

Attention is drawn to the order prohibiting publication of certain information referred to in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 244
3188059

BETWEEN MARIA ESCUDERO
 Applicant

AND OAK GROVE DENTAL LIMITED
 Respondent

Member of Authority: David G Beck

Representatives: Amy Kennerley and Madeline Thomas, counsel for the Applicant
 Dr Osvaldo Reyes Gonzalez for the Respondent

Investigation Meeting: 10 March 2023 at Ashburton

Submissions Received: 17 March 2023 from the Applicant
 17 March 2023 from the Respondent

Date of Determination: 16 May 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Maria Escudero worked as a part-time Dental Assistant/Receptionist in an Ashburton dental practice from 5 October 2021 until she was summarily dismissed on 19 January 2022. Mrs Escudero alleges the dismissal was unjustified.

[2] Dr Osvaldo Reyes Gonzalez, director, and sole shareholder of Oak Grove Dental Limited (OGD Ltd) initially asserted that Mrs Escudero was dismissed during a legitimate 90 days' trial period and therefore has no unjustified dismissal claim.

Issues

[3] The issues I am required to resolve are:

- (i) Whether Mrs Escudero's dismissal was unjustified.
- (ii) If a finding is made that Mrs Escudero was unjustifiably dismissed, what remedies are appropriate given claims for:
 - (a) lost wages; and
 - (b) Compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 ("the Act").
- (iii) If any remedies are awarded to Mrs Escudero, should they be reduced by application of s 124 of the Act (consideration of contribution).
- (iv) Costs of these proceedings.

The Authority's investigation

[4] At the investigation meeting I heard evidence from Mrs Escudero and her husband Guillermo Carlos Escudero, Dr Gonzalez and the OGD Ltd, practice manager.

[5] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions on identified issues. Whilst I record that I have carefully considered all material placed

before me, I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses draws from their written statements, the parties' submissions and attached documentation. For jurisdictional and procedural reasons, the Authority investigation of this employment relationship problem addresses the substantive issues "however described" by the parties.¹

What caused Mrs Escudero's employment relationship problem?

[6] Mrs Escudero says around September 2021 she was looking for a part-time job to find some relief from the isolation of working in the family's dairy farming business. A friend identified that OGD Ltd was seeking a part-time dental assistant. While Mrs Escudero had not experience in this type of role, she does have a medical degree and says she was keen to expand her skill set. Mrs Escudero recalls being interviewed on 4 October 2021 and being offered the job; but expressing some hesitation at the initial pay rate (\$20 per hour) being sufficient to take account of her commute from Dunsandel to Ashburton. However, the job was accepted on the strength of OGD Ltd assuring Mrs Escudero that her pay rate would be reviewed once she got up to speed with tasks. The role also suited Mrs Escudero as its hours were part-time (no more than 20 hours per week) allowing her to drop off/collect one of her two sons at school in Ashburton and still spend some time working for the family dairy business plus caring for her two boys. Days to be worked were agreed as Monday, Tuesday, and Wednesday between the hours of 9am – 3pm.

[7] In summarising evidence, I heard during the investigation meeting, it transpired that significant tension existed between Mrs Escudero and the experienced OGD Ltd practice manager over communication issues and training expectations. Central to the tension was a perception of the practice manager that Mrs Escudero would not recognise her authority and preferred to deal directly with Dr Gonzalez. As context, both Dr Gonzalez and Mrs Escudero often conversed in Spanish (being their first language).

¹ Employment Relations Act 2000, s 160(3).

[8] Dr Gonzalez says he and the practice manager attempted to resolve differences by discussion with Mrs Escudero but failed to do so and, while he got on well with Mrs Escudero, Dr Gonzalez concluded that the two could not work together and decided the solution was to end Mrs Escudero's employment.

[9] In a telling admission that the relationship between Mrs Escudero and the practice manager was dysfunctional, Dr Gonzalez described his refusal to support a warning letter the practice manager had drafted for Mrs Escudero. Dr Gonzalez frankly indicated he thought the practice manager was likewise contributing negatively to the poor relationship but he determined that the situation would only be resolved by dispensing with Mrs Escudero. The circumstances of how Dr Gonzalez effected the dismissal were unusual.

[10] Dr Gonzalez obtained no legal advice and said he initially thought Mrs Escudero was on a 90-day trial period and, he was able to easily end the employment without any repercussions.

Ending of the employment relationship

[11] In the period 29 November – 12 December 2021 the practice manager was absent and Mrs Escudero provided full time cover. Toward the end of the year Mrs Escudero says Dr Gonzalez indicated he planned to expand the business and hire an additional dentist and another dental assistant. Mrs Escudero introduced an Ashburton based friend to Dr Gonzalez and the friend was offered a dental assistant role. Mrs Escudero says she understood this person was also envisaged as part-time and would cover the days she was not working.

[12] After the 2021 Christmas break on 14 January 2022, Mrs Escudero emailed Dr Gonzalez seeking some additional unpaid leave until the end of January to coincide with leave her husband had planned. For February, Mrs Escudero indicated she was unable work an unspecified seven days but wished to collaborate with the newly appointed dental assistant to work out full-time cover for the role. In response by email an hour later, Dr Gonzalez stated:

Happy new year to you as well.

That is totally fine, (the new dental assistant) is already doing so (sic) work for me as I envisaged your situation. Let me know when in February are you busy, you mentioned 7 days.

[13] However, despite the above agreement to extend Mrs Escudero's leave, without any further discussion or contact with Mrs Escudero, Dr Gonzalez and the practice manager decided to end the employment. From evidence, I conclude this was largely driven by pressure from the practice manager threatening to quit if Ms Escudero returned and the fact that the other locally based dental assistant had commenced employment.

[14] By email of 19 January 2022 Dr Gonzalez outlined his decision in the following terms:

I have been thinking about your position and your future in this practice. I don't think I will be able to extend your contract due to the following reasons:

We are having a very slow flow of patients.

We need somebody who can work mostly until 5 pm, preferably on call and who can be available at all times.

There have been some difficulties between you and the practice manager and we believe that this situation will not be resolved sooner enough. You have not been following your contract in schedule A 4 paragraph, and I quote:

“you report to (the practice manager)”

I am sorry to let you go, You have been of great value for my practice. I wish you well and if you need a good reference please let me know.

Regards

Dr Osvaldo Reyes Gonzalez

[15] Mrs Escudero was passive in an email response of the same day and thanked Dr Gonzalez for letting her know the situation and asked to be paid a few days owed and her holiday pay.

[16] Dr Gonzalez responded appearing to be confused over the payment of final holiday pay suggesting Mrs Escudero had no entitlement as she had only worked for three months and he denied any additional days of pay were owed. Mrs Escudero also indicated the dismissal had been affected outside the 90 days trial period and without notice. On the latter issue Dr Gonzalez in an email of 21 January, after claiming no holiday pay was due until “after one year of continues work” nevertheless accepted a two-week notice was due and he claimed he had communicated that on 19 January (he had not) and then he invited Mrs Escudero to return to work up until 2 February or any other time to work out her notice period.

[17] By a letter of 17 March 2022 and a follow up letter from Community Law Canterbury of 14 April, Mrs Escudero raised a personal grievance claiming she had been dismissed outside the 90-day trial period. The parties subsequently attended mediation but were unable to resolve matters.

[18] During the investigation meeting Dr Gonzalez sensibly did not seek to rely upon the 90 days trial period provision saying he had mistakenly understood it related to the days Mrs Escudero worked (35). However, Dr Gonzalez accepted that this was in incorrect interpretation and that Mrs Escudero was in OGD Ltd.’s employment for 91 days.

Was Mrs Escudero unjustifiably dismissed?

[19] Given that OGD Ltd accept they cannot rely on a valid trial period I now consider whether Mrs Escudero’s dismissal was otherwise justified.

[20] The reasons for ending the employment relationship given in Dr Gonzalez’s email of 19 January 2022 confirming the summary dismissal, were twofold 1) a claim that the position Mrs Escudero occupied needed its hours restructuring and 2) performance issues being unspecified relationship difficulties with the practice manager.

[21] In submissions, Dr Gonzalez did not further address the reasons for Mrs Escudero's dismissal other than to suggest that he had previously brought performance concerns to her attention.

[22] The Authority must consider whether the summary dismissal of Mrs Escudero in all the circumstances was a step which a fair and reasonable employer could have taken.

[23] The first issue is that to dismiss Mrs Escudero summarily it must follow a finding of serious misconduct was evident. Clause 8.4 of the individual employment agreement states dismissal without notice follows if OGD Ltd "considers that you have engaged in any act of serious misconduct or other cause justifying summary dismissal."

Assessment

[24] Objectively viewed the two reasons given for dispensing with Mrs Escudero's services do not establish a conclusion that immediate dismissal was warranted – no serious misconduct was alluded to or established.

[25] At best for OGD Ltd, it was objectively apparent that Mrs Escudero was having difficulty in establishing a positive relationship with the practice manager and she preferred to deal with Dr Gonzalez. I am led to an objective conclusion that reason for the dismissal was this relationship.

[26] As a fair and reasonable employer, if OGD Ltd had performance concerns about the relationship that was not 'one way' they should have properly put Mrs Escudero on notice about these concerns and advised how they could be addressed, including offering necessary and appropriate training and support. This did not happen in the brief period of employment.

[27] A further factor was a genuine need for a dental assistant with a more flexible approach to hours of work but that discussion was not had with Mrs Escudero and it was reasonably apparent that nothing was explored about using the new dental assistant to cover the additional hours required.

[28] Mrs Escudero's claim essentially is that OGD Ltd dismissed her in a procedurally and substantively unjustified manner that cannot satisfy s 103A of the Act and she was, therefore, unjustifiably dismissed. The test in s 103A(2) is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Section 103A (3), requires that I consider several factors, including whether concerns were raised by the employer with the employee before dismissing the employee, whether a reasonable opportunity to respond to those concerns was given, and whether the employer genuinely considered the employee's explanations (if any) before dismissal.

[29] The employment was for a brief period, the manner of the dismissal was pre-determined and abrupt with no opportunity for Mrs Escudero to obtain representation and have input into the decision or address the decision-makers (Dr Gonzalez and the practice manager). Section 103A of the Act and good faith considerations were absent in the decision to dismiss. The procedural defects were multiple including not affording Mrs Escudero any opportunity to meet and discuss potential reasons for dismissal.

Finding

[30] No fair and reasonable employer could have concluded that summary dismissal was warranted in these circumstances. Mrs Escudero was unjustifiably dismissed.

[31] In concluding that Mrs Escudero was unjustifiably dismissed, she is entitled to consideration of available remedies discussed below.

Remedies

Lost wages

[32] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost should I find an established a personal grievance and, s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration. Here I find Mrs Escudero's lost remuneration was attributed to the personal grievance.

[33] OGD Ltd contested Mrs Escudero's evidence of her efforts to secure alternative employment pointing to her employment on the family farm and that she did not secure alternative employment until October 2022. Mrs Escudero conceded that she was only available for part-time work and because of family care reasons and location of the family home she had limited opportunities.

[34] OGD Ltd also noted that at the commencement of employment Mrs Escudero had suggested the employment was not sustainable due to commuting costs and that she would only continue working until an alternative assistant commenced work. However, Mrs Escudero indicated that once she got started, she enjoyed the work and valued the flexibility of being able to collect and drop of her son at an Ashburton school.

[35] ODC Ltd.'s Dr Gonzalez disclosed evidence in submissions that his financial situation was difficult and the dental practice was struggling to get established.

[36] In all the circumstances, I consider it equitable that OGD Ltd is ordered to pay Mrs Escudero thirteen weeks' lost wages and holiday pay for 20 hours contracted hours per week in the sum of \$5,685.20 gross (a sum taking account the minimum wage increase to \$21.20 on 1 April 2022 and an 8% holiday pay loading).

Compensation for hurt and Humiliation

[37] Mrs Escudero gave compelling evidence of the humiliating impact of the summary dismissal and the affect upon her self-confidence and health. Mrs Escudero explained that she derived a deal of satisfaction from the role and felt it best utilised her skills. She felt that she

had a good relationship with Dr Gonzalez and had been accommodating to the practice's needs and felt shocked and confused by the dismissal.

[38] I find that with some justification, Mrs Escudero felt OGD Ltd dismissed her in a callous and peremptory fashion. I find Mrs Escudero was afforded no dignity and she suffered significant humiliation and hurt as a direct result of how she was summarily dismissed.

[39] Mrs Escudero's claim was supported by evidence in paragraphs 49 and 50 of her witness statement and supporting documentation provided to the Authority and OGD Ltd. In terms of clause 10, Schedule 2 of the Act I place a non-publication order on this evidence.

[40] Mrs Escudero found alternative part-time employment but not immediately and was unable to put this unfortunate experience behind her for a reasonably significant period.

[41] Considering the circumstances and awards made by the Authority and Employment Court in similar situations and how OGD Ltd effected this dismissal, I consider Mrs Escudero's evidence warrants compensation of \$12,000 under s 123(1)(c)(i) of the Act.

Contribution

[42] Section 124 of the Act states that I must consider the extent to what, if any, Mrs Escudero's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedies granted should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*².

[43] Given the relatively short period of employment and the unfortunate circumstances of the dismissal I do not see any issues of contribution from Mrs Escudero. I cannot objectively deem Mrs Escudero's conduct to have been in any way 'culpable'.

² *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Finding

[44] I find that no reduction in the remedies I have awarded is justified.

[45] However, the Authority has discretion under s 123(2) of the Act to consider the financial circumstances of a party and may order payments of remedies by instalments. Given the evidence provided by OGD Ltd I order that the remedies be paid by instalments as follows.

Overall finding

[46] I have found that:

- a. Maria Escudero was unjustifiably dismissed from her employment with Oak Grove Dental Limited.
- b. Oak Grove Dental Limited must pay Maria Escudero the sums below:
 - (i) \$5,685, 20 gross lost wages inclusive of holiday pay pursuant to s 123 (1)(b)
 - (ii) \$12,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
 - (iii) Pursuant to s 123(2) of the Employment Relations Act 2000, the two sums above are to be paid in six equal monthly instalments of \$2,947. 53 with the first payment falling due on or before the 30 June 2023 and thereafter five further payments due on the last day of each following month.

Costs

[47] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, the party that considers it is entitled to seek a costs contribution has 14 days from the

date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply.

[48] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate basis unless circumstances or factors, require an adjustment upwards or downwards.³

David G Beck

Member of the Employment Relations Authority

³ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1