

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA11/09
5081794

BETWEEN MODUPE AKIB
 Applicant

AND CHIEF EXECUTIVE
 NORTHTEC
 Respondent

Member of Authority: Dzintra King

Representatives: Mark Ryan, Counsel for Applicant
 Bryce Quarrie, Counsel for Respondent

Investigation Meeting: 7 August 2008

Submissions Received: 19 December 2008 from respondent
 No submissions received from applicant

Determination: 19 January 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mrs Modupe Akib, says that she has been discriminated against on the basis of ethnicity and unjustifiably disadvantaged by the respondent, NorthTec. She also says that she has been unjustifiably dismissed in that her termination for redundancy was unjustified.

[2] Mrs Akib says she has been disadvantaged on the following grounds:

- (a) She was not placed on the correct step of the agreement according to her skill level.

- (b) She was placed on a salary that was lower than the salary that she had been on when she was on a fixed term part time employment agreement;
- (c) She was instructed to work in the Business Department when the offer of employment was in the Computing Department.
- (d) She was required to undergo a probationary period.

[3] The applicant seeks a penalty for breaches of the duty of good faith.

[4] Mrs Akib disputes the manner in which the respondent recovered an overpayment.

[5] She seeks reimbursement of lost wages for a period of three months and compensation for humiliation, loss of dignity and injury to feelings in the sum of \$8,000 for the disadvantage actions and \$8,000 for the unjustified dismissal.

[6] The respondent denies the allegations.

Background

[7] In 2006, Mrs Akib was offered by separate agreements temporary part time fixed term employment with NorthTec on the following basis:

- (a) Education: 5 hours per week, 15-30 June 2006;
- (b) Education: 5 hours per week, 27 June to 8 December 2006;
- (c) Computing: 18 hours per week, 21 August to 20 October 2006. This was amended to end on 15 December 2006.

[8] In total, the 23 timetabled teaching hours were the equivalent to a full time teaching load. She was a fixed term hourly paid worker.

[9] Mrs Akib was employed at the rate of Academic Staff Member (ASM) step 3. In addition to the hourly rate for each timetabled teaching hour (\$27.50), this rate had an additional loading or weighting of 20% in addition with clause 4.2.4 of the Academic Staff Multi-Employer Collective Agreement between the Chief Executive of Northland Polytechnic and the Association of Staff in Tertiary Education. The

20% weighting was to compensate for preparation and administrative requirements of the tutor's duty time. This created an hourly paid rate for each hour of teaching of \$33.084.

[10] During late 2006, NorthTec was conducting a review of all fixed term and part time employment agreements to ensure that it was compliant with s.66 of the Employment Relations Act 2000. Mrs Akib's employment arrangement was included in the review. As a result of the review, it was identified that in 2007 there would be an opportunity to offer Mrs Akib a permanent 0.5 full time equivalent ("FTE") role to be based in the Computing and Information Systems Department. Mr Leslie Freeman, the Director of Human Resources at NorthTec, said that the hours to be offered included the undertaking of teaching duties for approximately 120 hours in the Education Department. Although Mr Freeman and Ms Mary Hobson, the Programme Manager, Computing and Information Systems, were aware of the fact that the offer would also include duties in the Education Department, this was never conveyed to Mrs Akib.

[11] On 19 January 2007, Mrs Akib was offered the 0.5 FTE permanent role with effect from 15 January 2007. Mr Freeman said the fact that the offer was made on 19 January although Mrs Akib had been expected to start in the role on 15 January had been caused by an overload of applications that the HR Department had to deal with at that time of the year.

[12] Ms Hobson said she had assumed that Mrs Akib had commenced employment and had notified payroll accordingly and payments were made to her from 15 January. However, Mrs Akib was having discussions regarding her commencing salary and had not actually accepted the role or commenced work. She finally commenced work at the offered salary level on 20 February 2007.

[13] The result of this was that NorthTec made an overpayment which it subsequently sought to recover. For the period between 15 and 20 January, Mrs Akib was overpaid \$2,055.55 gross and had total net payments of \$1,663.29 placed in her bank account.

Permanent Employment Offer

[14] Mrs Akib's letter of appointment dated 19 January is headed "*Offer of permanent proportional (0.5 FTE) employment.*" It states:

I am pleased to confirm our offer of employment for the permanent, proportional .5 FTE position of tutor in the Computing and Information Systems Department, commencing on 15/01/2007. This position is based at the Raumanga Campus.

Remuneration/hours of work. Your salary will reflect the full time salary of \$42,873 gross per annum. This equates to \$21,436.5 per annum for your proportional .5 FTE position. This salary is ASM step 3 of the Northland Polytechnic Academic Staff Collective Employment Agreement. Proportional hours of work are 18 per week.

We wish to offer you this permanent position on the following terms and conditions:

- 1. A collective employment agreement exists that covers academic staff members. For the first 30 days of your employment you will be employed on an individual employment agreement, based on the terms and conditions contained in the collective agreement.*
- 2. The agreement provides for a 12 months probationary period and this will apply to your appointment. During this time your manager will agree to an appropriate level of support and guidance to assist your development in the role.*
- 3. ASTE (the Union) is party to this collective employment agreement. The Employment Relations Act requires us to advise you that you have the option of joining this union although joining is not compulsory. If you do join then you will become collectively bound by the collective agreement. You may contact ASTE's national office, P O Box 27151 Wellington or Eric Herzog branch chairperson on extension 3692. If you wish to join ASTE you will need to complete an application form, which can be obtained from human resources or your branch chairperson.*
- 4. If you decide not to join the union you will be offered the NorthTec individual employment agreement, this will be sent to you after the first 30 days of your start date at NorthTec.*

A copy of the Northland Polytechnic Academic Staff Collective Agreement is available on request.

Please find attached a copy of your job description.

[15] A copy of the individual employment agreement was not sent to Mrs Akib.

[16] On 21 February 2007, Mrs Akib signed an acceptance of offer. She wrote:

Your letter of 19 January 2007 is acknowledged, relating to the following offer:

Position: Tutor

Department: Computing and Information Systems

Status: Permanent proportional

Commencement: 15/01/2007

Hours of work: 18 hours per week

Proportional salary: \$21,426.5 gross per annum

I also enclose a signed and accepted copy of my job description.

Applicable Employment Agreement

[17] Mr Ryan contended that there was a dispute as to whether the collective employment agreement applied to Mrs Akib.

[18] Mrs Akib was not a union member. Pursuant to s.63(2), for the first 30 days after she entered into an individual employment agreement, her terms and conditions of employment comprised:

- (a) *The terms and conditions in the collective agreement that would bind the employee if the employee were a member of the union; and*
- (b) *Any additional terms and conditions mutually agreed to by the employee and the employer that are not inconsistent with the terms and conditions in the collective agreement.*

[19] Section 63(5) provides:

After the 30 day period expires, the employee and the employer may, by mutual agreement, vary the individual employment agreement as they think fit.

[20] Mrs Akib signed the acceptance letter on 21 February. For a period of 30 days after that, she was employed under the terms of the MECA and after that, no individual employment agreement having been provided for her consideration by NorthTec and no variation having occurred, her employment agreement comprised an individual agreement based on the MECA. The relevant provisions of the MECA for the purposes of this case are the salary set out at Schedule B3, the surplus staffing provision set out Schedule E2 and the probationary period provision set out at clause 3.2.3, Part A of which states:

Employees appointed for the first time to a tenured or limited tenured position may, but not necessarily, be required to serve a probationary period of one year.

Mrs Akib's Concerns

[21] On Monday 5 March, Mary Hobson emailed Mr Freeman and Ms Emma Campbell in HR saying:

I just had a conversation with Modupe. She is challenging my authority to give her teaching outside my programme area. She wants a separate contract for the work with foundation studies, and does not accept that I have the right to give her this work as part of the .5 duties. I have explained to her that it is my duty as a manager to request her to undertake any reasonable duties including teaching outside my programme area.

[22] On 7 March, Mrs Akib met with Mr Freeman to discuss some concerns she had about her permanent appointment, chiefly the salary level and also the requirement that she undertake a probationary period. She also complained that she had been compelled to teach business administration.

[23] Mr Freeman told her that she was employed as a computing tutor and her home department was IT. He said that if Ms Hobson was unable to give her a workload to fill the 0.5 position she was fully entitled to ask her to go and work in other departments until her workload was full. She was employed as a tutor for NorthTec and Ms Hobson was entitled to send her to other departments within the Polytechnic. The fact that she was placed within a department did not restrict her teaching within that department.

[24] In response to her salary queries, Mr Freeman said that he had shown her that she was getting paid as she had been the previous year. There were complications in the setting of the salary rate and hourly rate because one of the things that was taken into account was that she was entitled to five weeks' leave now plus four weeks' discretionary leave and her PD time. Last year as a part time tutor she had only been entitled to 6% in lieu of holidays.

Sick leave

[25] Mrs Akib believed she needed a separate contract for the Transition to tertiary teaching. Consequently, she refused to teach in Transition to Tertiary.

[26] On 17 March Mrs Akib asked for a mediation with the Labour Department. This took place on 2 April 2008.

[27] Mrs Akib went on sick leave for 14 days from 19 March. She then had further periods of sick leave from 2 April for 21 days and from 23 April to 22 May. The second medical certificate stated: “*Mrs Akib has been unwell extreme stress at work.*”

[28] Mrs Akib worked the full 18 duty hours in the week commencing 19 February; in the week commencing 26 February she only worked 10 hours in Computing and was absent from work for the weeks commencing 5 and 12 March, the two weeks prior to her being placed on sick leave on 19 March for 14 days.

[29] During the second period of sick leave, Mrs Akib’s entitlement to paid sick leave was exhausted. NorthTec asked for a more detailed diagnosis and prognosis in line with OSH guidelines from Mrs Akib’s GP.

[30] Mr Freeman said that through NorthTec’s occupational health adviser, they advised OSH of the situation and endeavoured to arrange for an investigative interview to be held. The adviser made five attempts to contact Mrs Akib to arrange an interview and to advise her to expect contact from an OSH inspector. All voicemail messages left were ignored by Mrs Akib and, as a result of her reluctance to participate, NorthTec had been unable to address the issues she alleged were affecting her health.

[31] Mrs Akib remained on leave without pay for the remainder of 2007 up to and past the second mediation hearing on 9 October 2007. It appears that after the mediation on 9 October, a conversation was had between Mr Freeman and Mr Ryan, acting for Mrs Akib, about the possibility that Mrs Akib’s position could be declared redundant. Mrs Akib did not recall whether her solicitor had passed this information on to her. However, a letter dated 25 October, sent by Mr Freeman to Mr. Ryan and copied to Mrs Akib, states:

Secondly, I confirm my statements made on 9 October that Mrs Akib’s role at NorthTec is at extreme risk of being declared surplus to the requirements of the organisation and that her employment could be terminated under the surplus staffing provisions of her employment agreement during the immediate future. This would, of course, involve consultation with her and you as her representative.

[32] On 23 October, Mr Ryan sent a fax to the Chief Executive advising:

Our client has instructed us that she wishes to return to work with NorthTec her return date to be Monday 29 October. Due to the amount of time our client has been off work on unpaid sick leave it

may be that you wish to implement a rehabilitation or reintegration programme to facilitate our client's returning to work.

[33] On 25 October, NorthTec replied saying that in light of the extended absence, based on advice that Mrs Akib was to remain away from a stressful environment, NorthTec required a medical clearance from her doctor saying she was in a fit state to return to what could still be perceived as a stressful environment, particularly as the issues had not been resolved and the grievance was still live. It was also indicated that NorthTec would expect Mrs Akib to abide by the terms set for her return to work in April in respect of probation, performance management and repayment of a salary overpayment, albeit that the repayment was to be extended over a longer period at a reduced rate. As her extended absence had resulted in her duties being reallocated to other staff, she would be required to undertake tutorial duties as directed by her Programme Manager.

[34] A month later, on 28 November, NorthTec received a medical clearance from Mrs Akib but there was no assurance that she would meet the other conditions of return expected of her. Confirmation of her acceptance of those conditions was further requested on 3 December.

Redundancy

[35] In the latter part of 2007, budget predictions clearly indicated that NorthTec was to face a financial deficit of some \$1.4m for the year. That resulted in a formal review of all departments, but as significant budget difficulties were in teaching departments, the review initially focused on economies to be made within the teaching areas. For Mrs Akib's department, the review indicated an overstaffing of 1 FTE staff in 2007 and into 2008. Half of this was able to be addressed by, not renewing a fixed term agreement with the department. The remaining 0.5 FTE was identified as possibly being Mrs Akib's role as her duties during her period of absence had been allocated to other staff within the department.

[36] Ms Hobson said that Mrs Akib's duties had, during her absence from work, been allocated to other permanent staff within the department and as a result her role was identified as the role most likely to be made redundant.

[37] On 26 November, Mrs Akib and Mr Ryan were advised that her role had been identified as being surplus to the organisation's requirements, and the reasons for the

recommendation. This letter invited Mrs Akib to make submissions by 7 December in relation to the proposal. No submissions were received. When I asked Mrs Akib why that was the case, she told me that her lawyer had advised her not to make any submissions.

[38] On 11 December, not having received any response from Mrs Akib, the Chief Executive declared her role as in the Department of Computing and Information Systems surplus to the requirements of NorthTec and approved the payment of a severance payment due to her under the agreement. She was notified of that decision the same day, and the payment of monies due was made. From the amount due, NorthTec recovered \$822.22 gross salary overpayment that had been held in abeyance over her period of leave without pay.

[39] Part 10 of the MECA (Mrs Akib's individual employment agreement) deals with surplus staffing provisions. The consultation subclauses (a)-(d) read:

- (a) *The National Secretary of ASTE, the Chair of the local branch of ASTE and affected employees will be notified by the employer of any reviews of the institute's organisational structure or function, which may result in any significant changes to either the structure, staffing or work practices affecting existing employees.*
- (b) *A minimum of one month will be provided to allow ASTE and affected employees to make submissions which will be considered by the employer before making a final decision. The parties may agree to a lesser period.*
- (c) *The employer will take all practicable steps to provide relevant information requested by ASTE.*
- (d) *The employer will provide the union with an opportunity to be involved in any review. Should the review confirm a surplus staffing situation, individuals who might be affected will be advised in writing of this and of their right to assistance from ASTE.*

[40] ASTE was involved in the review. Information provided to ASTE was not made available to Mrs Akib. Mr Freeman agreed that in terms of subclause (b), there had been no agreement to lessen the period of a month for making submissions.

Decision

Disadvantage and Discrimination Claims

[41] It was up to the employer to determine placement on the salary scale. There was nothing unreasonable or improper in the way the employer did this or about the actual placement on the scale.

[42] The salary that was paid to Mrs Akib was in accordance with her employment agreement and it was a salary to which she had agreed. Although it differed from the payments made when she had not been permanent that was simply because of the contractual provisions.

[43] Mrs Akib was required to undergo a probationary period, but was told that, in line with other staff members, the period of 12 months was very likely to be reduced. Because of Mrs Akib's illness, there was no opportunity to proceed with that.

[44] Mrs Akib was not discriminated against. It was clear that she keenly felt that this had been so, but there was no evidence of discrimination.

[45] In those respects, Mrs Akib has not suffered any disadvantage.

[46] Mrs Akib's letter of appointment specifically refers to the Computing and Information Systems Department and makes no mention of duties in another department. The offer is for 18 hours work in that department. Although Ms Hobson and Mr Freeman were aware that there would be duties in two departments neither of them informed Mrs Akib prior to her acceptance of the position. At the meeting with Mr Freeman on 7 March 2007 Mrs Akib said she would have appreciated being given that information so she could have made an informed decision. The attempt to force Mrs Akib to work in another department was a breach of contract.

[47] The failure of the respondent to inform Mrs. Akib that her employment offer included work in another department was misleading. Mrs. Akib accepted the offer on the mistaken view that her duties would be restricted to the Computing Department. Amongst other matters (the issues of probation, salary rate and placement on the scale) this led to her dissatisfaction with the way she was being treated.

[48] Mrs. Akib's going on sick leave was prompted by a number of factors, some of which were justifiable actions taken by the employer. The instruction to work in a department that her employment offer did not provide for was an unjustifiable action. It constituted a disadvantage.

Recovery of Overpayment

[49] The respondent overpaid Mrs Akib. The overpayment resulted from the respondent's error.

[50] Section 4 Wages Protection Act 1983 prohibits deductions from wages unless they are made pursuant to ss 5 (1) and 6 (2). Section 5 (1) provides that consent must be in writing. Mrs Akib did not give written consent.

[51] Section 6 provides that an employer can recover overpayments in certain circumstances. Section 6 (1) defines a "recoverable period" as one during which the worker has been absent without the employer's authority or been on strike, locked out or suspended. While the employer was not by law required to pay wages to Mrs Akib before she commenced work, that does not fall within the definition of a recoverable period.

[52] Furthermore, s 6 (3) provides a number of criteria that must exist before an employer can make a recovery. Even if the period had been a recoverable period, the employer would not have been able to recover the money because s 6 (3) (a) provides that it must by virtue of the methods used in paying wages not have been reasonably practicable for the employer to avoid making the overpayment. Clearly, the employer could easily have ascertained that Mrs Akib had concluded an employment agreement and commenced work.

[53] The respondent has not sought to recover the money either by an action in quasi contract based on mistake or by using the Judicature Act 1908.

[54] Despite Mrs Akib's oral consent to the deductions, the deductions were illegal.

Redundancy

[55] It is apparent that while the respondent had a genuine need to reduce staffing levels, the selection of Mrs Akib had much to do with the fact that she had been on sick leave during which time her duties had been reallocated. I have found that most of the reasons why Mrs Akib went on sick leave were due to her reaction to and dissatisfaction with justified actions of the employer. Had the sole reason Mrs Akib gone on sick leave been due to her disputing the employer's ability to make her undertake teaching duties in another department I would have found that her selection for redundancy was unjustified. However, given the preponderance of other factors, the selection was reasonable.

[56] What was problematic was the respondent's failure to give the requisite period of notice to provide submissions. While I have noted her unfortunate legal advice not to make submissions, the respondent was not in a position to legally terminate her employment until the contractual period of one month had lapsed. That fact renders the dismissal unjustified.

Remedies

[57] No penalties have been sought for breaches of the employment agreement. Nor have penalties been sought for breach of the Wages Protection Act.

[58] Given the substantive justification for the termination remedies can only be awarded for the procedural shortcomings. I make a global award for the unjustified dismissal and the disadvantage pursuant to s 123 (1) (c) (i) of \$3,000.

[59] Mrs. Akib did not contribute to the personal grievances and there will be no reduction in the remedies.

Costs

[60] Costs were reserved.

[61] If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority