

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 110  
5323615

BETWEEN JUSTINE HURLEY  
Applicant

AND SLC PHYSIOTHERAPY  
LIMITED T/A ORA 3  
PHYSIOTHERAPY  
Respondent

Member of Authority: P R Stapp

Representatives: Jenny Murphy, Counsel for the Applicant  
Wayne Wolfsbaur, for the Respondent

Investigation Meeting: 20 April 2011 at Palmerston North

Determination: 17 June 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Justine Hurley claimed that she was dismissed from her employment with SLC Physiotherapy Limited (SLC and also referred to as *Ora Three*) in the evening of 12 October 2010. She changed this in her written evidence to 13 October 2010. The dismissal was confirmed in a letter dated 13 October 2010, and that letter provided the following reasons:

- (a) That related to numerous discussions on hours of work and the nature of reception work;
- (b) That there had been no progress with finalising a provider contract with ACC.

[2] In the background to this matter, Ms Hurley transferred her employment from Ora3 Limited to SLC after working for Ora3 Limited that went into liquidation. She

claimed that her employment with SLC continued on the existing conditions, but not in a written employment agreement. There was no employment agreement until the parties started negotiating much later.

[3] Ms Hurley commenced work with SLC on 8 March 2010. For the first two pay periods she was paid \$22 per hour for 30 hours per week (timesheets produced).

[4] She claimed that on 17 March 2010 she was requested by Mr Wolfsbaur, SLC's director, to reduce her hours, which she was prepared to do, but Mr Wolfsbaur changed his mind on 18 March and informed her he would reduce her rate to \$18 per hour. The time sheets that Ms Hurley filled out reflect this change, but on the first period when the change applied she did make a note of what she thought they had discussed.

[5] During the employment Ms Hurley and Mr Wolfsbaur got into a disagreement about the following:

- (a) Time being taken off on the busiest day of the week (Friday);
- (b) The presentation of an employment agreement to sign;
- (c) A reduction of hours;
- (d) Taking a day off on 27 September and when Ms Hurley was not paid for it;
- (e) The nature of employment and the calculation of a day's holiday pay;
- (f) Payment of annual holiday pay;
- (g) Dismissal on 12 or 13 October 2010.

[6] Mr Wolfsbaur denied all the applicant's claims. He says that:

- (a) There was no agreement on pay and hours as claimed by Ms Hurley;
- (b) ACC advised SLC that accredited rates had been cancelled, which would require an application by SLC to continue. This was important for funding;
- (c) The business's income dropped by 33% when ACC funding ceased;

- (d) He explained to Ms Hurley the financial situation facing the business;
- (e) He never asked Ms Hurley to reduce her hours, but he would need to consider staffing arrangements;
- (f) Ms Hurley offered to reduce her hours for the same pay;
- (g) They agreed to \$18 per hour. That has never been challenged until these proceedings;
- (h) Inadvertently Ms Hurley was overpaid the wrong amount once. She agreed to have that fixed in her next pay;
- (i) He requested her to take annual leave for a day;
- (j) There were discussions on the type of employment with Ms Hurley and the contractual arrangements which involved contracts being presented. The first was a mistake. The second reflected her role as an employee for SLC (although Ms Hurley says she never received a copy of that document until these proceedings);
- (k) An employment agreement was not signed;
- (l) Ms Hurley wanted a day off on the busiest day of the week (Friday 24 September 2010). She accepted taking a second day off;
- (m) Ms Hurley made an offer to obtain 8% of her wages to date for her to leave. Mr Wolfsbaur says he was surprised by this development. Ms Hurley denied she asked for that sum.
- (n) He denied terminating Ms Hurley's employment on 12 and or 13 October 2010;
- (o) He gave Ms Hurley the letter and he assumed that it would assist her for family support or some other benefit. He says that the letter came about after a text from Ms Hurley on 15 October 2010, and he backdated the letter to 13 October since that was the last day Ms Hurley turned up for work, and he sent it on 15 March 2010;

- (p) He made the decision to make Ms Hurley redundant when all else had failed on any negotiations with her on the contractual terms, the nature of employment, the hours of work and the rate of pay.

### **Issues**

[7] The issues for the Authority to determine are:

- (a) What was the nature of Ms Hurley's employment with SLC?
- (b) How did the employment end?
- (c) When did it end?
- (d) What were the reasons for the employment ending?
- (e) Both parties have a dispute over the calculation of holiday pay and the entitlement to it. This has developed into an argument about whether or not an 8% loading applied to the hourly rate, and whether or not Ms Hurley offered to leave for a sum based on a calculation for holiday pay.
- (f) Is there any pay and/or holiday pay owing?
- (g) Is Ms Hurley entitled to remedies?
- (h) Both parties have applied for costs.

### **The facts**

[8] In the absence of any written employment agreement, Ms Hurley was initially paid \$22 per hour for 30 hours per week for the first two pay periods. This was at the commencement of her employment with SLC. Ms Hurley did note on a timesheet that she believed her rate was \$22 per hour because she and Mr Wolfsbaur had not had any discussions with regard to what she believed applied on continuing her employment arrangements without change. Subsequently, Ms Hurley was paid at \$18 per hour for at least 30 hours per week, which she accepted. Furthermore she completed the timesheets and wages calculations. I hold her pay was \$18 per hour for up to 30 hours per week.

[9] Ms Hurley did have some time off for holidays during her employment. It is common ground she took 2 days off when her son left for overseas and to be with her ill mother. She was paid on both occasions. On another occasion she had to take leave without pay, and she is claiming this. Mr Wolfsbaur says he did not allow Ms Hurley to take the day off as annual leave because she did not provide adequate notice to arrange cover.

[10] Ms Hurley initially claimed in her SOP she was dismissed on 12 October, but during the Authority's investigation changed the date to 13 October 2010 when she says Mr Wolfsbaur told her not to come back to work after they had a disagreement on the claims for the payment of holiday pay.

[11] However, Mr Wolfsbaur did not effectively terminate the employment until writing to her on 15 October with his letter dated 13 October. He says he sent the letter to Ms Hurley on 15 October. This was confirmed by the postal mark found on the envelope (15 October 2010), and which Ms Hurley says she received on 19 October. Also, Mr Wolfsbaur relied on a text message from Ms Hurley sent to him by her on 15 October asking for the letter (not challenged).

[12] The text stated:

*Hi Can I pick the letter up Monday Morning and I still need paying for Wednesday thanks 15 October 2010 7.57pm.*

[13] That letter reads verbatim as follows:

*Further to my letter date 24th June 2010 and the numerous discussions we have had regarding the hours of work and the nature of the reception work (copy attached) I am afraid that I will no longer be able to employ you as receptionist.*

*As stated in my previous letter the nature of physiotherapy nationwide is precarious at best and as you will be aware there has been no substantial progress with regard to increasing patient numbers over the previous six months. You will also be aware that as Ms Kath O'Donald has left and competition to provide physiotherapy services in Palmerston North has increased the treatment numbers have dramatically decreased by 30% and it is critical that Ora Three meets accreditation standards by mid-November to maintain its endorse provider contract with ACC to ensure financial viability.*

*As part of this contract necessitates having contracts in place for reception staff and as there has been no progress with regard to finalising the offered contract I am left with no choice but to terminate employment as Ora Three reception forthwith.*

*I am sorry that the current economic situation and legal requirements prevent me from offering any other solution as I am sure you can appreciate from the many discussions we have regarding this matter. I can assure you I have tried my very best over the past seven months to supply you with most hours of work and best income that Ora Three Physiotherapy could offer. I wish you the very best for the future.*

[14] Mr Wolfsbaur has said that this letter reflects his reasoning for terminating Ms Hurley's employment as a receptionist. He relied on the detail in regard to the precarious nature of physiotherapy, reduction in staff and the impact of the provider contract with ACC which, taken together, were causing financial difficulties. He also says that he wanted to provide her with a casual on-call and as-needed arrangement as an alternative, which she would not accept.

[15] Ms Hurley has a very different understanding of the letter dated 13 October 2010. First, she believed it was written on 15 October 2010 and dated to cover Mr Wolfsbaur in regard to her claim about what happened on 13 October 2010. She believed that her position as receptionist was terminated because the letter referred to no progress being made in regard to finalising the offered contract and that Mr Wolfsbaur said that he had no choice but to terminate her employment.

[16] Mr Wolfsbaur relied on his letter as proof of redundancy. He accepted when I questioned him that the first time "redundancy" was actually referred to was in his written replies in these proceedings.

[17] Both parties accept that it is their word against each other in respect of what the contractual arrangements for pay and hours were and what the reasons were for the employment ending. Mr Wolfsbaur has claimed that Ms Hurley has deliberately manipulated the situation to create a personal grievance against SLC. Ms Hurley denied the claim.

### **Determination**

[18] The parties had no written employment agreement. I find that Ms Hurley's pay was for \$18 per hour and that she was required to work for 30 hours per week because she accepted that for the majority of time during her employment. The change over of employment to SLC without any employment agreement has confused the matter. However, the timesheets support my conclusion because although Ms Hurley contested the change she did accept it by receiving the new payment and

worked the hours over a period of time until her dismissal without further complaint, challenge and or claim. She completed the timesheets and calculated her pay. Her claim for arrears on the basis of \$22 per hour is dismissed.

[19] I accept that Mr Wolfsbaur's letter was written on 15 October, but was dated 13 October 2010. The evidence supports the letter being sent to Ms Hurley on 15 October. This was confirmed by the postal mark found on the envelope (15 October 2010). Ms Hurley says she received the letter on 19 October, which makes it more than likely it was sent on 15 October. Also, there was a text message that Mr Wolfsbaur referred to that Ms Hurley sent to him on 15 October asking for a letter (not challenged).

[20] I hold that it is more than likely that Ms Hurley was dismissed on 19 October when she received the letter and not 13 October. My reasons are:

- a. Ms Hurley's text did not refer at all to any telephone conversation about being told not to return to work.
- b. There is the background on the negotiation of an employment agreement.
- c. There is the background dispute over whether or not Ms Hurley offered to leave subject to an agreement on a payout involving her holiday pay.
- d. Ms Hurley did not have her dates sorted out in regard to 12 and 13 October between filing her claim and presenting herself to give evidence. She has changed her dates.
- e. Although Ms Hurley's husband witnessed her reaction to the telephone conversation with Mr Wolfsbaur, he did not actually hear what was said, other than witnessing Ms Hurley's reaction and what she told him. There were no other witnesses to what was said. Given the disputes between Mr Wolfsbaur and Ms Hurley I hold that the relationship was tense and emotionally charged and as such it is likely that Ms Hurley has interpreted more in the situation than there was. In this regard I am sure that Mr Wolfsbaur had become frustrated by her reaction and he concluded when she asked for a termination letter he decided to write one despite any misgivings and apprehension about it.

He was adamant that he never told her not to bother coming in and did not terminate her employment.

- f. Ms Hurley worked the following day.
- g. She supplied a final pay sheet.

[21] Mr Wolfsbaur's letter was not eloquent and lacked the degree of detail often associated with employment matters. I accept that the letter related to the financial difficulties faced in physiotherapy work and that no other options were able to be negotiated between the parties. This was more than likely related to the financial challenge faced by SLC because of the ACC circumstances. Thus, I accept that Mr Wolfsbaur had reason to change arrangements. It is not likely that he has deliberately set out to cover his tracks in regard to Ms Hurley's claims about what she says happened on 13 October.

[22] The reasons for the dismissal have become blurred partially because the letter refers to two things. First it refers to the financial background faced by the company. Secondly it referred to the inability of the parties to agree on new terms for a change. I am satisfied that there is a link between the two in regard to the financial situation. Thus, although the respondent never referred specifically to redundancy as a reason, it follows that was what was involved. When any agreement to change failed to materialise Ms Hurley was dismissed for what amounted to what Mr Wolfsbaur now says was redundancy (although the term was never used at the time), I hold. Ms Hurley has relied upon Mr Wolfsbaur's failure to mention redundancy at the time as proof that her termination of employment had nothing to do with redundancy, but every thing to do with the dispute over the payment of holiday pay and her failure to sign a new employment agreement. I agree with her that these two matters would not justify the termination of her employment. However, it is my conclusion the thrust of the letter around the finances and ACC make it more than likely that was where the real problem rested for the company. Usually it would be expected that redundancy would be raised and mentioned specifically for consultation/input from an employee.

[23] In this case I hold that Ms Hurley was consulted and she had an opportunity for input and discussion on changes to the proposed employment agreement, but not in regard to the threat of redundancy because it was never referred to by Mr Wolfsbaur. There is evidence of discussions going on between them during this time

that covered matters on the employment agreement and certainly included changed arrangements. The ACC situation was not challenged, although Ms Hurley has not been able to establish her claim that it would have had no impact on her employment. I accept Mr Wolfsbaur's knowledge of his own business and expertise on that issue and that he referred to it and the impact of it in his letter (13 October). Ms Hurley had an opportunity to discuss options and indeed negotiate an alternative involving new terms and conditions, given for example the proposals to change to casual as and when needed employment and a contracting arrangement. However she never had the opportunity to leave her employment with the clear understanding about what was actually involved and the accurate reasons, thus she reached a reasonable interpretation that Mr Wolfsbaur's letter of dismissal related to her failure to sign a new employment agreement. I can not establish if she has deliberately manipulated the situation to create a personal grievance against SLC as claimed by Mr Wolfsbaur.

[24] Also, the reasons for the termination of employment have become blurred by Mr Wolfsbaur's attempt to negotiate an employment contract with Ms Hurley. This involved confusion around the nature of the arrangement he envisaged, which first involved a contracting arrangement, and then the attempt to get agreement on terms and conditions of employment. Ms Hurley reasonably believed her dismissal related to this alone because Mr Wolfsbaur never referred to "redundancy" at all at the time. Thus, she believed the reasons for her dismissal followed the decision being made by Mr Wolfsbaur. At best it seems that it was expected that Ms Hurley would infer what was happening, and that is not sufficient, I hold. I hold that the underlying reason had more to do with the changes required to affect the ACC accreditation and consequential funding. At best Mr Wolfsbaur's approach to his dilemma was clumsy and inexperienced, and has left him open to criticism about his motives and reasons relied upon for ending Ms Hurley's employment.

[25] I find that Ms Hurley does have a personal grievance in regard to her employer failing to provide clear reasoning in regard to her employment ending. A fair and reasonable employer would have been much clearer on its process, stated the change arrangements had the potential to involve a threat of redundancy and would have kept the negotiation of terms and conditions of employment separate and or clearly put it in context to avoid any misunderstanding.

[26] I hold that there was no proper consultation over the threat of redundancy. Ms Hurley has a personal grievance for unjustified dismissal.

[27] As there was a genuine redundancy situation underlying Ms Hurley's continued employment there can be no loss of wages.

[28] Any compensation claimed must be modest. Compensation can only relate to the breaches in the process and as the elements did exist the only problem has been the lack of accuracy and detail on the reasons that have been open to misinterpretation. This is a matter for compensation because Ms Hurley was shocked by the suddenness of losing her job and the surprise without being properly consulted that there was a threat of redundancy. This prevented a dignified departure. I assess the compensation as \$3,000.

[29] I hold that there was no contribution on Ms Hurley's part.

[30] I now turn to the holiday pay claim. This claim relates to a period less than 12 months prior to Ms Hurley's employment being terminated. Ms Hurley has made a claim for holiday pay when she was required to take a day off on 27 September without pay.

[31] Ms Hurley's employment was a permanent position with SLC. She was paid \$18 per hour up to 30 hours per week. The regularity of her employment means that the employer was not entitled to incorporate holiday pay in her hourly rate of pay rate unless there was a genuine fixed term employment agreement or the employment was intermittent in character. Indeed there was no employment agreement separating the hourly rate and the holiday component. The right to incorporate holiday pay in the hourly does not apply to Ms Hurley's employment with SLC. The fact that Ms Hurley was paid for days she took off on holiday supports this finding.

[32] Therefore, SLC must pay Ms Hurley her proper holiday pay entitlement upon terminating her employment. Ms Hurley received a payment for \$1,513.62 net (including \$1,071.08 net holiday pay and \$442.54 net pay). By my calculation 8% of the gross wages paid is \$1,314.59: (\$16,432.39-document N 1, 2 and O SOP and documents 9 and 10 SIR). This includes the reconciliation of leave taken by Ms Hurley. Deducting the \$1,297.64 gross<sup>1</sup> already paid from \$1,314.59 above results in

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<sup>1</sup> Gross sum related to \$1,071.08 net: document 10 SIR and N1 and N2 SOP and para 22 SOP.

\$16.95 holiday pay owing. This accounts for differences between the parties' documents in the absence of a proper wage and time and holiday record.

[33] SLC is required to pay Ms Hurley \$16.95 holiday pay.

**Order of the Authority**

[34] SLC Physiotherapy Limited is required to pay Ms Hurley:

- a. \$3,000 compensation under s 123 (1) (c) (i) of the Act.
- b. \$16.95 holiday pay.

[35] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority