

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 19
5390673**

BETWEEN

REHANA HUSSEIN
Applicant

AND

OTAHUHU COMMUNITY
PHARMACY LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Mike Harrison, Advocate for Applicant
Nagi Faltaus, Counsel for Respondent

Investigation Meeting: 10 January 2013 at Auckland

Submissions received: 14 January 2013 from Applicant and from Respondent

Determination: 21 January 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Rehana Hussein, claims that she was employed by the Respondent, Otahuhu Community Pharmacy (the Pharmacy) and that she was unjustifiably constructively dismissed.

[2] The Pharmacy denies that Ms Hussein was employed, or that she was unjustifiably constructively dismissed.

Issues

[3] The issue for determination is whether or not Ms Hussein was unjustifiably constructively dismissed by the Pharmacy. However, as only an employee can make a claim for unjustifiable constructive dismissal, it must first be established whether or not Ms Hussein was an employee.

Background Facts

[4] Mr Atia, sole director of the Pharmacy, said the Pharmacy had commenced in Otahuhu on 10 June 2012, having previously traded in Botany Downs on the North Shore. Mr Atia explained that he is the sole employee at the Pharmacy and that business had been poor following the opening.

[5] Mr Atia said he had received advice from which he had been lead to understand that the Pharmacy might be able to obtain a 40% subsidy towards an employee's salary if the successful applicant was a client of WINZ. Mr Atia explained that it would only have been possible for the Pharmacy to financially afford to employ an additional employee if the 40% subsidy was available.

[6] Mr Atia said he had telephoned WINZ and, following a conversation with Mr Ramesh Prasad, WINZ Work Broker, who had confirmed that the Pharmacy might be eligible for the 40% subsidy, had registered a vacancy for a Pharmacy Assistant with beauty therapy and massage qualifications and experience. Mr Atia explained that the requirement for beauty therapy and massage skills was important to him as he had been advised that being able to offer these services would enhance business in the Pharmacy.

[7] Mr Atia said he had also informed Mr Prasad that the applicant should be attentive and cheerful and able to successfully interface with the Pharmacy customers in order to enhance the Pharmacy's business.

[8] Mr Prasad confirmed that the initial conversation with Mr Atia had centred on the 40% subsidy and whether or not the vacancy at the Pharmacy would qualify for it. Mr Prasad agreed that the availability of the 40% subsidy had been important to Mr Atia.

[9] However Mr Prasad explained that he would not have been able to confirm the 40% subsidy entitlement until such time as he had been provided with the details which enabled him to complete the 'Flexi Wage Subsidy Calculator' form, these included the hourly rate for the job and the hours of work to be offered by the employer. The Flexi Wage Subsidy Calculator' form once completed, then had to be submitted by Mr Prasad to a manager for approval.

[10] Mr Prasad confirmed that he had interviewed Ms Hussein in connection with the Pharmacy vacancy and had established from her responses that she had worked in a customer

service role, had some experience in beauty therapy and massage, and was interested in applying for the Pharmacy position.

[11] Mr Prasad said that at the time of interviewing Ms Hussein, the 'Flexi Wage Subsidy Calculator' form had not been completed because he did not know the terms and conditions of employment pertaining to the Pharmacy position, stating that this would be a matter to be discussed between the employer and the applicant. Accordingly he had not informed Ms Hussein of any terms and conditions of employment, including the hourly rate of pay or the hours of employment.

[12] Mr Atia said Mr Prasad had contacted him on 9 July 2012 and explained that he had an applicant, Ms Hussein, who had the necessary skills and experience, and had assured him that she met all the requirements of the position.

[13] Mr Atia said he had agreed with Mr Prasad that he would interview Ms Hussein for the vacancy on Friday 13 July 2012. Mr Atia said Mr Prasad had informed him that he could give Ms Hussein a pre-employment test as part of the interview process.

Friday 13 July 2012

[14] Mr Atia said Ms Hussein had attended for an interview at 10 a.m. on Friday 13 July 2012. Mr Atia said he had commenced the interview by reviewing Ms Hussein's curriculum vitae and although this showed that she had had experience in beauty therapy and massage, he had been concerned at her job history. In particular, Mr Atia said he had been concerned that she had:

- been out of work for three years;
- not held a job for more than a few weeks; and
- had a succession of different jobs which all appeared to have been terminated prematurely.

[15] Mr Atia said that during the interview with Ms Hussein Mr Prasad had telephoned him to check how the interview was proceeding and he had told him (Mr Prasad) that he was not satisfied with Ms Hussein's skills and credentials, however Mr Prasad had urged him to give Ms Hussein "a chance" and reminded him that he could give her a pre-employment test as part of the interview process.

[16] Mr Atia said the interview had continued following the telephone call with Mr Prasad. Ms Hussein said that Mr Atia had discussed his concerns about the work history as indicated on her curriculum vitae, and also her experience. Ms Hussein explained that Mr Atia had been particularly interested in her experience of massage, which she had confirmed she had in addition to a qualification in retail.

[17] Ms Hussein said Mr Atia had discussed his future plans for the Pharmacy which included offering beauty therapy and massage, although there was no equipment for this at that time. Also Ms Hussein said Mr Atia had also discussed the possibility of her using his motor car on Pharmacy business.

[18] Mr Atia confirmed he had discussed his future plans for the Pharmacy and that these had included the provision of beauty therapy and massage services in order to increase business.

[19] Mr Atia said he had also discussed Ms Hussein's driving qualifications as her Curriculum Vitae stated she had a restricted licence, and the Pharmacy Assistant would be expected to use his (Mr Atia's) personal motor car for Pharmacy errands.

[20] Mr Atia said he had concluded the interview after approximately 40 minutes by informing Ms Hussein that she was to return the following day for a pre-employment test as part of the interview process.

[21] Mr Atia stated that he had not offered Ms Hussein employment at the conclusion of the interview process, and there had been no discussion about the terms and conditions of the position.

[22] Ms Hussein said that she had assumed that she had been employed because Mr Atia had asked her to return the following day, but agreed that there had been no discussion about the terms and conditions of the position, and that she had not asked about the salary, the hours of work, or any other details.

[23] Ms Hussein said that a further indication to her that she had been employed was the fact that Mr Atia told her she was to wear black trousers the following day. However Mr Atia denied that he had told Ms Hussein what to wear the following day and stated that there had been no discussion about a uniform or dress code.

Saturday 14 July 2012

[24] Mr Atia said that when Ms Hussein had left the Pharmacy on Friday 13 July 2012, there had been no discussion about the time Ms Hussein should attend the Pharmacy the following day and that he had confirmed the time to her by text message on Saturday 14 July 2012.

[25] Following Ms Hussein's arrival at the Pharmacy at approximately 10.30 a.m. on Saturday 14 July 2012, Mr Atia said he had asked her to do some Pharmacy cleaning and to serve the customers who came into the Pharmacy. Mr Atia said he had included cleaning in the pre-employment test on the basis that many Pharmacy Assistants objected to that aspect of the job but he considered it was an intrinsic part of the position.

[26] Ms Hussein said she had been asked to work in the storeroom of the Pharmacy and had not been asked to serve customers, just to pop out to watch Mr Atia serve them. During this time Ms Hussein said she had carried out tasks including emptying out tablets and other medication and removing the labels from old medication containers.

[27] Mr Atia said that he had not asked Ms Hussein to destroy medication as this would be a task only a registered Pharmacist could carry out due to privacy and medical considerations.

[28] In regards to the customer interface and serving part of the pre-employment test, Mr Atia said he had become concerned by the fact that whenever a customer came into the Pharmacy, Ms Hussein withdrew to the back of the Pharmacy and did not interface with them. When he had queried this with her, Ms Hussein, who confirmed at the Investigation Meeting that she suffered from social anxiety, explained that she did not feel comfortable with people she did not know.

[29] During the pre-employment test, Mr Atia said he had decided to test Ms Hussein's massage skills which had been discussed with her on the previous day and which had been stated on Ms Hussein's curriculum vitae, by asking Ms Hussein to massage his neck.

[30] Mr Atia said the massage given by Ms Hussein had not been satisfactory and it had been clear to him that she had no massage experience. Mr Atia said he had informed Ms Hussein that he considered her massage skills were poor, and that he considered her beauty therapy skills would be of the same poor standard.

[31] Mr Atia said at this point he had informed Ms Hussein that he would not be offering her employment, and that he would be informing Mr Prasad of his decision

[32] Ms Hussein denied that Mr Atia had told she would not be offered employment, but agreed that he had told her that her massage skills were “*bullshit*” and that she should not have included it on her Curriculum Vitae; and additionally that she considered Mr Atia had insulted her in respect of his comments relating to her beauty therapy skills

[33] Ms Hussein also said that Mr Atia had paid her \$30.00 and asked her to return to work at the Pharmacy on Monday 16 July 2012.

[34] Mr Atia said that after he had informed Ms Hussein that she had not passed the pre-employment test, Ms Hussein had asked him for the sum of \$30.00. Mr Atia said he had told Ms Hussein that he did not expect to pay her for an assessment of her suitability for the position; however because Ms Hussein had become agitated and told him she needed the money for food shopping, he had agreed to pay her the \$30.00 on the understanding that she completed the vacuuming at the Pharmacy.

[35] Mr Atia said that Ms Hussein had told him she could not finish vacuuming at that time because she had to collect her young daughter from her mother; but she would return on Monday 16 July 2012 to complete it.

[36] Both Mr Atia and Ms Hussein confirmed that at no time had there been any discussion of the terms and conditions of employment for the Pharmacy Assistant position.

[37] Mr Atia said that later that day he had sent Ms Hussein a text message saying: “*Hello Rehana if you are coming in Monday what time u can come thanks*”. In reply Ms Hussein had texted: “*What time would you like me to come in?*” to which Mr Atia had responded: “*Around 12 will be oky.*”

[38] Ms Hussein said that because she had felt uncomfortable during the time she had spent at the Pharmacy on 14 July 2012, she had not returned to the Pharmacy on Monday 16 July 2012 and had sent a text message to Mr Atia confirming this.

[39] Ms Hussein did not return to the Pharmacy after 14 July 2012.

Determination

[40] In order for Ms Hussein to bring a personal grievance on the basis of unjustifiable constructive dismissal she must be an employee in accordance with s 102 of the Employment Relations Act 2000 (the Act) which states:

Employee may pursue personal grievance under this Act
An employee who believes that he or she has a personal grievance may pursue that grievance under this Act.

[41] In deciding whether Ms Hussein was employed by the Pharmacy, I apply s.6 of the Act which provides:

“s.6 Meaning of employee:

- (1) *In this Act, unless the context otherwise requires, **employee** –*
 - (a.) *Means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
- (2) *In deciding ... whether a person is employed by another person under a contract of service, the Authority-... must determine the real nature of the relationship between them.*
- (3) *For the purposes of subsection (2)... or the Authority-*
 - (a) *must consider all relevant matters, including any matters that indicate the intention of the parties*
 - (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[42] In s 5 of the Act a person intending to work is defined:

Person intending to work *means a person who has been offered and accepted, work as an employee; and **intended work** has a corresponding meaning*

[43] Fundamental to both sections 5 and 6 of the Act is the concept of offer and acceptance. Applicants for a position have been held to be outside the scope of the personal grievance procedures. As stated by Judge Shaw in *Hayden v Wellington Free Ambulance*

*Service*¹: “... it is intended that relief available under the Act is only available where a person has actually been employed on settled terms and conditions².”

[44] In *Weal v Leusen Holdings Ltd t/a Heather-lea Rest Home*³ the then Chief Judge Goddard stated⁴

An employment contract, in common with every other kind of contract, displays certain basic characteristics. There must be an offer by one party to the other and an acceptance by that other. Moreover, that acceptance must be communicated to the party making the offer

[45] As also stated in the Employment Court, an employment contract must: “*satisfy the common law requirements of offer, acceptance, contractual intention, consideration and certainty*”⁵.

13 July 2012

[46] I find that during the interview on 13 July 2012 there had been no discussion between Mr Atia and Ms Hussein of the terms and conditions of employment, specifically such basic terms and conditions as the rate of pay, hours or days of work, uniform provision, or holidays and sick pay entitlements, in connection with the position for which Ms Hussein had been interviewed.

[47] The reason that Ms Hussein had not made any enquiry about the terms and conditions of employment cannot be attributed to the fact that she already knew what these were, because at the time of her initial interview with WINZ Mr Prasad did not know, and had not discussed, the terms and conditions of employment relating to the Pharmacy Assistant position with her, since he considered that these were for the employer and applicant to discuss and agree upon.

[48] Ms Hussein who is the mother of a young child would need to make provision for child care in the event that she was employed. Ms Hussein was also registered with WINZ and in receipt of unemployment and domestic purpose benefit.

[49] In these circumstances I consider it highly unusual and unlikely that Ms Hussein would make no enquiry whatsoever about the terms and conditions of employment of a

¹ [2002] 1 ERNZ 399

² *Ibid* at para (28)

³ [2002] 1 ERNZ 655

⁴ *Ibid* at para [30]

⁵ *McDonald v Ontrack Infrastructure Ltd* [2010] ERNZ 223 at para [36]

position she believed she was being offered. Nor do I consider that there could be acceptance when the terms and conditions of employment were not settled and certain.

[50] I do not consider that the discussion of the future plans Mr Atia had for the Pharmacy, or of Ms Hussein's driving restrictions, to be indicative of an offer of employment.

[51] Ms Hussein confirmed that her belief that she had been employed had been based on an assumption as a result of being asked to return the following day for a practical pre-employment test, rather than on any consideration and acceptance of settled terms and conditions of employment.

[52] I find that at the conclusion of the interview on 13 July 2012 there had been no settled terms and conditions of employment and consequently no offer and acceptance.

[53] I determine that at the conclusion of the interview on 13 July 2012 Ms Hussein was an applicant for a position and not an employee.

14 July 2012

[54] Having considered the events on Saturday 14 July 2012 I find that Ms Hussein was an applicant attending a practical pre-employment test and not an employee for the following reasons:

- There were no settled terms and conditions of employment. Mr Atia states, and Ms Hussein confirms, that there was no discussion about any terms and conditions of employment including such basic elements as the rate of pay, hours of work, holidays or provision of an employment agreement.
- The payment of \$30.00, which I find took place after Ms Hussein had been informed that she had not been successful in relation to the Pharmacy Assistant position, cannot be referenced to an agreed rate of payment, or to settled terms and conditions of employment. Rather I consider it was in the nature of an ad hoc payment made to an independent contractor.
- There had been no agreement on hours of work which is at variance with the concept of settled terms and conditions in which the employer offers, and the employee accepts, terms and conditions of employment including the actual hours of work. This is exemplified by the text message exchanges between the parties.

- The understanding by Ms Hussein that 14 July 2012 was in the nature of a pre-employment interview test, as indicated by her confirmation in the Investigation Meeting that she had agreed to massage Mr Atia's neck because he had wanted to ascertain her massage ability to see if this was at a suitable level for the Pharmacy to offer this service to clients.
- That following the unsuccessful massage, Mr Atia said he had informed Ms Hussein that he would not be making her an offer of employment. Whilst Ms Hussein denied this, I accept Mr Atia's evidence as the more credible given Ms Hussein's confirmation that Mr Atia had been very dissatisfied with her massage describing it as "*bullshit*" and had in her words "*insulted*" her in respect of his comments on her beauty therapy skills.
- I accept that Mr Atia would not have made an offer of employment to Ms Hussein without having first obtained confirmation from WINZ that the Pharmacy Assistant position qualified for the 40% subsidy, on the basis that Mr Atia said he could not afford to employ a Pharmacy Assistant unless WINZ confirmed that the 40% subsidy would be available to him. Mr Atia said he had not informed Mr Prasad that Ms Hussein had been successful in her application, and therefore there had been no confirmation that the employment of Ms Hussein would qualify for the 40% subsidy. I note as significant in this regard Mr Prasad's evidence which confirmed that Mr Atia had not informed him that Ms Hussein had been a successful applicant.
- Ms Hussein also stated that she had not informed Mr Prasad or WINZ that she had been offered, and had accepted, the position of Pharmacy Assistant, which Mr Prasad again confirmed. As a recipient of unemployment and domestic purpose benefit, I find it would have been incumbent on Ms Hussein to have informed WINZ that she had obtained employment. The fact that she did not do so I consider to confirm the conclusion that she had not accepted an offer of employment from the Pharmacy because none had been made.

[55] Having considered: "*the real nature of the relationship*" between Mr Atia and Ms Hussein in accordance with s 6(2) of the Act, I find that in the complete absence of settled terms and conditions of employment there had been no offer and acceptance, and indeed no

evidence of contractual intention or certainty to support the existence of an employment contract between Ms Hussein and Mr Atia.

[56] I determine that Ms Hussein was not an employee of the Pharmacy.

[57] As I have determined that Ms Hussein was not an employee in accordance with the Act, Ms Hussein is unable to pursue a personal grievance claim and I am unable to assist her any further.

Costs

[58] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority