

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 210
5404985

BETWEEN DOROTHY SMART
 Applicant

AND CANTERBURY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Christine Hickey

Representatives: Andrew McKenzie, Counsel for Applicant
 Penny Shaw, Counsel for Respondent

Investigation Meeting: 30 October 2014

Submissions Received: 3 November 2014 from Applicant
 30 November 2014 from Respondent

Determination: 15 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dorothy Smart was employed as a Dental Therapy Assistant by the Canterbury District Health Board (CDHB) when she applied for a position as a Dental Therapist in 2012. The CDHB made her a conditional offer of the position subject to her gaining an annual practicing certificate (APC) issued by the Dental Council. The first offer was made on 18 June 2012.

[2] On 27 June 2012 in response to Mrs Smart's application for an APC the Dental Council advised her that because of the further 16 months since the 2011 conditions were placed on her practice the Dental Council proposed to consider the:

... conditions on your Dental Therapy practice due to the extended time away from practice.

[3] When it became clear the Dental Council would not be able to respond to Mrs Smart's application for an APC in time to allow her to start in July 2012 a further offer was made on 5 July 2012 for a start date of 13 August 2012.

[4] Because of prior communication with the Dental Council in 2011 both parties expected that Mrs Smart would need onsite supervision for 150 hours as a condition of the Dental Council granting her an APC. The CDHB suggested to Mrs Smart that Joanne Munro, one of its dental therapists, would be Mrs Smart's supervisor and so Mrs Smart put Ms Munro's name forward to the Dental Council.

[5] The 5 July 2012 letter of offer from CDHB said that it was:

... conditional upon your provision of an Annual Practising Certificate with the conditions as outlined by the Dental Council of New Zealand as follows:

- 1. 150 hours of onsite supervision under a Supervisor to be approved in advance by the Board*
- 2. The provision of a 12 month CPD plan including peer contact activities to ensure Ms Wade [also known as Mrs Smart] maintained her competence in her scope of practice*
- 3. The completion of 60 hours of CPD within the current cycle ending on 31 December 2013.*
- 4. The satisfactory completion of diagnostic radiography relating to fifty patients under onsite supervision, each case to include taking radiographs and providing diagnostic analysis.*

[6] Mrs Smart counter-signed the letter of offer on 11 July 2012 and returned it to the CDHB.

[7] On 29 August 2012 the Dental Council issued a Protocol for the Clinical Supervision of Mrs Dorothy Smart (the Protocol).

[8] The Protocol approved Ms Munro as Mrs Smart's clinical supervisor and echoed the conditions foreshadowed in the 5 July 2012 letter of offer but, materially, added:

Method

*The Council approved supervisor must be onsite **and in attendance** when Mrs Smart is practicing, to **observe, advise, monitor, participate or intervene in all procedures or treatment** undertaken by Mrs Smart.*

Duration

The supervision is to continue until Mrs Smart has completed all requirements set out in the conditions on her general dental therapy and diagnostic radiography scopes of practice and, approval to

remove the conditions from her scope of practice has been granted by the Dental Council, even if this period extends beyond 150 hours practice in the general dental therapy scope and diagnostic radiography relating to 50 patients. (my emphasis)

[9] The CDHB considers that the Protocol significantly changed its liability to assist Mrs Smart to gain her APC. It says it made its offer to employ Mrs Smart under the understanding that as Supervisor Ms Munro only had to be in the same premises - *onsite* - as Mrs Smart but could be seeing her own patients, rather than *in attendance* while Mrs Smart saw patients. The requirement that Ms Munro had to directly observe and monitor Mrs Smart for at least 150 hours was an onerous requirement for the CDHB and one it was not prepared to meet.

[10] On 6 September 2012 Megan Gibbs, the service manager of the Community Dental Service, emailed Mrs Smart that:

*... due to the delay in dental council feedback you were unable to commence employment as a Dental Therapist with CDHB....
The Dental council[’s] ... supervision protocol and ... specifications are higher and potentially longer than we had been initially led to believe. ...
The Service now needs to consider the resourcing requirements of the supervision protocol, impact on service delivery and potential impact on any revised offer of employment we may now decide to offer.*

[11] On 12 September 2012 Ms Gibbs wrote to Mrs Smart stating:

*... following the Dental Councils revision of your supervision protocol related to your Annual Practising Certificate, the CDHB will not be proceeding with an offer of employment as a Dental Therapist.
The Supervision protocol requires an additional level of supervision (‘in attendance’) which this service is not resourced to provide.*

[12] Mrs Smart says she was unjustifiably dismissed from her role as dental therapist or was unjustifiably disadvantaged by the CDHB’s actions of withdrawing its offer to employ her as a dental therapist. Mrs Smart remained employed by the CDHB as a dental therapy assistant after September 2012.

[13] The CDHB says that it did not dismiss Mrs Smart but that as she was unable to start on 13 August 2012 the offer lapsed.

[14] In addition CDHB argues that the 150 hours of onsite supervision condition of Mrs Smart being granted an APC was not able to be met because of the additional

requirement the supervisor be *in attendance*, and so she could not have been employed under the letter of offer of 5 July 2012.

Issue

[15] The issue to be resolved is whether the CDHB was contractually bound to assist Mrs Smart to obtain her APC so it could employ her as a dental therapist. I need to examine whether the letter of offer was accepted and became a binding contract before the Protocol was issued. Mrs Smart considers that it was.

[16] Mrs Smart was unable to obtain her APC because CDHB was not willing to offer 150 hours or more of supervision at the level the Dental Council required. Mrs Smart claims that the CDHB had agreed to offer that supervision and therefore resiled from an agreed term of the contract she had with it.

[17] Mrs Smart says she always understood that the requirement for supervision would be for Ms Munro to be in attendance and to observe her work for the 150 hours.

[18] As part of the negotiations leading up to the CDHB making the job offer on 8 May 2012 Mrs Smart emailed Ms Kirner:

How much support? I am required to do 150 hrs on site support. I would like to think that after a week or two, one on one I will be up to scratch.

[19] Ms Kirner's understanding of what onsite supervision would require is set out in her email of 21 March 2011 to Mr Lee and Ms Gibbs:

150 hours 'on-site' supervision – this is equivalent to roughly 4½ weeks and would require a DT to be on-hand for this time. This would be easy enough to do in a CC with colleagues working in next door surgeries, but would require a DT to accompany her in a preventative mobile for a week (?) – could perhaps work as a DA with her?

[20] Both those emails show that the parties contemplated that there was likely to be a need for some in attendance supervision, but that it may be limited to a week or two. For completeness sake I add that I do not find that Mrs Smart was misleading the CDHB in this email either expressly or impliedly and I endorse her view that she was merely putting her best foot forward and being optimistic about where her level

of experience would see her getting to within a couple of weeks of intensive supervision.

[21] The agreement Mrs Smart and the CDHB had relating to Ms Munro providing supervision to her was not in writing other than in the letter of offer. Their agreement about supervision consisted of discussions and emails over a period of months between Mrs Smart and Heather Kirner, CDHB professional leader of the Community Dental Service and Megan Gibbs, CDHB's service manager of the Community Dental Service.

[22] Mrs Smart and the CDHB's understanding of the conditions that would be imposed on Mrs Smart's APC prior to the Protocol were based on Mrs Smart's interaction with the Dental Council once she returned to New Zealand having worked in Australia for a period of time. Dental therapists are required to be registered by the Dental Council and hold an APC. On 1 March 2011 the Dental Council's Dental Hygiene-Dental Therapy Board agreed that:

- *You be registered in the general dental therapy scope of practice subject to the following conditions:*
 - a. *150 hours of onsite supervision under a Supervisor to be approved, in advance, by the Board;*
 - b. *the provision of a 12 month CPD plan including peer contact activities to ensure you maintain your competence in your scope of practice; and*
 - c. *the completion of 60 hours of CPD within the current cycle ending on 31 December 2013.*

The Board propose to decline your application for registration in the additional scopes of pulpotomies and diagnostic radiography in dental therapy practice.

[23] The limitation on Mrs Smart's ability to undertake diagnostic radiography was addressed through Martin Lee's offer to supervise Mrs Smart's diagnostic radiography of 50 patients and is not relevant to the CDHB's withdrawal of its offer of employment. Mr Lee is the Community Dental Service Clinical Director for the CDHB.

[24] Ms Gibbs and Mr Lee gave evidence at the investigation meeting that their understanding of onsite supervision, as required by the Dental Council in 2011, meant that Ms Munro would undertake her own patient workload in a room next door or

very near to Mrs Smart in the same building and would be present to be consulted by Mrs Smart as necessary.

[25] Mr Lee's evidence was that he equated *onsite supervision* with being in the same facility because he was familiar with the term *direct clinical supervision* relating to dental hygienists and orthodontic auxiliaries.

Direct clinical supervision means the clinical supervision provided to a dental hygienist by a practising dentist or dental specialist when the dentist is present on the premises at the time the dental hygiene work is carried out.

[26] I find that the job offer made by the CDHB on 5 July 2012 was not capable of being a concluded contract upon being counter-signed by Mrs Smart because it was conditional on her obtaining an APC under the conditions set out in that letter of offer. The conditions would only be met once an APC was issued for Mrs Smart, which it never has been.

[27] The Dental Council's 2011 condition was for 150 hours of *onsite supervision*. That formed one of the grounds under which CDHB offered Ms Munro's supervision of Mrs Smart's 150 hours of practice. Mrs Smart was on notice after the Dental Council's letter of 27 June 2012 that the conditions on her practice for gaining an APC were being reviewed by the Dental Council.

[28] On 30 August 2012, the day after the Protocol was issued, Mrs Smart specifically enquired of Sarah Harding, the Registration and Recertification Officer of the Dental Council whether the supervisor, must be alongside her or just onsite.

[29] Ms Harding responded:

... your Council approved supervisor must be onsite and in attendance while you practice until the condition of supervision is removed from your scope of practice.

[30] I consider Mrs Smart's enquiry of Ms Harding to be evidence that she had noticed the significant difference in relation to supervision between the Protocol and the 2011 conditions for her registration.

[31] I consider that the Dental Council's Protocol significantly changed the conditions under which Mrs Smart could be issued an APC from its conditions imposed in March 2011 for her registration. The CDHB made the offer to employ Mrs Smart in good faith based on its understanding that an APC would be issued subject to the same conditions as imposed on her registration in 2011, apart from the radiography condition which changed after March 2011.

[32] The 2012 increased requirement for supervision was akin to a counter-offer being made by Mrs Smart to CDHB, which CDHB was entitled to reject. It rejected the amended conditions for the reason that it did not have, or did not wish to devote, the required increased resources to assisting Mrs Smart to obtain her APC.

[33] Mrs Smart claims that she was already an employee of the CDHB as a dental therapist because she was a person intending to work, as defined in s.6 of the Employment Relations Act 2000 (the Act). I reject that proposition because of my finding that there was no concluded contract to employ Mrs Smart as a dental therapist as the conditions were not satisfied so she could not have already been an employee as a dental therapist.

[34] In addition, the fact that Mrs Smart was not engaged as a dental therapist could not have been a disadvantage to her in her employment. Mrs Smart was employed as a dental therapy assistant before, during and after the relevant period in 2012. She suffered no disadvantage in her employment as a dental therapy assistant and given my finding that she never became a dental therapist it was not possible for her to suffer any disadvantage in that role.

[35] It follows that Mrs Smart's claims must fail.

Costs

[36] Costs are reserved. The parties are encouraged to resolve costs themselves. However, if that is not possible and bearing in mind the imminent Christmas break any party wishing to claim costs has until 31 January 2015 to file a costs memorandum and the other party has a further 14 days within which to respond.

[37] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The current daily tariff is \$3,500 per day. The investigation meeting took less than half a day.

Christine Hickey
Member of the Employment Relations Authority