

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 170
3000014

BETWEEN TRACEY OLSEN
Applicant
AND PENINSULA HEALTH (2010)
LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Anna Oberndorfer, Advocate for Applicant
Andrew Riches, Counsel for Respondent
Investigation Meeting: 30 June 2017 at Christchurch
Submissions Received: 21 July 2017 and 18 August 2017 from Applicant
7 August 2017 from Respondent
Determination: 6 October 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A Tracey Olsen was unjustifiably disadvantaged when her hours of work were unilaterally changed in breach of her employment agreement.**
- B Tracey Olsen was unjustifiably constructively dismissed from her employment with Peninsula Health (2010) Limited.**
- C Peninsula Health (2010) Limited is ordered to pay to Tracy Olsen the following:**
- (i) Lost wages under s 123(1)(b) of the Employment Relations Act 2000 in the sum of \$9620 gross.**

(ii) Compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 of \$15,000 without deduction.

D There is no award of a penalty for a breach of the employment agreement or for a breach of good faith.

E Costs are reserved and failing agreement a timetable has been set.

Prohibition from publication

[1] I prohibit from publication under clause 10 (1) of the Employment Relations Act 2000 (the Act) the content of the applicant's ACC file and any medical information that has not been referred to in this determination. I also prohibit from publication any information about the non-work related August 2015 incident.

Employment relationship problem

[2] Tracey Olsen commenced her employment on 18 May 2015 as a Trainee Pharmacy Technician with Peninsula Health 2010 Limited (Peninsula Health) a duly incorporated company which has operated the business of Akaroa Pharmacy and Gift Shop based in Akaroa since late 2010.

[3] The two directors of Peninsula Health are Garry Benson and Jennifer Benson. Mrs Benson is a qualified Pharmacy Technician.

[4] Ms Olsen has four employment relationship problems that she says arose during her employment and resulted in the ending of the relationship.

Unjustified constructive dismissal

[5] Ms Olsen says her resignation by email dated 9 November 2015 was in the nature of a constructive dismissal following unilateral changes being made to her terms and conditions of employment, hours and her role.

Unjustified action causing disadvantage

[6] Ms Olsen says that Peninsula Health acted unjustifiably and caused her disadvantage in her employment. She says that her hours and days of work were changed without consultation and there were unsubstantiated allegations of unsatisfactory performance and conduct made against her. She says that these were

not investigated and she was not allowed to respond meaningfully to them. Further, that there was conduct on the part of Mr Benson that was belittling of her and there were attempts to intimidate and isolate her from talking to Mrs Benson about her concerns.

Breaches of the individual employment agreement

[7] Ms Olsen says that her terms and conditions of employment were unilaterally altered in breach of clauses 8.2 and 8.3 of her employment agreement.

Breaches of good faith

[8] Ms Olsen says that Peninsula Health failed to consult her on changes she says were designed to sanction her for sick leave rather than a commercial reason. It is also alleged that there was a failure to provide her with notice or opportunity to seek support when meeting with her and making serious allegations about her performance and other concerns.

Remedies

[9] Ms Olsen seeks by way of remedy reimbursement of lost wages, compensation in the sum of \$25,000, penalties for breaches of the employment agreement and for breaches of good faith and reimbursement of the filing fee, together with costs.

Peninsula Health's response

[10] Peninsula Health does not accept that Ms Olsen was unjustifiably constructively dismissed. It says that she failed to attend work beyond 3 November 2015 in response to being told that she was required to enrol in a course as a pharmacy technician if she wished to continue to undertake that role. It says that she failed to take any steps towards enrolling for that course. Further, it says that it was entitled to change her hours and days of work under clause 8.2 and 8.3 of the employment agreement. It says that any stress Ms Olsen suffered was as a result of an earlier non-work related incident on 20 August and it denies breaching any terms and conditions of her employment. It does not accept that it breached good faith obligations. It says that it understood that Ms Olsen applied to ACC immediately after the end of the employment for compensation.

The Investigation

[11] The Authority heard evidence during its investigation from Ms Olsen and Mr Benson.

The issues

[12] The issues for the Authority to determine are as follows:

- What was Ms Olsen's role at the Akaroa Pharmacy?
- What were the expectations about her enrolling for a pharmacy course?
- When Ms Olsen was provided with her employment agreement and/or was she provided with two employment agreements?
- How was the working relationship leading up to 23 September 2015?
- Were Ms Olsen's hours and days of work altered from early October and if so did this amount to a breach of clause 8.2 and 8.3 of the employment agreement?
- Were performance concerns raised unfairly and was Ms Olsen subjected to belittling and/or isolating conduct from Mr Benson?
- What was said on 3 November 2015?
- What interaction followed after 3 November 2015 between Ms Olsen and Mr Benson before her resignation on 9 November 2015?
- Was the resignation caused by a breach of duty or was there a course of conduct embarked upon with the purpose of coercing her to resign?
- If there was a breach of duty then was it of sufficient seriousness to make resignation reasonably foreseeable?
- If there was a dismissal, then was it unjustified?
- If the dismissal and/or actions were unjustified and caused disadvantage, then what remedies should be awarded and are there issues about

reimbursement of lost wages given payment of ACC compensation? Are there issues of mitigation and contribution?

- If there is a breach of good faith then should a penalty be awarded?

What was Ms Olsen's role at the Pharmacy?

[13] Ms Olsen commenced her role on 18 May 2015 with Peninsula Health in Akaroa. Her individual employment agreement (the employment agreement) is dated 7 July 2015 and was signed on 17 July 2015.

[14] Clause one of the employment agreement refers to the position of Trainee Technician and states that Ms Olsen will undertake the duties and responsibilities as outlined in the job description set out in schedule A of the employment agreement.

The reference to Retail Assistant

[15] On page 20 of the employment agreement there is a heading Schedule A - Job Description. Beside the typed description of Ms Olsen's position under that heading as Trainee Pharmacy Technician is handwritten Retail Assistant. That handwritten change is initialled by both parties. Ms Olsen said that there was discussion and agreement that she would cover the breaks and some leave of the retail staff.

[16] The position description proper in schedule A refers to Ms Olsen's position as Trainee Pharmacy Technician and the position type as permanent and full time. The position description has two key responsibilities. The first is to assist the pharmacist with the operation of the dispensary, including dispensing, administrative duties and managing stock and the second to advise customers and patients about health and medicine and give retail assistance.

What were the expectations for undertaking a Pharmacy Technician Course?

[17] The expectations to study and achieve the full technician qualification are set out on page 20 of the employment agreement under the Schedule A - Job Description heading. They are that study will be undertaken beginning with the commencement of the next relevant course.

When Ms Olsen was provided with her employment agreement and/or was she provided with two employment agreements?

[18] Mr Benson said that before employment commenced he provided Ms Olsen with an employment agreement using as a template the Pharmacy Guild employment agreement but it was never signed and returned despite request. Then on 7 July 2015 he said that he was satisfied with her performance. He said that he had regarded Ms Olsen, he accepted erroneously, as having been engaged until that time on a trial period. The trial period provision in the employment agreement dated 7 July 2015 provided in clause 3.1:

The employee will be employed initially for a trial period from the date on which the employee's employment commences. The trial period will end on the 7th of July 2015.

[19] Ms Olsen says that the first time she received a copy of an employment agreement was on 7 July 2015. Her evidence was that when she was offered the role it was to work full time Monday to Friday in the Pharmacy dispensary with some cover in the gift shop. She knew that she would do pharmacy technician training. On 7 July 2015 she was advised that she could take the employment agreement home and look over it which she did. Mr Benson then asked her to go through the employment agreement with him at work on 17 July 2015 which they did together. Ms Olsen said that having already worked at Peninsula Health for about two months she knew the role and the hours and signed the agreement as did Mr Benson on 17 July 2015. She said that she would not have signed an employment agreement with a trial provision in it because she was shifting to the Akaroa role from Wanaka.

[20] I prefer Ms Olsen's evidence that the employment agreement was not provided until 7 July 2015 for the following reasons. There is no evidence of any earlier employment agreement. The date of 7 July 2015 was typed onto the employment agreement in two places on the first and second pages. If an earlier agreement had been provided then it is more likely that Mr Benson would have simply printed the same document out with the same date. Further the 7 July 2015 date was seemingly without any relationship to a trial period for employment that had commenced on 18 May 2015. This makes the evidence that the changed date was related to a trial period less likely.

[21] I am satisfied from the evidence that the first and only time an employment agreement was provided to Ms Olsen was on 7 July 2015. This employment agreement was signed on 17 July 2015.

The working relationship up to 23 September 2015

Leading up to the change of hours

[22] On 20 August 2015 Ms Olsen had a traumatic experience outside of work. As a result she said her job became more important to support herself and pay bills and because she wanted some stability in her life. She carried on working as normal but felt that her relationship with Mr Benson deteriorated. She said that he became more hostile and critical towards her and would berate her in front of other staff and sometimes customers and she became increasingly nervous and anxious around him. She said that she was too scared to say anything to him and confronting him made her “feel sick”. Ms Olsen’s evidence was that until 23 September 2015 she felt supported and was mentored by Mrs Benson. After that date she was told any staff issue had to go to Mr Benson.

[23] Mr Benson said that overall he was supportive of Ms Olsen as an employee although there were a number of minor issues throughout the employment and Ms Olsen had not enrolled in the pharmacy technician course despite being asked about it on numerous occasions. Ms Olsen agreed that she was asked about whether she had enrolled in the course but said it was only on two occasions and when Mr Benson was in a bit of a temper. Ms Olsen emailed the Open Polytechnic to get the information about the course on 19 August 2015 and was provided with the link the following day but the incident overtook matters and she did not follow up on it. She thought that had the incident on 20 August not occurred then she would have been enrolled.

