hrs per week, we cannot afford to pay you. We are losing money.  
We want to have a part time nurse on call to come in when appointments are booked – like other practices.*

[30] In his brief of evidence Mr Roberts states Ms Ross then asked what option she had and he told her the only option was part time. The full time job she wanted was redundant. He says he explained *we had to try to align our nurse hours with the patient load*. He goes on to say Ms Ross then asked when the redundancy would be applicable from and he advised *from today as there is no full time position available*. Mr Roberts says Ms Ross then became emotional and accused him of having predetermined the issue. He says she claimed he was financially incompetent and started swearing at him. He says he left to allow things to calm down.

[31] Mr Roberts says Ms Ross then came from the room, went to the reception desk and tore up a number of letters she had just completed. He says she threw them in the bin and said he would not need them any more as he would never have a nurse. Mr Roberts says Ms Ross then had a discussion with Dr Blanshard, packed her bags and stormed from the premises. Mr Roberts then phoned Dr McKinnon to advise him the meeting had not gone well.

[32] The following day Dr McKinnon came to work and said he had spoken to Ms Ross but felt it was unlikely she would return. That, as events transpired, was perceptive. She did not and on 19 November Midtown received a letter from a solicitor raising the personal grievance.

[33] By way of summary, Mr Roberts acknowledges that he never had a chance to discuss his concerns properly with Ms Ross but claims she never gave him a chance.

### **Issues for determination**

[34] There are, potentially, three issues to be determined. They are:

- i. Was Ms Ross dismissed or did she simply leave as Midtown contends;
- ii. If there was a dismissal, can Midtown justify it; and

- iii. Is Ms Ross entitled to receive a bonus payment as claimed?

### **Determination**

[35] The first question is whether or not there was a dismissal. Ms Ross claims she was dismissed on 15 November. Midtown denies dismissing her.

[36] It is, in my view, difficult not to conclude there was a dismissal.

[37] There is no doubt Ms Ross was told she was redundant on 15 November. The meeting notes record Mr Roberts told Ms Ross *we don't need a full time nurse it is legally called redundancy*. Ms Ross then asked when the redundancy would take effect and was told immediately. Mr Roberts accepts, through paragraphs 59 and 60 of his brief, that the notes are essentially accurate.

[38] Redundancy is, adopting a traditional definition, a situation in which a position is surplus to an employer's requirements and, as a result, the incumbent can no longer be retained. It is a dismissal. Ms Ross was told she was redundant effective immediately – that is a dismissal.

[39] Midtown's contention Ms Ross *walked out* (paragraphs 63 and 67 of Mr Roberts brief) is untenable. I am satisfied that by the time she is alleged to have *walked out* the words of dismissal, namely advice of immediate redundancy, had already been uttered.

[40] Even if the above were wrong and Ms Ross was not expressly dismissed, I would still conclude there was an unjustified dismissal. Mr Roberts' evidence is Ms Ross was upset – so upset he thought it prudent he leave the meeting. His evidence is Ms Ross then left after a tantrum in which she shredded some documents. The law requires employers to allow a cooling period before attempting to revisit issues after such displays (see, for example, *Kostic v Dodd EMC Christchurch* CC14/07, 11 July 2007, Judge Couch). That did not occur here. Instead Midtown advertised for a replacement the following day thus confirming Ms Ross's departure in the event it had not already been signalled.

[41] The conclusion there was a dismissal leads to the question of whether or not it can be justified. The justification tendered by Midtown, albeit in the alternative, is redundancy.

[42] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is justifiable

*... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.*

[43] That test is used as Ms Ross was dismissed before the current test came into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect.* Section 4 makes it clear all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. There is no suggestion in the Act the revised s.103A has retrospective effect so the earlier test applies.

[44] To act fair and reasonably an employer must comply with its statutory obligations. In *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 the Employment Court held:

*The relationship between s.4(1A)(c) and s.103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure that does not comply with s.4(1A)(c) will not be justifiable.*

[45] The statutory obligation concerned is a requirement the employer consult. Section 4(1A)(c) demands an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employees employment give the employee access to relevant information and an opportunity to comment before the decision is made.

[46] Notwithstanding its assertions to the contrary, I conclude Midtown failed to consult adequately. It must therefore have failed to justify its decision to declare Ms Ross redundant.

[47] I reach this conclusion for three reasons. First, and primarily, the consultation process never ran its course. The evidence is Ms Ross accepts there were cash flow issues. She had a couple of options she intended raising at the meeting of 15 November and which she thought might assist in addressing the situation. The meeting went so badly she never had the chance, as is conceded by Mr Roberts at paragraph 78 of his brief.

[48] The failure to consider alternatives means Midtown can not convince me it was necessary to resort to redundancy. There may have been other, unconsidered options which may have addressed its concerns.

[49] Second, I conclude the consultation was inadequate. In a setting such as this consultation implies an employer advising the nature of the problem, and asking if affected employees have any possible solutions before pursuing one it may wish to apply. That did not occur here, with Mr Roberts simply seeking to impose a significant variation to Ms Ross's terms of employment. I say significant notwithstanding disagreement about whether or not Ms Ross was full time and/or had started working more hours than agreed. I do so given Mr Roberts' own evidence. While he opens by saying there were no agreed hours he immediately contradicted that by saying Ms Ross was engaged to work 32 hours per week (see paragraph 10 above). His evidence is his proposal would see that reduced to 13.5 hours per week (paragraph 61 of his brief). That is a reduction of some 60%. It would have been accompanied by a corresponding reduction in pay. The reduction is significant and it was being proffered as the only solution. That is not consultation.

[50] Third, and if there is validity to Midtown's claim Ms Ross failed to respond when asked for input, there is an obligation to put the employee on notice that by continuing with such an approach they run the risk a decision will be made without their input. There is no evidence this occurred.

[51] The conclusion Midtown dismissed Ms Ross in a way it can not justify raises the issues of remedies.

[52] Ms Ross seeks lost wages and compensation for hurt and humiliation (s.123(1)(c)(i)).

[53] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis assuming a concerted, but unsuccessful, attempt to mitigate the loss Ms Ross asks that I exercise that discretion given a failure to find full time employment since her dismissal.

[54] Her request I exercise my discretion and award her full loss to the date of investigation is, however, undermined to some extent by her evidence. Ms Ross

obtained a seven week engagement with Queenstown airport commencing approximately 21 February 2011. She says she then increased her hours with Pacific Blue due to the commencement of the winter schedule and having concluded she could manage, stopped applying for jobs. In my view, that admission means any award should stop with the attainment of the full time work from the airport.

[55] Accepting Mr Roberts' evidence about the original hours of work (paragraph 10 above) as Ms Ross's view fails to give a computational base (she stated when answering questions, the hours were never specifically set), I conclude the loss between 16 November 2010 and attainment of the airport work is \$13,248. That amount should be paid as the evidence is the only work Ms Ross performed during that time, and during which she was seeking work, was with Pacific Blue which is work she would have performed anyway.

[56] Finally, and given the defence of redundancy I must ask whether Ms Ross would have been made redundant in any event. If she would, there can be no loss in respect to wages as she would not have earned the money in any event. For reasons already discussed, I conclude the answer is no. Had the consultation process run its course, redundancy may have been avoidable.

[57] Ms Ross seeks \$15,000 as compensation pursuant to s.123(1)(c)(i). She supported the claim with evidence, though relatively brief. Having considered the evidence, I conclude an award of \$5,000 to be appropriate.

[58] Finally the conclusion remedies accrue means I must, in accordance with s.124, address whether not Ms Ross contributed to her demise in any significant way. The defence was redundancy. Redundancy implies no fault, therefore the answer must be no.

[59] Finally there is the claim for arrears. This relates to the \$2000 bonus. Midtown did not specifically state whether or not the threshold for payment was ever reached. However, and when answering questions, Mr Roberts accepts he advised Ms Ross the payment would be made in recognition of her efforts but adds he asked payment be delayed due to cash flow problems. The fact he confirmed payment means the money is owing.

**Conclusion and Orders**

[60] For the above reasons I conclude Ms Ross has a personal grievance in that she was unjustifiably dismissed.

[61] As a result the respondent, Midtown Medical Limited, is ordered to pay Ms Ross:

- (i) The sum the sum of \$13,248 (thirteen thousand, two hundred and forty eight dollars) gross as reimbursement of wages lost as a result of the unjustified dismissal; and
- (ii) A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- (iii) A further \$2,000 (two thousand dollars) being the bonus promised but not paid.

[62] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority