

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 533
3258059

BETWEEN OBF
Applicant

AND SENSCIO LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Ashleigh Fechney, advocate for the Applicant
Ramses Hunt, counsel for the Respondent

Investigation Meeting: 9 May and 5 June 2024 in Christchurch and by AV

Submissions Received: 5 June 2024 from both the Applicant and Respondent

Determination: 5 September 2024

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] The applicant applies for non-publication of her identity and medical evidence under Schedule 2, clause 10(1) of the Employment Relations Act 2000 (the Act).

[2] The grounds relied on for a non-publication order are the health concerns the applicant says prevented her from having the COVID-19 vaccination. The applicant does not want her personal health circumstances to become public information. Ms Fechney submits that this matter relates to vaccinations which is a contentious issue and that the applicant should not become a “lightning rod” for the anti-vaccine movement.

[3] In her written evidence the applicant said that her medical condition can be exacerbated by stress and, having been discharged from a rehabilitation team, she wants

to reduce the risk as much as possible including ensuring her name is not published. Ms Fechney submits that the applicant should not be exposed to significant risk to her health and safety and wellbeing in progressing her claim.

[4] The application is opposed by Senscio Limited (Senscio) on the basis that the standard to depart from the principle of open justice is not met by the applicant's application for non-publication.

[5] Senscio accepts the sensitive nature of the health issues but says a broad non-publication order is not necessary and that the Authority could make targeted orders to protect the sensitive medical information.

[6] Senscio says that concerns about the political climate and vaccination are less relevant because this matter is concerned with an evaluation of the applicant's role and how that operated under the COVID-19 Public Health Response (Vaccinations) Order 2021. It says that the applicant advised she refused to be vaccinated on the basis of her medical circumstances rather than a broader view about the appropriateness of vaccination for COVID-19.

[7] There is sensitive medical evidence concerning OBF. I am not satisfied a targeted order would necessarily overcome the concerns for OBF. The applicant says that there is a risk that publication of her name may exacerbate the condition she has that is susceptible to stress. From the evidence I conclude there is a risk that the stress of publicity could aggravate the condition the applicant suffers from. The Authority concludes a potentially adverse impact of publication arises from that.

[8] Non-publication has been ordered by the Authority and Employment Court in cases where vaccination is an issue. Strongly held views by some in the community have been referred to as a potentially adverse impact supporting a departure from the principle of open justice. Those views, as Mr Hunt submits, may not be as strongly held as they were. Even with the passage of time and a medical reason for not being vaccinated a potentially adverse impact for the applicant from publication could not be ruled out.

[9] I conclude that there are adverse consequences that could be expected to occur for the applicant with publication. Primarily there is the potential for exacerbation of the applicant's medical condition from the stress of publication. I have also placed some weight on the likelihood there could be some adverse consequence because the

applicant was not vaccinated regardless of the reasons for this. The interests of justice require a departure from open justice.

[10] A permanent non-publication order is made in respect of the applicant's name and any identifying details and in respect of her medical information.

[11] I will refer to the applicant by way of a computer generated three letter string as OBF.

Employment Relationship Problem

[12] OBF says that she was unjustifiably dismissed from her employment in circumstances that were neither fair nor reasonable and that Senscio did not exhaust all reasonable alternatives to termination of employment. OBF received notice of termination on 20 April 2022 on the basis that she was required under a COVID-19 order and Senscio's own health and safety policy not to carry out work unless she was fully vaccinated by early January 2022. There was a notice period of six weeks provided that ended on 3 June 2022.

[13] Alternatively, OBF says that she was unjustifiably disadvantaged in her employment because of the following:

- (a) The unreasonable timeframe she was given to respond to a proposal.
- (b) That there was a failure to communicate properly with her when she raised concerns about a proposed agreement.
- (c) There was a failure to provide proper notice of and support during a Zoom meeting on 19 April 2022 which was effectively to exit her from her employment.

[14] There was a claim in the statement of problem that OBF had been discriminated against in the course of her employment by reason directly or indirectly because of her disability. Ms Fechny advised at the start of the investigation meeting that OBF was not continuing with that claim.

[15] Senscio trades as Sleep Well Clinic (Sleep Well). Sleep Well is a medical practice that provides services to treat sleep disorders. Senscio says that OBF was not unjustifiably disadvantaged in her employment and was not unjustifiably dismissed.

[16] It says that it acted fairly, reasonably, in good faith and in accordance with its health and safety policy and the COVID-19 Public Health Response (Vaccinations) Order 2021. Sencio says that there were no reasonable alternatives to the giving of notice of termination.

The Authority process

[17] The statement of problem was lodged on 20 October 2023.

[18] The Authority held investigation meetings on 9 May and 5 June 2024 in Christchurch. The Authority heard sworn evidence from OBF and sworn evidence from Dr. Bryn Sparks who is a director of Sencio and Christine Sparks who is the national practice manager for Sleep Well Clinic. Dr. Sparks and Mrs Sparks are married.

[19] Statements of evidence were provided for three other witnesses. There was agreement to these witnesses giving their evidence by audio visual link. The Authority and Ms Fechny agreed that the evidence of two of those witnesses who I will call Kim and Claire could be taken as read. The Authority heard affirmed evidence by audio visual link from the third witness who I shall call Cassie.

[20] At the end of the evidence on 5 June 2024 the Authority heard comprehensive submissions from Ms Fechny and Mr Hunt.

[21] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received and considered but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and any orders that it has made as a result.

The issues

[22] The Authority needs to determine the following issues in this case:

- (a) What are the material provisions in the written employment agreement?
- (b) Was OBF's position covered by the COVID-19 Public Health Response (Vaccinations) Order 2021?
- (c) What did Sencio's health and safety policy require?
- (d) Was there adequate consultation with OBF about the vaccination requirements?

- (e) Did trust issues develop in the relationship between OBF and Senscio?
- (f) What led to OBF working at home from in or about November 2021?
- (g) What proposal was discussed between OBF and Dr. Sparks on 16 February 2022?
- (h) What happened during the ZOOM meeting on 19 April?
- (i) Was the subsequent dismissal justifiable?
- (j) Alternatively, were there unjustified actions that disadvantaged OBF?
- (k) If OBF was unjustifiably disadvantaged in her employment or dismissed, then what remedies is she entitled to and are there issues of mitigation and contribution?

What are the material provisions in the written employment agreement?

[23] Senscio and OBF entered into a written individual employment agreement on 23 July 2019 (the employment agreement) about the time OBF commenced her employment with Senscio.

[24] The employment agreement provided that OBF was employed as clinic support. The role entailed reception, administrative and telephone duties. The advertisement for the role was provided as part of the documentation. Amongst other matters it referred to the need for a person who is “comfortable meeting and greeting local clients.”

[25] Clauses under a heading “Hours of Work” in the employment agreement are relevant. They provide as follows:

6.1 Part Time Hours

The parties agree that the Employee is being employed to perform duties on a permanent full time basis. The hours and days on which the Employee shall work are as follows: 40 hours per week. The start and finish times will be agreed between the parties. The parties agree, however, that the Employer may, by mutual agreement with the Employee, modify this arrangement if this is in the best interests of the Employer’s operations.

6.2 Variation to Hours of Work

The Employee’s hours of work may be varied by mutual agreement between the Employee and the Employer, provided that the Employee’s minimum hours of work are not reduced below 30 hours and that any increase in hours of work is reasonable and by mutual agreement.

When seeking to vary the Employee’s hours, the Employer shall act reasonably and shall take into account the Employee’s personal circumstances and commitments.

Was OBF's position affected by the COVID-19 Public Health Response (Vaccinations) Order 2021?

[26] OBF's role in the reception area meant that she was likely to be near to members of the public from time to time and she was also required to provide support to health professionals during her working day. There was no evidence presented that suggested OBF was not in her role an "affected person" as defined by the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order).

What did Senscio's health and safety policy require?

[27] Senscio updated its health and safety policy on 4 November 2021 to reflect the requirements of the Order for vaccination of those in affected positions. Its health and safety policy required employees who were affected under the Order because of their positions to receive an approved first COVID-19 vaccination by 15 November 2021 and an approved second vaccination by 1 January 2022 to be considered fit for duty.

Was there adequate consultation with OBF about the requirements?

[28] I am satisfied from the evidence that the consultation about vaccination requirements with OBF was clear and adequate. OBF did not dispute in her evidence that there was significant communication about the requirements.

Did trust issues develop in the relationship between OBF and Senscio?

[29] Senscio say trust issues started to develop in its relationship with OBF as a result of the vaccination requirements.

[30] There was a staff meeting in or about early November 2021 during which Dr. Sparks asked those in attendance including OBF to confirm they had received their vaccinations. This was to ensure continued referral of patients could be confirmed with the then District Health Board. Dr Sparks said that OBF stated that she was vaccinated at that time.

[31] OBF said that she felt put on the spot and the meeting was a surprise. She said that she did not expect to be asked publicly about her vaccination status and was unwell and anxious about her illness. She later that same day advised Mrs Sparks that she had not been vaccinated and the next morning left Dr. Sparks and Mrs Sparks a bottle of wine and card in which she said sorry. It is likely that Dr. Sparks then advised at a brief

meeting that the matter would need to be investigated as possible misconduct. He recalls OBF becoming somewhat agitated about that and he advised that the bottle of wine could not be accepted. OBF did not recall being advised about that.

[32] Between 11 and 14 November 2021 an employee who had driven OBF to a doctor's appointment approached Dr. Sparks and Mrs Sparks. Dr. Sparks said the employee appeared distressed and told them OBF had plans to take legal action against Dr. Sparks for bullying her into getting vaccinated. She advised OBF also had a complaint with another director of Senscio. Dr. Sparks emailed that director about that matter on 15 November 2021. He referred to another staff member who had confirmed that Dr. Sparks had not raised his voice in talking to OBF. It was decided not to raise concerns with OBF about this matter as that would impact on the employee who disclosed the conversations.

[33] Dr. Sparks and Mrs Sparks gave evidence that they continued communicating regularly with OBF by text, phone call, and emails whilst she was on sick leave. There was reference in the evidence of Mr and Mrs Sparks to multiple promises made by OBF to get vaccinated but that never occurring. The majority of reasons OBF gave for not proceeding to get vaccinated were related to medical advice. The evidence supported Dr. Sparks and Mrs Sparks did not accept from a medical perspective that the reasons advanced for not being vaccinated were necessarily sound. The Authority is in receipt of a number of text and email messages asking for updates about vaccination status and responses from OBF from November through to February 2022.

[34] Dr. Sparks and Mrs Sparks remained constructive, supportive, and encouraging in their communications with OBF and were hopeful OBF would be vaccinated and return to work as she expressed a willingness to do so. The constant questioning about vaccinations and assurances that OBF would get vaccinated on specific dates and then advice that she had not in fact been vaccinated likely took a toll on the employment relationship. Dr. Sparks and Mrs Sparks said that they would have moved sooner to consider OBF's future with Senscio if not for these assurances.

[35] No medical evidence was supplied in support of the delays in vaccination whilst OBF was employed. OBF said she was never asked for this. Mrs Sparks in her oral evidence was adamant that she asked OBF for supporting information from a medical source but nothing was provided. I conclude that is more likely in the circumstances.

A medical certificate was supplied during the investigation meeting which on its face appeared to support a delayed vaccination on 14 February 2024.

What led to OBF working at home from November 2021 to May 2022?

[36] After 2 November 2021 OBF was on a period of sick leave supported by medical certificates. She was then hospitalised between 6 and 11 November 2021. Sencio agreed to her working from home once she was well enough to do so on the basis that she was unwell. A medical certificate supports that she was well enough to work from home from 22 November 2021 and return to the workplace on 6 December 2021. Support was provided to assist with an IT at home set up.

[37] OBF did not return to work at the workplace after this time.

What proposal was discussed on 16 February 2022

[38] Dr. Sparks said there was confirmation from OBF that she had not been vaccinated as expected on 14 February 2022. A phone call took place on 16 February 2022 between Dr Sparks and Mrs Sparks and OBF. During the telephone discussion an offer was made to enable OBF to continue to work at home but with a reduction of her hours.

[39] There are aspects of the discussion about which there are different views. One is about the level of reduction of hours.

[40] OBF said that the discussion was about a reduction to her hours from 40 per week to between 25 – 30 hours. Dr. Sparks said that he recalled saying that if they reduced the minimum hours in OBF's employment agreement from 30 hours to 20 hours that would offset the cost of hiring someone to come in and fill the receptionist role. He advised that the change to 20 hours would not occur until 1 April 2022 when the new financial year commenced. Beyond that date notice would be given if it was necessary to reduce the hours to 20.

[41] He recalled OBF thanking him profusely and that she sounded relieved and emotional. I accept that is likely.

[42] The second area of dispute was about what the next steps would be.

[43] Dr. Sparks said that OBF told him she would consult a business advisor about whether it would be better for her to remain an employee or become a contractor. He said there was agreement that OBF would get back to them about her plan whether she wanted to be a contractor or remain an employee before the new financial year.

[44] OBF said that she understood Dr. Sparks was to come back to her about the hours and what they were to be reduced by.

[45] Claire was a friend of Dr. Sparks and had advised him in a human resource capacity. Her statement of evidence confirmed his understanding as set out above that OBF was to get back with advice about her status going forward.

[46] Dr. Sparks then became aware of a Facebook post on OBF's social media in which he recalled she referred to herself as a victim of "vaccination discrimination." and claimed she would lose her job. He called her to discuss this. It is likely OBF apologised and said that she had been confused and thought that hours would be reduced straight away and she would be down to 20 hours on 1 April 2022. Dr. Sparks said that he reassured OBF that there was no change until 1 April and even then the hours may not need to be reduced. OBF apologised and deleted the post. OBF when asked about this matter at the Authority investigation meeting said that she was confused.

End of financial year approaches

[47] As the end of the financial year approached Dr. Sparks had not heard anything further from OBF about where she wanted to be engaged as a contractor or employed and said he started to worry it was "another delaying tactic." During this period OBF had been in contact with Mrs Sparks about day-to-day matters. Dr. Sparks said after the telephone discussion with OBF on 16 February 2022 he was "highly involved" with the daily operation of the clinic and it had been a challenging time.

[48] On 28 March 2022 Dr. Sparks emailed OBF the changes to her employment agreement and asked her to confirm acceptance by email. After a query from OBF he confirmed the minimum hours were 20 hours per week. It was clear from the correspondence that Dr. Sparks wanted to have everything sorted for the new year.

[49] The variation to hours of work clause proposed by Dr. Sparks was as follows:

Variation to Hours of Work

The Employee's hours of work may be varied at the discretion of the employer while always acting in Good Faith. The employee acknowledges that the employer might require a reduction in the employee's hours to allow for employment of new staff to replace the employee's previous receptionist duties. The employer undertakes to give a minimum of four weeks' notice of any reduction of greater than 10 hour per week, and that any reduction will not be beyond 20 hours per week.

[50] OBF indicated in an email to Dr. Sparks that she would get the proposed variation "checked out by someone" and mentioned that she had not sorted herself out about the contracting aspect.

[51] OBF said that it took a couple of days for her to get a response from her adviser. Her evidence was that she tried to call Dr. Sparks on 31 March 2022 to discuss some questions and concerns about the proposal but he was on annual leave that day. The concerns that OBF had were primarily about the level of the reduction of her hours and what the pattern of the reduced hours would be. For example, would the hours be expected to be worked in the morning or afternoon or across all five days or only on some days.

[52] It is likely that during a telephone discussion with OBF on 1 April 2022 Dr. Sparks advised that the offer was withdrawn. This was confirmed in an emailed letter of 1 April 2022 which provided amongst other matters as follows:

Since that deadline has passed, I have spoken with the senior management team today and the outcome of our meeting is that we now withdraw that order.

[53] There was also an alleged concern of a misconduct nature raised in the letter of 1 April 2022 that OBF had spoken to other staff about changing duties and/or suggesting their roles may be in jeopardy.

Zoom meeting proposed

[54] A Zoom meeting was proposed in the emailed letter of 1 April 2022 to OBF to "discuss your situation in more detail with you" and there was advice that OBF could have a person present. The meeting was recorded and a recording and transcript provided to the parties and the Authority.

What happened during the Zoom meeting on 19 April 2022?

[55] The meeting on 19 April 2022 was attended by OBF and Dr. Sparks. At various points of the discussion Dr. Sparks emphasised that the offer was withdrawn. There was discussion about what had led to the offer being made. At one point of the discussion OBF stated that the reception role she was doing at home was “90 % of it probably at least.” Dr. Sparks responded that she was doing “zero percent of the reception part.” He talked about the stress on other staff dealing with the reception duties. OBF asked what the next offer was as the other offer had been taken off the table. Dr. Sparks responded with reference to the health and safety policy and that if OBF is not vaccinated, they would have to give her notice.

[56] Dr. Sparks referred to not wanting to negotiate a whole new contract because he was exhausted and had been dealing with the matter for months. During the meeting OBF said she would love to keep her job even “if it’s only 20 hours a week” in two months’ time [taking into account the four weeks’ notice period before each 10 hours reduction that had been offered]. She accepted that Dr. Sparks may want the notice period to run from 1 April 2022.

[57] Dr. Sparks said that he would need to talk to the management team about that and other matters discussed.

Notice of termination

[58] OBF was provided with the notice of termination the following day on 20 April 2022. Dr. Sparks said in his evidence that the references to the phone call with OBF occurring in January instead of February in the letter is a mistake. I accept that.

[59] The letter referred to the amended health and safety policy that incorporated the requirements of the Order. There was reference to the policy requirement for unvaccinated staff to be required to take annual leave until evidence of vaccination was provided. If that was longer than 20 days and the employee was still unvaccinated the notice of termination would be issued to the employee.

[60] The letter referred to the job that OBF undertook requiring her to be present in the clinic for reception duties and that given her medical problem a temporary workaround had been arranged to give her more time to meet the mandate requirement.

[61] There was reference to the February 2022 discussion and the offer of a reduction of guaranteed minimum hours with any new arrangement needing to be in place by 31 March 2022. It was set out that OBF had expressed some “misgivings” around the proposed hours, the timing of notification of stepwise reductions, and the provision of hours of work during the workday and therefore had not agreed. Further that Dr. Sparks had pointed out it was not intended the offer to be an offer of re-negotiation of her contract and therefore the offer of alternative hours was not renewed because the timeline discussed had passed.

[62] The letter referred to an additional two weeks’ notice on “compassionate grounds” in addition to the four weeks.

Was the dismissal justified?

[63] The Authority must assess justification of Senscio’s decision to dismiss by applying the test of justification in s 103A of the Act. In determining justification of the decision to dismiss the Authority does not consider what it may have done in the circumstances but is required to consider justification on an objective basis. On an objective basis it considers the actions of Senscio and how it acted and whether they were that a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[64] As part of this objective consideration the Authority must consider the four procedural fairness factors set out in s 103A(3) (a) to (d) of the Act with any necessary common sense modifications to take into account the reason for the termination of employment. These require a sufficient investigation by an employer, raising of concerns with a reasonable opportunity to respond and genuinely considering the explanation before dismissal. Minor defects in the process if they did not result in OBF being treated unfairly do not make the dismissal unjustified.

[65] Senscio say that the reason for the termination of employment was because OBF was not vaccinated by the specific dates required by a COVID-19 Order which requirements were implemented into Senscio’s health and safety policy. Schedule 3A of the Act which contains provisions relating to COVID-19 vaccinations applies in these circumstances.¹ There is a requirement in Schedule 3A of the Act that the

¹ Employment Relations Act 2000 Schedule 3A (3) inserted on 26 November 2021, by section 22 of the COVID-19 Response (Vaccinations) Legislative Act 2021 (2021 No 51).

employer must ensure all other reasonable alternatives to termination of employment have been exhausted.²

[66] Sencio could also be expected as a fair and reasonable employer to comply with the statutory obligations of good faith.

What was the reason for termination of OBF's employment?

[67] Ms Fechny submits the evidence shows the termination was effectively a redundancy disguised as a response to OBF's vaccination status.

[68] There is some evidence to support focus at the material time by Sencio on the financial constraints and difficulties facing the business. There is reference to financial issues in the notice of termination. A replacement for OBF was not found until in or about July 2022 and that was on a part-time basis at least for some months. Other tasks were redistributed amongst other staff. I could not discount some overlap between the vaccination status and the financial constraints of retaining a full-time receptionist role at least in the short term that could support a restructuring situation rather than a vaccination status situation. What was less clear is when the decision was made that Sencio could manage for a period with a part-time person in the reception role.

[69] With that in mind I will assess justification on the basis that the reason for the dismissal was the vaccination status but in doing so what part financial concerns played in the decision making.

Were there reasonable alternatives to dismissal?

[70] Mr Hunt submits that the Dr. Sparks made a personal decision to propose reduced hours and remote work arrangements for OBF driven by compassion from his experiences growing up and his religious beliefs. He submits that the proposal to reduce OBF's hours was never a reasonable or sustainable alternative to dismissal from a business perspective.

[71] Mr Hunt says that Sencio was never legally compelled to provide the proposal it presented because it was not reasonable and therefore it was an "entirely discretionary variation" to OBF's employment agreement. He submits the enforceability of the proposal falls to be considered in line with ordinary contractual principles. Mr Hunt

² Employment Relations Act 2000 Schedule 3A (4).

sets out in his submissions a detailed analysis of the withdrawal of the proposal and justifies its withdrawal with regard to ordinary contractual principles.

[72] Respectfully I do not agree with Mr Hunt's submission in that respect. The Authority must consider the justification test in s 103A with the provisions in Schedule 3A (3) of the Act as set out earlier. Regardless of the motivation in offering the reduced hours in February 2022 Senscio was required to ensure that all other reasonable alternatives that would not lead to termination of OBF's employment were exhausted.

[73] Senscio knew it was OBF's view she was able to perform most of the role from home as she considered the predominant aspect of the role was phone calls including setting up nationwide appointments.³ Dr. Sparks did not agree that OBF could perform 90 % of the role at home because she could not perform the receptionist aspect which included some sales of products related to sleep disorders. OBF said that many of these sales were done on-line.

[74] The focus of the proposal was the need to have some certainty to be able to employ a receptionist at the workplace part time. Dr. Sparks confirmed at the Authority investigation meeting that the reason for the start of the financial year deadline was to give other employees who had been covering the reception duties some certainty as to when there could be some relief for them. It was not until notice of termination was provided that there was reference to Senscio not being in a financial position "to be able to hire a replacement and at the same time keep you in employment at home."

[75] OBF had been working from home since about 22 November 2021. A component of the role involved telephone calls and the setting up of appointments. OBF said that this was the main aspect that she would spend time on in her role. OBF said that after COVID-19 the foot traffic dropped dramatically and attending to those who came to the reception area involved between 15 -30 minutes in a day. Senscio did not agree with this in their evidence and said the number of people coming in had increased. Cassie for example said that it was stressful doing her job and OBF's when people came in and that it felt almost like having another job when covering for OBF.

³ This was discussed during the Zoom meeting on 19 April 2022.

[76] The evidence supported it was more likely than not that there were components of the role that could be performed at home that could support an alternative to termination. OBF had been working at home for some months by that time.

[77] I accept Ms Fechny's submission that OBF did not explicitly decline the proposal made on 16 February 2022. She was unclear about some aspects and did not understand the proposal sent to her on 28 March 2022 to reflect the proposal discussed.

[78] In any event OBF accepted the proposal at the meeting on 19 April 2022 to reduce her minimum hours to 20 per week with four weeks' notice of each reduction of 10 hours and work remotely. Notice of termination followed the next day and there was no reference to that acceptance of the proposal in the letter and it was unclear if it had been considered and, if so, why it was not seen as a reasonable alternative.

Provision of information for comment

[79] The statutory duty of good faith requires an employer who is proposing to make a decision that will have an adverse effect on continuation of employment to provide access to information relevant to the decision to the employee and an opportunity to comment on the information before a decision is put.

[80] There were strongly held views about the absence of any business justification for OBF working from home. It was not accepted by Senscio to be a reasonable alternative. There was however no information provided to OBF for her comment before termination about why that was so. There was no analysis of what OBF had been doing at home from in or about 22 November 2021 and whether her work was related to the receptionist role. There was no information provided about why it was not reasonable that this continue with a reduction of minimum hours to accommodate employing someone at the workplace for the reception duties.

[81] It was even more important that such information be provided in circumstances where there had been an original proposal about working from home and then it was withdrawn but then accepted or proposed again by OBF as an alternative.

[82] The statutory duties of good faith were not met in this regard by Senscio.

Decision making involved other considerations?

[83] It is likely from the evidence that part of the reason for the withdrawal of the proposal by Dr. Sparks was a growing sense of frustration with OBF about what Sencio saw as “extended accommodations” and “missed timelines.” In his written evidence he wrote that his “empathy for OBF had run dry.” Dr. Sparks also said:

...When she missed the confirmation timeline, that offer could not be accepted, and I could not trust her to extend a new offer.⁴

[84] I could not safely conclude that these views and a concern about the financial viability of the role did not contribute to the decision that there were no reasonable alternatives and employment should therefore be terminated. OBF did not have an opportunity to comment on these matters. That is not the approach a fair and reasonable employer could be expected to take in its decision making under Schedule 3A of the Act in considering whether all other reasonable alternatives to dismissal were exhausted.

[85] Sencio wanted to have a receptionist on site. The evidence disclosed justifiable reasons for this. I accept it was a very difficult time for the business and that Dr. Sparks and Mrs Sparks had been accommodating and supportive of OBF whilst she was off work because she was unwell. Sencio is not a large organisation with ready access to human resources and legal advice. There was from the evidence considerable reliance on trust, openness, and goodwill in interactions with the employees.

[86] I could not be satisfied however that Sencio exhausted all reasonable alternatives that would not result in OBF’s termination. I do not consider the cause of this was a lack of resources because an alternative had been proposed. OBF working part-time from home would have enabled the employment of a part-time receptionist at the workplace in circumstances where OBF had been working at home for some months and continued to do so for most of her notice period.

⁴ Dr. Sparks statement of evidence paragraph 6.29.

Conclusion on the justification of the dismissal

[87] There was no information provided to OBF about why working from home was not seen by Sencio as a reasonable alternative to termination even for at least 20 hours per week.

[88] I am not satisfied that reasons for the decision making were based exclusively on business requirements and not, at least in part, on a growing sense of frustration with OBF and feeling let down by her. It is likely a view about financial issues formed part of the decision making and the extent of this was never disclosed. OBF did not have an opportunity to comments on these matters. It was not clear what was relied on in the decision making to conclude there were no reasonable alternatives to dismissal. The letter appeared to rely on OBF's concerns or misgivings about what was proposed. That did not seem to take into account the subsequent acceptance of the proposal.

[89] I could not be satisfied that Sencio exhausted all reasonable alternatives that would not lead to termination. I am not satisfied that the dismissal was what a fair and reasonable employer could have done in all the circumstances under s 103A of the Act considered with Schedule 3A obligations.

[90] There is an overlap between the procedural unfairness and the substantive justification for the dismissal.

[91] OBF has made out her personal grievance that she was unjustifiably dismissed. I do not need to consider the alternative claim of unjustified disadvantage. OBF is entitled to consideration of remedies for her successful grievance of unjustified dismissal.

Remedies

Lost wages

[92] OBF seeks lost wages from the date of her termination to the end of the financial year 2023 which is a period of 43 weeks.

[93] Section 123(1)(b) of the Act provides that the Authority may order the reimbursement of a sum equal to the whole or any part of the wages or other money lost by the employer as part of the grievance.

[94] Section 128(2) of the Act provides that where the employee has lost remuneration as a result of the personal grievance the Authority must whether or not it provides for any of the other remedies order the employer to pay to the employee the lesser of a sum equal to lost remuneration or to 3 months ordinary time remuneration.

[95] Section 128(3) provides that the Authority may, in its discretion, order an employer pay for lost remuneration a sum greater than that specified in s 128(2) of the Act. OBF wants the Authority to exercise its discretion and award a sum greater than that specified in s128(2) of the Act.

[96] OBF said that she found it difficult to secure new employment and it was complicated by her health issues which she could not conceal from prospective new employers. Over this period OBF was on a sickness benefit and also undertook a variety of jobs such as security work, event set up and washing dishes. Putting the sickness benefit to one side other earnings received over the period from the end of the notice to 31 March 2023 were \$6,412.80.

[97] Mr Hunt submits that OBF's claim was based on procedural unfairness and that means that she would have been dismissed in any event because of her vaccination status. I have not found that.

[98] In considering whether to exercise my discretion and award a sum greater than that in s 128(2) of the Act I have taken into account that some of the difficulty in securing new employment was due to medical issues. I also take into account the limited material supplied in support of attempts to mitigate loss. I have considered the likelihood of the relationship continuing for the period for which lost wages are claimed. Sencio referred to its financial difficulties at the time and there is evidence that at least for some months after OBF's termination the receptionist position was only filled part-time with other duties absorbed by other staff.

[99] Whilst the Authority is satisfied that OBF has lost remuneration as a result of the personal grievance it is not minded to exercise its discretion and award a greater sum than the lesser of actual loss or three months ordinary time remuneration.

[100] Actual loss is the greater sum. Three months ordinary time remuneration is the lesser amount and that is the amount subject to contribution the Authority must award.

[101] The Authority has considered the calculation of three months lost remuneration. There is an aspect of uncertainty had OBF not been dismissed about what would have happened with her hours if a reasonable alternative had been implemented. I take into account that notice was required for up to four weeks before a reduction of up to ten hours. There is an aspect of uncertainty about when the hours would have dropped to part-time. I have also taken into account that it took until in or about July 2022 to secure another receptionist on a part time basis.

[102] It is appropriate to assess lost wages for three months based on ordinary time remuneration. Ms Fechner submits this should be assessed at 40 hours per week at a rate of \$26.50.

[103] Subject to any issues of contribution lost wages are calculated on the basis of 40 hours multiplied by \$26.50 which is the sum of \$1060 which is then multiplied by 13 weeks to arrive at a total of \$13,780 gross.

Loss of benefits

[104] Loss of the benefits of holiday pay and employer Kiwisaver contribution are claimed as benefits that OBF might reasonably have been expected to obtain if the personal grievance had not arisen.⁵

[105] Subject to any issues of contribution OBF is entitled to payment of the lost benefit of holiday pay of \$1,102.40 being 8 percent of \$13,780.00 gross.

[106] Subject to any issues of contribution OBF is entitled to payment of the loss of the benefit of the Employer contribution towards her Kiwisaver of \$413.40 being 3 percent of \$13,780.00.

Compensation

[107] OBF gave evidence about the impact of the dismissal on her. I accept that she has suffered harm under each of the heads identified in s 123(1)(c)(i) of the Act of humiliation, loss of dignity and injury to feelings. OBF explained that the termination impacted on her social interactions and personal identity. She referred to going from being an extrovert to being withdrawn. OBF was required to work in roles that were

⁵ Employment Relations Act 2000 s 123(1)(c)(ii).

different from those she had undertaken earlier in her career such as cleaning and controlling traffic signalling which she found humiliating and a backward step.

[108] OBF explained that her trust in others has been eroded and that has led her to question her own beliefs. There was reference to a loss of sleep and a battle for financial survival. The ending of the relationship at a time when she was unwell and the loss of her role that she loved was clearly a shock.

[109] Some distress must be attributed to the medical condition that in turn caused some difficulties in finding alternative employment. I do not conclude as Mr Hunt submits I should that the unfairness was only procedural and that the compensation should only be directed to that aspect. A fair process could have resulted in a reasonable alternative to dismissal and continuation of the employment relationship. It is likely however that with a reasonable alternative OBF would have needed to obtain other employment and I have taken that into account.

[110] I have considered awards in similar cases in terms of harm and quantum with the harm that was experienced in this matter and the extent of the loss. I conclude subject to any issue of contribution that a suitable award under this head is the sum of \$18,000.

Contribution

[111] The Authority must under s 124 of the Act consider the extent to which the OBF's actions contributed to the situation that gave rise to the personal grievance and if a reduction to the remedies is required and to what extent.

[112] The approach to determining contribution was set out in the Employment Court judgment of *Maddigan v Director-General of Conservation* with summarised with reference to recent judgments of the Court:⁶

- (a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?
- (b) Second, did that conduct create or contribute to the situation giving rise to the dismissal?
- (c) Third, what is a fair assessment of the extent of the contribution?

⁶ *Maddigan v Director-General of Conservation* [2019] ERNZ 550.

(d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[113] Mr Hunt submits that OBF's conduct is blameworthy and significantly contributed to the situation that led to her dismissal.

[114] He refers to her alleged dishonesty about her vaccination status, her failure to follow through on her vaccination promises, remarks made to Mrs Sparks of a political nature in an aggressive manner, threatening to take legal action and approaching junior staff attempting to take on more work herself and suggesting allegedly that their jobs were at risk.

[115] Even if these matters were considered blameworthy I could not be satisfied that they created or contributed to the situation that gave rise to the personal grievance. The causal link is not established between them and the failure to exhaust all reasonable alternatives to termination. The potential of separate disciplinary outcomes had been signalled for two of the matters Mr Hunt refers to. They were matters that were seen or should have been seen as distinct and separate from whether or not there were reasonable alternatives to dismissal.

[116] A matter that does require some more consideration is Mr Hunt's submission that OBF failed to follow through on her commitments and did not confirm her preference regarding the contractor role or provide the necessary documents by the deadline on 31 March 2022.

[117] The evidence about who was waiting for who after the telephone discussion on 16 February is somewhat unclear. On 28 March 2022 the email Dr. Sparks sent to OBF with the proposed changes started with the sentence "I've finally got to typing up the changes we discussed for you to permanently work from home." It did not make any critical comment about OBF's failure to get in touch earlier.

[118] Having carefully listened to the evidence I could not be satisfied on the balance of probabilities OBF deliberately failed to get in touch about her employment status. I do accept that it was a matter that was of concern for Dr. Sparks.

[119] As to delays or restating what had been agreed earlier OBF obtained some advice and returned with some questions and issues. I do not conclude that seeking advice on what was a proposal to vary the employment agreement and significantly reduce the number of hours to be worked was blameworthy even if annoying and

frustrating for Dr. Sparks. It is likely that OBF wanted to try to retain as many hours and as beneficial an outcome as she could. At the Zoom meeting on 19 April 2022 OBF agreed to what was proposed including backdating to 1 April 2022 for any notice of a reduction in hours. I do not conclude blameworthy behaviour. Ultimately the decision-making power was always with Senscio.

[120] I could not be satisfied that OBF contributed to the personal grievance and the above amounts are not reduced.

Findings and orders made.

[121] OBF was unjustifiably dismissed from her employment with Senscio Limited. The alternative unjustifiable disadvantage claim has not accordingly been determined.

[122] Senscio Limited is ordered to pay to OBF the following to settle the grievance:

- (a) Reimbursement of lost wages under s 123(1)(b) of the Act in the sum of \$13,780 gross.
- (b) Payment of compensation for loss of the benefit of holiday pay in the sum of \$1,102.40 under s 123(1)(c)(ii) of the Act.
- (c) Payment of compensation for the loss of the benefit of the employer's Kiwisaver contribution in the sum of \$413.40 under s 123(1)(c)(ii) of the Act.
- (d) Payment of compensation for humiliation, loss of dignity and injury to feelings in the sum of \$18,000 without deduction under s 123(1)(c)(i) of the Act.

Costs

[123] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[124] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Fechny may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Hunt will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[125] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁷

Helen Doyle
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1