

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 99
3168301

BETWEEN

NADEEN SALEEM
Applicant

AND

MUSSELBURGH PHARMACY
(2021) LTD
Respondent

Member of Authority: Peter van Keulen

Representatives: Phillip de Wattignar, advocate for the Applicant
Malcolm MacDonald, counsel for Respondent

Investigation Meeting: 9 and 10 August 2023 in Dunedin

Submissions and Further Information Received: 15 and 29 August 2023 and 24 January 2024 from the Applicant
23 August 2023 from the Respondent

Date of Determination: 23 February 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nadeen Saleem was employed as an intern pharmacist by Musselburgh Pharmacy (2021) Ltd (MPL) on a fixed term arrangement to cover the period until she sat the Pre-

Registration Assessment Board (PRAB) assessment.¹

[2] Ms Saleem did not pass the PRAB assessment and MPL extended Ms Saleem's employment for a further term so she could re-sit the PRAB assessment. Ms Saleem also says as part of that extension MPL offered her a role as a pharmacist commencing once she passed the PRAB assessment – MPL denies this.

[3] During the extended period of employment Ms Saleem was involved in a car accident and this restricted her ability to work. Ms Saleem says MPL did not support her during this time – MPL denies this.

[4] When Ms Saleem passed the next PRAB assessment she asked MPL about being paid as a pharmacist. In response, MPL terminated her employment claiming that her contract as an intern pharmacist had expired four weeks after she had re-sat the PRAB assessment.

[5] Ms Saleem did not accept that MPL could terminate her employment because she believed she should continue to be employed by MPL as a pharmacist as she had passed the PRAB assessment.

[6] Ms Saleem raised a personal grievance for unjustified dismissal and for unjustified action causing disadvantage based on MPL's alleged failure to support her return to work after her car accident.

The Authority's investigation

[7] After raising her personal grievances, Ms Saleem lodged a statement of problem in the Authority claiming unjustified dismissal and unjustified action causing disadvantage.

¹ The PRAB assessment is the last requirement in order to become a registered pharmacist – Ms Saleem had completed a Bachelor of Pharmacy and 52 weeks of trainee internship at an approved pharmaceutical establishment.

[8] I investigated Ms Saleem's claims by receiving written evidence and documents, holding an investigation meeting on 9 and 10 August 2023 and assessing the written submissions of the parties' representatives.

[9] In my investigation meeting, under oath or affirmation, witnesses who had previously provided written statements confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

What happened?

[11] Ms Saleem was employed as an intern pharmacist by MPL from 23 April 2021. She worked in a pharmacy owned and operated by MPL (the Pharmacy).

[12] Ms Saleem was employed on a fixed term employment agreement with the fixed term due to end on the earlier of 25 June 2021 or 4 weeks after Ms Saleem received her results for the PRAB assessment. The reason for Ms Saleem's employment ending on either of these dates was because MPL would no longer have work for an intern pharmacist.

[13] On or around 14 June 2021 Ms Saleem received her results from the PRAB assessment; Ms Saleem did not pass the assessment.

[14] Ms Saleem took a few days off work following this and then met Kamal Slaimankhel, the director and shareholder of the respondent and also a qualified Pharmacist who worked in the Pharmacy. Ms Saleem and Mr Slaimankhel met on 19 June 2021 and they discussed what would happen with Ms Saleem as she had not passed the PRAB assessment.

[15] Ms Saleem says Mr Slaimankhel verbally offered to extend her employment as an intern pharmacist so that she could sit the PRAB assessment again in November 2021. And she says he also offered her a position as a pharmacist when she passed the PRAB assessment.

[16] Mr Slaimankhel says he offered Ms Saleem an ad hoc locum position which would allow Ms Saleem to work as an intern pharmacist on a casual basis until she was able to sit the PRAB assessment again. He denies offering Ms Saleem a role as a pharmacist saying that MPL did not need another pharmacist and, in any event, Ms Saleem was not competent enough for MPL evidenced by mistakes made in her work and having failed to pass the PRAB assessment on two occasions.

[17] Whatever the agreement was regarding Ms Saleem's continued employment with MPL, there was no written employment agreement produced to record that.

[18] From 19 June 2021 Ms Saleem worked two weeks in the Pharmacy doing 46 hours one week and 41.5 hours the other week.

[19] On 25 June 2021, Ms Saleem was involved in a car accident. Ms Saleem had one month off work recovering and from 31 July 2021 she commenced a return-to-work plan that had been organised through ACC.

[20] Through August, September and October 2021, Ms Saleem worked reduced hours starting with a six-hour week and building up to 20.5 hours in the last week of October. Ms Saleem then worked around 30 hours per week from the middle of November 2021 until 13 December 2021.

[21] On 13 December 2021 Ms Saleem received the results of the PRAB assessment that she had taken in November 2021; Ms Saleem had passed the assessment.

[22] After receiving her results, Ms Saleem sent an email to the Pharmacy manager, Sandra van Zoomeran. In this email, on the morning of 13 December 2021, Ms Saleem stated:

I have received my assessment centre results.
I am practicing as a pharmacist from today.
My rate would go up could you please clarify?
Thank you.

[23] Following this email, Mr Slaimankhel turned up at the Pharmacy and told Ms Saleem not to do any work in the dispensary. Mr Slaimankhel and Ms Saleem then spoke; the conversation was fractious, both Mr Slaimankhel and Ms Saleem accuse the other of being rude and dismissive.

[24] Based on the evidence I heard it was difficult to assess exactly what was said in this short meeting. It appears that Mr Slaimankhel told Ms Saleem that as she had completed the PRAB assessment her role had ended. When Ms Saleem insisted she was now a pharmacist, as she had been told she would be once she passed the PRAB assessment, Mr Slaimankhel told her there was no role available as a pharmacist as MPL had recently hired a pharmacist.

[25] Ms Saleem responded to this by insisting that she would continue working until she had taken legal advice. Mr Slaimankhel says that by this point he could not deal with Ms Saleem as she was being so rude to him, so he left.

[26] Ms Saleem then sent a second email to Mr Slaimankhel and Ms van Zoomeran stating:

Further to our discussion today I will be working until I seek legal advice.

[27] Ms van Zoomeran responded telling Ms Saleem that she would be in the Pharmacy at 1:30pm and they could talk then. Ms Saleem responded stating that there was nothing to discuss until she had sought legal advice.

[28] Ms van Zoomeran then arrived at the Pharmacy and asked Ms Saleem to come to the office so they could talk; Ms Saleem refused, insisting that she would not discuss matters until she had legal advice. Ms van Zoomeran says that Ms Saleem was “ranting and raving” at her so she told her that she was not to be in the dispensary because there was no contract in place. Ms Saleem then left demanding that Ms van Zoomeran set out the position in an email.

[29] Ms van Zoomeran then sent Ms Saleem an email stating:

As I tried to explain, but you wouldn't allow a conversation, your contract as an intern has expired 4 weeks after your exam.

I have said there is no contract between us and you cannot be in the dispensary at all.

[30] Ms Saleem did not return to work for MPL at the Pharmacy. On 28 January 2022 Ms Saleem raised her personal grievances through her lawyer.

Unjustifiable dismissal

Issues

[31] The first issue for any unjustified dismissal claim is to establish whether there has been a dismissal. In this case it appears that there are four possibilities as to how and why Ms Saleem's employment came to an end with differing implications on the question of dismissal:

- (a) Ms Saleem was employed on a fixed term arrangement which expired after she had re-sat the PRAB assessment.
- (b) Ms Saleem was employed on a casual basis up until she had her results from the re-sit of the PRAB assessment and when she received her results MPL stopped offering her work, as it could do with any casual employee.
- (c) Ms Saleem was employed on a permanent basis because she had accepted the pharmacist role and that was effective as she had passed the PRAB assessment.
- (d) Ms Saleem was employed on a permanent basis without the pharmacist role having been offered and accepted by her as there was neither a fixed term arrangement nor a casual arrangement put in place when her employment was extended.

[32] Ms Saleem's claim is based on the proposition that she was a permanent employee at the time of her dismissal. This is because:

(a) She had accepted an offer to become a pharmacist when she passed the PRAB assessment and MPL terminated her employment after she had passed the PRASB exam, so this was when she was permanently employed as a pharmacist.

(b) In the alternative, if there was no permanent role offered and accepted by Ms Saleem as a pharmacist, she was a permanent employee as the extension of her employment was neither a fixed term arrangement because the requirements of s 66 of the Act had not been met nor, was she a casual employee.

[33] MPL's response and opposition to Ms Saleem's claim for unjustified dismissal is that there was no dismissal because Ms Saleem was either on a fixed term arrangement or a casual arrangement – there being no offer of permanent employment to her at any stage.

[34] So, it follows that I need to determine what Ms Saleem's employment status was – was she a casual employee, an employee on a fixed term arrangement, a permanent employee, which included the role of pharmacist, or a permanent employee without the pharmacist role.

[35] Based on my finding of Ms Saleem's employment status I will then be able to determine if she was dismissed or not and if she was dismissed, if this was done in a manner that was unjustified.

Establishing Ms Saleem's employment status

[36] In order to decide what Ms Saleem's employment status was I must assess the real nature of the employment relationship with MPL.

[37] The first step in this exercise is to normally assess any written employment agreement as that identifies the parties' intentions.² However in this case there was no written employment agreement and all that I have to ascertain the parties' intentions is the evidence of what Ms Saleem and Ms Slaimankhel discussed and agreed on 19 June 2021 when Ms Saleem's fixed term agreement with MPL came to an end.

[38] As I have already outlined the evidence of Mr Slaimankhel and Ms Saleem about what was discussed and agreed on 19 June 2021 is conflicting. This means I have to review the evidence and assess which I prefer on the basis of credibility.³

[39] The one aspect of the discussion on 19 June 2021 that Mr Slaimankhel and Ms Saleem agree on is that her employment would be extended to allow her to re-sit the PRAB assessment in November 2021. This was because Ms Saleem needed to be employed as an intern pharmacist in order to sit the assessment. It is notable however that she was not required to be supervised during this time or undertake any particular training. Ms Saleem had already completed her supervised hours previously and only needed to be employed when she sat the assessment.

[40] Where Mr Slaimankhel and Ms Saleem disagree is how this extended employment would operate. Ms Saleem describes it as an extension to her employment as an intern pharmacist with an offer of a role as a pharmacist when she had passed the prior assessment. Mr Slaimankhel describes that the agreement as simply Ms Saleem being offered an ad hoc locum position, that is a position that was casual in nature insofar as the hours of work that she would be given.

[41] Having considered the written and oral evidence of both Mr Slaimankhel and Ms Saleem and having considered the general circumstances under which the discussion on 19 June 2021 took place, it is my conclusion that what was offered by Mr Slaimankhel and

² *Baker v St John Central Regional Trust Board* [2013] NZEmpC 34 at [20]; and *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

³ *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21];

accepted by Ms Saleem was a fixed term employment arrangement, that is employment until she had received her results from the PRAB assessment, with no guarantee as to the number of hours that would be offered to her.

[42] To be clear, I am not satisfied that Mr Slaimankhel offered Ms Saleem a pharmacist role once she had passed the PRAB assessment. Other than Ms Saleem's evidence on this point there is no other evidence to support her position. That is, the circumstances and evidence that describes those circumstances supports Mr Slaimankhel position - that being that MPL did not need a pharmacist, it would not have offered her a role as a pharmacist because of its views of her capability and had there been an offer for a permanent pharmacist role it would have been recorded in writing as was MPL practice.

[43] My second step is to consider how the relationship operated, looking for whether it operated in line with the intentions or differently.

[44] There is nothing in the evidence to suggest that the parties operated their employment relationship any differently than intended. The only difference was Ms Saleem acted in accordance with her view that she had been offered a pharmacist role once she passed the PRAB assessment. This does not change my view on whether there had been an offer and acceptance of a pharmacist role – my view remains that this was not the case.

[45] On the basis of the agreement in the meeting of 19 June 2021 and the way Ms Saleem's employment operated I conclude that:

- (a) There must have been an obligation on MPL to provide Ms Saleem with work, regardless of how much work, so that she could both be employed at the time that she sat the PRAB assessment and so that she could continue to develop the necessary skills required to be a pharmacist (which in turn would assist her ability to pass the prior assessment).

(b) And it follows that there must have been a reciprocal obligation on Ms Saleem to accept work so that she was employed at the time that she sat the PRAB assessment and so that she could continue to develop the necessary skills.

(c) The mutual obligations expressed above operated within the confines of a fixed term arrangement.

[46] In these circumstances it is the case that Ms Saleem was only employed on a casual basis insofar as the amount of hours she would be offered to work each week, and consequently she was expected to accept each week, was not set and could vary week to week depending on MPL's requirements.

[47] However, insofar as ongoing status of her employment, Ms Saleem was employed on a fixed term basis, albeit a fixed term employment agreement that was not recorded in writing (contrary to section 66 of the act).

Assessment

[48] Having concluded that there was a fixed term employment agreement with hours set on a casual basis, it follows that Ms Saleem was not a permanent employee of MPL.

Conclusion on unjustifiable dismissal

[49] Section 66 of the Act sets out the requirements for a fixed term employment arrangement. The key requirement in terms of the circumstances surrounding the end of Ms Saleem's employment is the requirement that an agreement must state in writing the way in which the employment will end and the reasons for ending the employment in that way.⁴ If the parties fail to comply with this requirement the fixed term employment arrangement will still be valid.⁵ However if there is a failure to comply with this requirement then the employer cannot rely on the fixed term to end the employee's employment if the employee elects at any

⁴ Section 66(4) of the Act.

⁵ Section 66(5) of the Act.

time to treat that term as effective, i.e. the employee objects to their employment ending at the completion of the fixed term.

[50] In this case Ms Saleem did object to her employment ending at the expiry of the fixed term. She did so initially because she believed she was entitled to continued employment with MPL as a pharmacist, as she had completed the PRAB assessment.

[51] Then in her correspondence of 28 January 2022 (sent by her solicitor) she raised a personal grievance for unjustified dismissal noting in that grievance that because there had not been a written variation to her prior fixed term employment agreement the fixed term became invalidated and Ms Saleem became a permanent employee i.e. her employment did not end at the expiry of the term.

[52] So it is my conclusion that notwithstanding that there was a fixed term arrangement in place between MPL and Ms Saleem, this fixed term agreement could not be relied on to bring Ms Saleem's employment to an end.

[53] For these reasons then I conclude that Ms Saleem was dismissed by MPL as her employment did not simply come to an end at the expiry of the fixed term. And as a result of this conclusion, I must decide if that dismissal was justified or not.⁶

[54] There are two aspects to justification; whether the employer carried out a fair process in coming to the decision to dismiss and whether the decision to dismiss was substantively justified.

[55] Clearly these requirements for a dismissal to be justified were not met in this case as Ms Saleem was sent away from the Pharmacy and told that there was no ongoing employment, without any consultation and in reliance on a reason which was not valid (that being the expiry of a fixed term arrangement).

⁶ Applying the test for justification at s 103A of the Act.

Conclusion

[56] MPL unjustifiably dismissed Ms Saleem.

Unjustified action causing disadvantage

[57] I will deal with Ms Saleem's unjustified action causing disadvantage personal grievance in fairly brief terms. The problem with Ms Saleem's claim based on this personal grievance is that I am not satisfied on the evidence I heard that MPL acted as alleged. That is, I am not persuaded that MPL failed to support Ms Saleem after her accident and in particular in relation to any return to work program organised through ACC.

[58] Ms Saleem's claim based on unjustified action causing disadvantage does not succeed.

Penalty

[59] In her statement of problem Ms Saleem sought a penalty for an alleged failure by MPL to provide wage and time records.

[60] It was unclear from the submissions whether this penalty claim was still being advanced, so I will deal with it.

[61] Whilst there was some delay in MPL providing the requested information I do not accept that MPL failed to provide wage and time records such that a penalty should be imposed. In the circumstances there is no basis to impose a penalty against MPL.

Remedies

[62] As Ms Saleem has been successful with her unjustified dismissal claim, I must consider what remedies she may be entitled to. I may award any of the remedies provided for under s 123 of the Act.

Compensation

[63] Ms Saleem seeks \$18,000.00 in compensation. Compensation is an award for the humiliation, loss of dignity and injury to feelings that an employee suffers as a result of the unjustified acts (in this case dismissal) and is made pursuant to s 123(1)(c)(i) of the Act.

[64] When assessing compensation my task is to quantify the harm and loss caused by any humiliation, loss of dignity and injury to feelings arising out of the unjustified actions (dismissal).⁷ In this case I must consider the effect of the dismissal on Ms Saleem and establish what that shows in terms of the harm caused to her and the loss she suffered as a result. Then I must quantify that harm and loss. This is done by assessing that harm and loss against others who have been unjustifiably dismissed and establishing where that sits compared to the range of compensation awarded.⁸

[65] Ms Saleem's evidence of the effect of the dismissal on her included that she had a hard time thinking about the mistreatment that she went through, she felt insignificant and depressed suffering from low self-esteem. As a result of her dismissal she has lost confidence and she became distressed and desperate to find a job.

[66] This is evidence of harm and loss manifesting in diminished self-worth and low self-esteem and harm to her emotional health through depression and feeling distressed.

[67] Comparing this loss and harm to other cases of unjustified dismissal and the amounts of compensation awarded I quantify Ms Saleem's loss and harm at \$12,000.00.

⁷ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁸ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

Reimbursement

[68] As Ms Saleem has a personal grievance if she has lost remuneration as a result of that grievance, pursuant to sections 123 and 128 of the Act, she must be awarded the lesser of her lost remuneration or three months ordinary time remuneration.⁹

[69] I have reviewed Ms Saleem's Inland Revenue summary of earnings and on the basis of this document conclude that Ms Saleem did not lose any remuneration after her dismissal by MPL – this is because she received ongoing support from ACC and then obtained a permanent role as a pharmacist.

Contribution

[70] As I have awarded remedies to Ms Saleem, I must now consider whether she contributed to the situation that gave rise to her grievance.¹⁰ This assessment requires me to determine if Ms Saleem behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievance.¹¹

[71] There is no factual basis for me to conclude that Ms Saleem behaved in a manner that was culpable or blameworthy and contributed to her grievance. This means I do not need to reduce the remedies I have awarded.

Summary

[72] Musselburgh Pharmacy (2021) Limited unjustifiably dismissed Nadeen Saleem. In settlement of this grievance Musselburgh Pharmacy (2021) Limited must pay Nadeen Saleem \$12,000.00 for compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

⁹ Noting that there is a discretion to award an amount up to an applicant's actual loss if this is greater than three months ordinary time remuneration under s 128 of the Act.

¹⁰ Section 124 of the Act.

¹¹ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

Costs

[73] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and a determination on costs is needed, Ms Saleem 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 MPL 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.

[74] If I am asked to determine costs, the parties can expect me to apply the Authority's usual daily rate for costs unless particular circumstances or factors require an upward or downward adjustment of that tariff.¹²

Peter van Keulen
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.