[24] I accept Ms Olsen’s evidence that she had become somewhat nervous and anxious around Mr Benson before 23 September 2015 although in all likelihood he was unaware how she felt. There were text messages between Ms Olsen and Mr and Mrs Benson before September 2015 that showed Mr and Mrs Benson to be supportive including about the 20 August incident.

Was there a breach of clause 8.2 and 8.3 of the employment agreement when Ms Olsen's hours and days of work were altered?

Change of days and hours advised on 23 September 2015

[25] There is no dispute that Ms Olsen's hours and days changed from early October 2015. Mr Benson said that such a change could be made under the employment agreement and that it was well known at the Pharmacy that in the summer months the shop opened seven days a week because of the cruise ships that came to Akaroa.

[26] The hours of work provision is found in clause 8 of the employment agreement. I will set out the material hours of work provisions:

- 8.1 The Employee will work such hours as are necessary to fulfil the requirement of the Employee's position. In general, the Employee may be required to work on up to five of any seven days of the week with the five days to be confirmed by the Employer at the Employer's sole discretion.
- 8.2 In general, the Employee's normal hours of work shall be 40 hours per week, between the hours of 9 am and 5.30 pm.
- 8.3 The Employee may be required at times to work beyond his or her ordinary hours, including weekends, to fulfil his or her duties. The Employer may make reasonable changes to the Employee's hours of work following consultation with the Employee, and on no less than one week's notice.

[27] Ms Olsen says that her hours and days of work from the start of her employment with Peninsula Health were Monday to Friday between 9am to 5.30 pm for 40 hours per week and that she had no knowledge they would change. She said that she was then advised on or about 23 September 2015 by Mr Benson that the shop would be opening for seven days a week. Ms Olsen said that she was advised she would work from Sunday to Thursday with Friday and Saturday as her days off and that this was by way of announcement without any warning or discussion. Prior to that Mr and Mrs Benson worked on Saturdays but Ms Olsen had never worked on the weekend.

[28] Ms Olsen said that she was concerned about a cut to her hours. That was because Monday to Saturday the pharmacy opened from 9.00am to 5.30pm but on Sunday it opened from 10am to 4.30pm. Ms Olsen said the pharmacy would shut earlier on a Sunday if it was not busy and in fact that occurred when she worked on

Sundays and she was told to go home early. Ms Olsen said that she knew she would not be working 40 hours per week with the change.

[29] She went to see Mr Benson urgently to see what was going to happen with her 40 hours. Mr Benson, when I put such a meeting and a concern being raised about the 40 hours, said that he did not recall Ms Olsen saying to him that she needed 40 hours per week. I prefer Ms Olsen's evidence as more likely that she went to see Mr Benson because this was a significant change and she was concerned from a financial perspective about any reduction to her hours and weekly income. Mr Benson in all likelihood responded along the line that it would not always be like that and it would not make too much of a difference. There were some other comments made at that time but I will refer to these when I turn to the next issue.

[30] Ms Olsen's hours and days were changed to Sunday to Thursday from the week commencing 28 September 2015. Up to that point Ms Olsen had, unless sick or otherwise away from the workplace, worked 40 hours per week Monday to Friday and was paid \$740 gross per week.

[31] When the days of work were changed Ms Olsen worked and was paid as follows:

- (a) Pay period ending 4/10/15 worked 37.25 hours and was paid \$689.13 gross.
- (b) Pay period ending 11/10/15 worked 37.50 hours and was paid \$693.75 gross.
- (c) Pay period ending 18/10/15 worked 36.50 hours and was paid \$675.25 gross.
- (d) Pay period ending 25/10/15 worked 37 hours and was paid \$684.50 gross.

[32] Mr Riches submits that there was no breach of the employment agreement because clause 8.3 of the employment agreement allows reasonable changes to the hours of work following consultation and no less than one week's notice.

[33] Clause 8.1 provides that the employee will work such hours as are necessary to fulfil the requirements of the position and that they may be required to work on up to five of the seven days at the employer's discretion. Clause 8.2 of the employment agreement provides for the normal hours of work to be 40 hours per week between the hours of 9am and 5.30pm. Ms Olsen worked 40 hours per week between those hours.

[34] I am not satisfied that under clause 8.3 a reasonable change could include a decrease in hours for an extended period of time of some months without some accounting for the difference between reduced hours and 40 hours per week. Further I do not find that there was consultation about the change before it occurred.

[35] I find that there was a breach of the employment agreement when Ms Olsen's days of work and hours of work were unilaterally changed without consultation from 28 September 2015. It could not be said to be a reasonable change because it resulted in a decrease in her hours of work from those previously worked since commencement of employment on 18 May 2015. The actions were unjustified because they were not what a fair and reasonable employer could have done in all the circumstances. Ms Olsen was disadvantaged by this action because her income was reduced each week as set out above.

[36] Ms Olsen has a personal grievance that she was unjustifiably disadvantaged by the unilateral change to her hours of work. The remedy sought was compensation and will be assessed if necessary on a global basis with any other grievance made out.

Were performance concerns raised unfairly and was Ms Olsen subjected to belittling and/or isolating conduct from Mr Benson?

[37] Ms Olsen said that at the meeting with Mr Benson about her concerns that her hours had changed Mr Benson "had a real go at her". She recalls him saying that everyone had to "carry her" and that she was unprofessional and was not doing her job properly. She said that Mr Benson told her that he had called her previous employers and they had said that she had not done her job properly there.

[38] After the meeting Ms Olsen said that she started to cry and she went to Mrs Benson and asked if she could speak with her privately. Mr Benson then came in and said that she had no right to talk to Mrs Benson and she could only talk to him because he was in charge of staff. Ms Olsen said that she was told to stop crying and get back to work which she did. Ms Olsen said that she felt she had no choice but to work the changed hours and days which impacted on her income. She said that she became very stressed at work and had "become a nervous wreck".

[39] Mr Benson could not recall the meeting or at least not clearly. There was some recollection of part of the discussion although he said that it had occurred at the

3 November meeting that I will come to. He said that he had never seen Ms Olsen tearful but he confirmed that he and Mrs Benson had separate roles and that it was important that she not be interrupted with staffing issues.

[40] I prefer Ms Olsen's evidence about what was said to her by Mr Benson at that time as more likely. I find it quite unlikely that Ms Olsen would simply have manufactured that exchange. Mr Benson tended in his evidence to play down his view of Ms Olsen and limit his concerns to her enrolment in the pharmacy training course. When the complete ACC file was provided one of the notes records his view that Ms Olsen was unreliable and unemployable together with a view she was faking her injury. I think it more likely that Mr Benson was in or about September 2015 becoming somewhat tired of issues in Ms Olsen's personal life impacting on work.

[41] An employer is of course able to raise concerns with an employee but this should be done in a way to ensure that the relationship is not damaged. Advance notice of the specific issues to be discussed is important so that there can be a proper response. The way the concerns were raised and the very general nature of them meant Ms Olsen was not able to respond to them. It was unfair and it impacted on Ms Olsen's confidence and was undermining of the employment relationship. When she went to talk about her concerns with Mrs Benson she was forbidden to discuss the matter and I accept felt quite isolated in the workplace.

[42] Ms Olsen went to the doctor on 23 October 2015. Although Ms Olsen said that she attended because of stress at work, the medical certificate and the consultation notes do not provide that work was the main stressor. Ms Olsen did, as supported by the medical notes, ask for counselling and was put on stress leave for a week from 23 October to 2 November 2015. She said that she could not tell Mr Benson how she was feeling but felt she needed to give a reason for taking leave and in a note limited the reasons for sick leave to the 20 August 2015 incident. She did state that incident had been affecting her work which upset her. Ms Olsen also said in her note that she hoped to be a lot more focussed with rest and counselling on her return to work. This note was consistent with Ms Olsen wanting to continue on with her employment and provide some reassurance to Mr and Mrs Benson for the future. Mr and Mrs Benson cannot be criticised for their conclusion that the stress was solely related to the 20 August 2015 incident. They did, however, know whether work related or not that Ms Olsen was on leave for stress related issues.

[43] These matters have been raised as a separate grievance. It was clearly unpleasant conduct and the fact Ms Olsen could not talk to Mrs Benson about her concerns was quite unfair and isolated her from support. I find that the appropriate way to deal with the matter is to assess this as background to the employment relationship and the primary claim which is that of unjustified dismissal rather than as a standalone grievance. That approach sits with the role of the Authority which is to resolve employment relationship problems according to the substantial merits of the case.

What was said on 3 November 2015?

Telephone call on 1 November 2015 about coming back

[44] On 1 November 2015 Ms Olsen telephoned the Akaroa Pharmacy and spoke to Mrs Benson. She advised that she was returning back to work on 3 November 2015 in accordance with the return to work date on her medical certificate. Mrs Benson, consistent with Mr Benson's earlier instruction, said that Ms Olsen needed to talk to Mr Benson if she had a staffing issue. Mrs Benson transferred the call through to Mr Benson. Mr Benson could not recall the telephone conversation. I accept Ms Olsen's evidence that she apologised to Mr Benson for taking time off and assured him she would be able to return. He said that he would talk to her on the Tuesday when she returned.

Tuesday 3 November 2015

[45] On Ms Olsen's return to work on 3 November 2015 she went to start her usual duties. She was then asked by Mrs Benson to follow her to Mr Benson's office.

[46] There is no dispute that Mr Benson asked Ms Olsen about enrolling in the training course. Ms Olsen said that she had not enrolled in the course. The dispute is about what was said after that and when Ms Olsen was told that she could not work in the dispensary.

[47] Ms Olsen said that she was told she could not work in the dispensary and would be working in the shop. She was told she would be slotted in but would not get 40 hours per week.

[48] One of the key areas of dispute is whether Mr Benson, as he said in his evidence, told Ms Olsen at the meeting that she should enrol immediately with a training provider and her retail duties were only until the time that she did that. Ms Olsen denies that and says that she would have done anything to have kept her job. She said that when she offered to enrol that day Mr Benson said that it was too late. Ms Olsen denied that she ever refused to do the course. She did not accept that she refused to undertake the academic work or exams because she needed the job and wanted to work in the dispensary. Mr Benson's oral evidence did not go so far as to say that Ms Olsen refused to enrol in the course. In his oral evidence Mr Benson said that Ms Olsen said that she said "I'll do it" initially but he said that she had said this to him previously and had not enrolled. Mr Benson said that Ms Olsen then did not respond when asked further questions.

[49] Mr Benson said in his oral evidence that he asked Ms Olsen during the conversation whether "the other issues were a problem." He said that he felt the 20 August issue was behind her but he wanted to hear from Ms Olsen's perspective whether as he put it the crises were abating. Ms Olsen said Mr Benson referred to a separate matter, her grieving over her mother's death, and asked her when that was going to be over. Mr Benson said that Ms Olsen responded she was feeling more positive. Mr Benson said that it was at this time rather than the earlier conversation he discussed having talked to Ms Olsen's previous employers at the time she applied for the role and that they mentioned she had crises in her life.

[50] There is a dispute about how the meeting ended and what happened after it did. Mr Benson said that he told Ms Olsen she would have to continue with her retail duties until she was enrolled but that as soon as she was enrolled she was needed in the dispensary. He said that although he expected Ms Olsen to work her shift in the shop she said that she was going home to think about it. He said that he took that to mean she was thinking about whether to enrol in the course or not.

[51] Ms Olsen said that during the conversation she turned to Mrs Benson in the hope that she could help her but Mrs Benson simply pointed at Mr Benson. Ms Olsen said that she was offered work in the shop for the day and agreed. She was then too upset to be dealing with customers and went back to tell Mr Benson that she could not work like that with no hours and having been taken out of the dispensary.

[52] Ms Olsen said that she felt sick and tried to explain to Mr Benson that she was upset and had not expected her first morning to go like that. Ms Olsen said that Mr Benson responded “you have got to be joking” and she felt “like I was an idiot who should have expected it.” Ms Olsen said that Mr Benson then walked away but she stayed shaking and upset and when he came back and saw her he told her to leave if she was not going to work. Ms Olsen said that she asked him what would happen with the hours and he said something about doing a roster.

[53] Before determining which account is the more likely I want to weigh in my considerations what then happened between the parties. That is because that may include other reliable evidence against which to test the reliability of the accounts of the 3 November meeting.

What happened after Ms Olsen left the work place

3 November 2015

[54] On 3 November at 18:53 Ms Olsen sent Mr Benson a text message and asked *Hi did the roster get done today?* Having not had a response at 20:54 Ms Olsen sent a further text message *Hi haven't heard back so I be there at 9 am tomorrow?* Mr Benson responded by text message *No work tomorrow Come in Thursday.*

4 November 2015

[55] Ms Olsen said that she started to feel anxious about available work. On 4 November 2015 at 14:23 Ms Olsen sent a text to Mr Benson *Hi how many shifts do I have this week ending Sunday?* Having had no response she sent a further text at 20:46 *Hi Did you get my message 6 hours ago?* Mr Benson sent a text in reply *Phone during work hours.* Ms Olsen sent a text in reply *I did text asking at 2:23 today which was in working hours...*

[56] Mr Benson said that he was unable to deal with some of the text messages from Ms Olsen because he was in the pharmacy dealing with distraught customers and/or was at home for the evening. He said that he was intending on 5 November to sit down with Ms Olsen and discuss her hours.

5 November 2015

[57] On 5 November at 07:31 Ms Olsen sent a text message saying *Hi I won't be at work today as I have had legal advice.*

9 November 2015

[58] On 9 November Ms Olsen sent Mr Benson the following email:

Dear Garry

Regrettably I can no longer work for you under these conditions that you have set for me. You have changed my terms and conditions of employment, you have also taken my hours away and changed my role.

I will not be returning to work.

Please ensure my holiday pay and all entitlements are paid directly to me.

11 November 2015

[59] Mr Benson responded to Ms Olsen's email by email dated 11 November 2015 and advised

We are sorry to receive your resignation and we wish you well in the future.

Your resignation is accepted and all entitlements will be paid today.

16 November 2015

[60] Ms Oberndorfer wrote a detailed letter to Mr Benson raising a personal grievance which was sent by email to the same business email address Ms Olsen had forwarded her resignation to a few days earlier. Ms Oberndorfer asked Mr Benson to acknowledge receipt of the email by way of reply. When that did not occur a further email was sent on 26 November 2015 to Mr Benson at the same email address asking for him to confirm that he had received the letter emailed on 19 November 2015.

No response to 16 November 2015 letter until March 2016

[61] There was no response from Mr Benson until a letter from Mr Riches was received on 9 March 2016. Mr Benson said that he did not believe he ever received the letter of 19 November 2015 raising a personal grievance and setting out in some detail the concerns of Ms Olsen including the exchange on 3 November 2016. As I said to Mr Benson during the Authority investigation meeting the letter was sent to

the same email address as Ms Olsen had sent her resignation. Mr Benson received the resignation email and responded to it. There was no other evidence such as a record of emails received on 19 November 2015 at the pharmacy business email to satisfy me it was not received. It is not enough to simply deny receiving an email and I find that the 19 November 2015 email was on the balance of probabilities received.

[62] Mr Riches in his letter of 9 March 2016 set out that Mr Benson was contacted by the mediation service in mid-January 2016 and the service provided him with a copy of Ms Oberndorfer's letter at that point. Mr Riches referred to the allegations as a "complete surprise". His letter focusses on the 20 August incident as being causative of stress and denies the remainder of the allegations and says that the resignation decision was because following the 20 August incident Ms Olsen faced a number of personal problems. Although the 3 November exchange is set out in some detail in Ms Oberndorfer's letter it was not responded to specifically.

Conclusions on what occurred on 3 November 2015

[63] Mr Benson's evidence was that Ms Olsen needed to enrol in the course as soon as possible if she wanted to work in the dispensary and she left to think about that. In the meantime he said she could work in the shop. Mr Riches in his submissions states that Ms Olsen was given a lawful instruction to undertake the training course which made her unhappy because she did not want to undertake the training obligation and she resigned. Ms Olsen said that she was given no opportunity to enrol, told that it was too late to do so and that she could not work in the dispensary.

[64] If Mr Benson was waiting for Ms Olsen to decide to enrol or not then it would be more likely he would have asked when Ms Olsen sent a text message on 3 November 2015 about whether to come in at 9am the next day what she had decided. He would be less likely I find to have simply advised, without knowing whether Ms Olsen had enrolled or indeed intended to do so, that there was no work the next day. Even after the change of work days, to Sunday to Thursday, Wednesday was always a work day for Ms Olsen.

[65] Mr Riches submits that Ms Olsen fabricated her evidence in which she stated she told Mr Benson that she would enrol that day and he said it was too late. He submitted that at no earlier point did Ms Olsen mention being prepared to undertake

the course. The evidence from Ms Olsen and Mr Benson does not support that Ms Olsen said she would not do the course. Ms Olsen said that she believed after the meeting she would just be working in the shop and focussed on getting information on what that may mean for her in terms of hours worked and income. Ms Olsen concluded as she said in her resignation letter that her role had changed. I find her actions were consistent with her evidence that she was told she could not work in the dispensary.

[66] Significantly Ms Oberndorfer in her 19 November 2015 letter wrote at 4.21 when questioned about her polytechnic papers “our client explained that she had managed to get her internet connection sorted and was in the process of getting papers sent..... At 4.22 of the letter it states “You told our client that she was no longer allowed to work in the dispensary.”

[67] The other factor that I have weighed is why on 3 November 2015 Mr Benson would tell Ms Olsen she could no longer work in the dispensary. Mr Benson attached to his statement of evidence a copy of the Pharmacy Services Agreement with the District Health Board which requires a regular audit process. The audit document provides that staff working in the dispensary have to be qualified or in a registered training programme. There was going to be an audit within the next 12 months although the evidence supported that there was some warning about that before it happened. Enrolment by Ms Olsen within a training programme was something that needed to be addressed but it was not of such urgency that it could not be addressed in a measured considered way that was not damaging and destructive to the employment relationship.

[68] The Authority asked Mr Benson why he would tell Ms Olsen she could not work in the dispensary on 3 November. He responded that it was his way of encouraging her to enrol. If that was the case then it is more likely that Mr Benson would want to know whether she had decided to enrol or not. He did not however ask the question or explain that he did not accept her role had changed permanently when Ms Olsen resigned with that as one of the reasons.

[69] I prefer Ms Olsen’s account as more likely about what occurred on 3 November 2015. I do not find for the reasons set out above that she understood from the conversation she could remain in the dispensary if she enrolled. The responses

that were received from Mr Benson although limited in nature do not support that the change was temporary and he was waiting for her to enrol in the training.

Was the resignation caused by a breach of duty or was there a course of action embarked upon with the purpose of coercing her to resign?

[70] Ms Oberndorfer confirmed that Ms Olsen was basing her claim of constructive dismissal on the second and third non-exhaustive categories of constructive dismissal referred in by the Court of Appeal in *Auckland etc Shop Employees IUOW v Woolworths*¹ that there had been a breach of duty and that the respondent had embarked on a course of action with the deliberate purpose of coercing her to resign.

[71] I have determined firstly whether Ms Olsen's resignation was caused by a breach of duty. In doing so I have considered both the contents of the email sent when Ms Olsen resigned and the circumstances of the resignation.

[72] During the meeting on 3 November 2015 Ms Olsen was told that she could not continue working in the dispensary but only in the shop because she had not enrolled with a training provider. That was a significant change to the fundamental nature of her employment both in terms of her role and the full time permanent nature of her employment. Ms Olsen understood she would be slotted in on a roster and that she would not be working 40 hours per week.

[73] Mr Riches submits that Ms Olsen should have waited for the roster to see if there was a significant impact to her hours. I do not accept that. Ms Olsen was a permanent full time employee, who was not rostered hours each week. Simply put she knew the hours she worked. To be on a roster was a fundamental change. Ms Olsen had in any event asked about the roster and shifts on 3 November and 4 November 2015 and the only advice received was about work on 5 November. Mr Benson said in his evidence that he wanted to discuss the roster on 5 November when Ms Olsen came in but he did not state that to Ms Olsen at any time before she resigned.

[74] I have not found on the balance of probabilities that Ms Olsen was advised the change to her role and hours was only temporary for reasons set out above. I further

¹ *Auckland etc Shop Employees IUOW v Woolworths* [1985] ERNZ Sel Cas 136

do not accept as Mr Riches submits that the evidence supports that Ms Olsen was given a lawful instruction on 3 November which she failed to comply with or that Ms Olsen resigned to go onto ACC compensation. Ms Olsen put how she felt in her written evidence:

To me the whole thing was hopeless. I had no guaranteed hours and I wasn't allowed to work in the dispensary. Garry wouldn't contact me and he clearly had made up his mind that that was how it was."

[75] Peninsula Health did not act in accordance with its obligations of good faith to be active and constructive in maintaining the employment relationship in which the parties are responsive and communicative. It breached the implied duty of trust and confidence not to act in a manner calculated or designed to destroy or seriously damage an employment relationship. It made unilateral and fundamental changes to Ms Olsen's hours of work and her role immediately after a period of stress leave and without warning.

[76] I find that Ms Olsen's resignation was caused by breaches of duty on the part of Peninsula Health. I do not find I need to conclude in those circumstances whether there was additionally a course of conduct designed to coerce her to leave.

If there was a breach of duty then was it of sufficient seriousness to make resignation reasonably foreseeable?

[77] Mr Riches submits that there was no conduct on the part of Peninsula Health that could be said to be repudiatory let alone sufficiently serious enough for a constructive dismissal and that there are also issues of foreseeability. I find that the breaches of duty in this case were of a sufficiently seriousness nature so that objectively assessed Ms Olsen could conclude that Peninsula Health did not intend to be bound by the terms and conditions of her employment agreement and she could treat her employment agreement as repudiated.

[78] As to foreseeability Ms Olsen had sought legal advice before she resigned and she advised Mr Benson of this on 5 November 2015. Mr Benson said after receiving that text about Ms Olsen obtaining legal advice he decided not to communicate with her any further. He did not between her text message about legal advice on 5 November and the date of the resignation on 9 November 2015 communicate with her

to allay concerns that Peninsula Health did not intend to be bound by the employment agreement. I find a substantial risk of resignation was foreseeable.

[79] I am satisfied that the breach of duty in this case was of sufficient seriousness to make it reasonably foreseeable to Peninsula Health that Ms Olsen would not be prepared to continue to work in the circumstances that existed at the time she resigned.

[80] Ms Olsen was constructively dismissed.

If there was a dismissal, then was it unjustified?

[81] I accept that Mr Benson became concerned that Ms Olsen had not enrolled in a training course. Mr Benson could have given Ms Olsen a timeframe to enrol, provided her with the information he produced for the Authority as to why it was important to do so and he could have assisted her with enrolment. He did not do this. Without warning on the day Ms Olsen returned from stress leave he told her she could no longer work in the dispensary. There was no procedural fairness. Any urgency was not such that it justified that action. This was not what a fair and reasonable employer could have done in all the circumstances. The justification test in s 103A is not satisfied.

[82] Ms Olsen was unjustifiably constructively dismissed and is entitled to an assessment of remedies.

Remedies

Lost Wages

[83] Evidence about lost wages at the investigation meeting was somewhat confused by the subsequent receipt by Ms Olsen of ACC compensation although the claim was belatedly accepted by the Corporation. Ms Olsen was able to and did undertake some work after her dismissal. The Authority after the investigation meeting became aware of a recent judgment from the Employment Court *Judea Tavern Limited v Patricia Jesson*² about lost wages and accident compensation payments. There was an argument in *Judea Tavern* on behalf of the plaintiff that Ms

² *Judea Tavern Limited v Jesson* [2017] NZEmpC 82

Jesson had not made out her claim for lost wages because she received accident compensation payments.³

[84] Judge Inglis, as the Chief Judge was then, accepted that Ms Jesson would have been ready and able to attend work on 26 October but for her unjustified dismissal on 20 October and did not consider it appropriate to deny reimbursement of lost wages in the circumstances.⁴ It was recognised that any award under s 123(1)(b) raised the spectre of duplication of payments for lost wages Ms Jesson received accident compensation for. There was reference in *Judea Tavern* to previous cases where the liability to pay wages rests with the employer and that is not displaced by social security and accident compensation.⁵ Rather any question of reimbursement of such payments falls on the organisation and the individual.

[85] Mr Riches seeks to distinguish that judgment and another referred to in the judgment *Scissor Platforms (1997) Ltd v Brien*⁶ because Ms Olsen's situation was not an employer terminating an employee for medical incapacity while recuperating. He submits that her situation was compensation for the injury from the August 2015 incident and not for mental injury. I accept Ms Oberndorfer's submission that the basis for the assessment as found at 63 – 73 of the ACC file does not support that submission. Further Ms Olsen continued to work after 20 August 2015 until the period of one week's stress leave in late October and was confident after that that she was ready to return to work and did.

[86] Whilst Mr Riches has focussed in distinguishing the nature of the dismissal I find the more appropriate question to ask is whether there was remuneration lost by Ms Olsen because of the unjustified dismissal. I find, as did the Court in *Judea Tavern*, that but for the unjustified constructive dismissal Ms Olsen was able to attend work. Accordingly as was held in *Judea Tavern* I do not consider it appropriate to deny reimbursement of lost wages in the circumstances and any question of reimbursement of payments made falls to the Corporation and Ms Olsen.

[87] Medical notes dated 10 November 2015 reflect that Ms Olsen advised her doctor that she went back to work on 3 November and found her role changed and was going on a roster when they could fit her in. She advised the doctor that prior to

³ Above n 2 at [38]

⁴ Above n 2 at [39]

⁵ Above n 2 at [40]

⁶ *Scissor Platforms (1997) Limited v Brien* [1999] 2 ERNZ 672 at 681 – 682.

that she was on 40 hours per week. There is a further medical appointment on 18 November. The notes confirm that it is at that time a claim is made to ACC. Ms Olsen's mood is noted as low and the notes reflect that she was declined a job.

[88] There was a short period in November when Ms Olsen was given a medical certificate but she said that she looked unsuccessfully for roles and that is supported by the medical notes. The ACC notes reflect there was not much work around in Akaroa.

[89] Ms Olsen did obtain some housekeeping work at a Hotel in Akaroa from late February 2016 but I am satisfied there were no earnings before that time. The payments the ACC record shows as made in November 2015 are in fact holiday pay from Peninsula Health. Ms Olsen wants reimbursement of lost wages until September 2016 when ACC made a lump sum payment for backdated compensation.

[90] I am not minded to exercise my discretion and make an award for more the three months ordinary time remuneration. The reality is that in Akaroa opportunities for Ms Olsen were limited and accordingly there is limited evidence of mitigation. I do not find that the decision to stay in Akaroa should fairly be visited on Peninsula Health beyond a three month period from 3 November to 2 February 2016. Ms Olsen eventually shifted to Christchurch in August 2016 to undertake a course. Subject to any issues of contribution, three months ordinary time remuneration for Ms Olsen is \$9,620 based on \$18.50 per hour for a 40 hour week multiplied by 13 weeks.

[91] I order Peninsula Health 2010 Limited to pay to Tracey Olsen the sum of \$9,620 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.

Compensation

[92] The sum sought under this head for both grievances found to be made out, the unilateral change to hours in breach of clause 8.2 and 8.3 of the employment agreement and the unjustified dismissal, is \$25,000.

[93] An assessment for compensation is not straightforward. There were other stressors in Ms Olsen's life. I need to and do focus solely on the impact the dismissal/change to hours had on her. I start with the fact that the role was very important to Ms Olsen. There was obviously the income aspect but also because of

the 20 August incident it represented stability and the prospect to obtain a qualification. Ms Olsen had travelled from Wanaka to take up the role on that basis.

[94] Ms Olsen started, I accept, to lose confidence because of how she was treated. She felt compelled to accept a reduction in hours imposed without consultation even though that impacted on her income. She was not allowed to obtain support from Mrs Benson when criticism was made of her. A loss of confidence and a sense of a need to maintain the employment relationship are evident from the note she wrote when she took her stress leave and then her apologies about the leave in the 1 November 2015 telephone call to Mr Benson.

[95] Mr and Mrs Benson knew about the traumatic event on 20 August and the stress. Notwithstanding there was then the unexpected meeting on 3 November resulting in changes to hours and changes to her role. The text messages sent on that day and following support Ms Olsen's anxiety about what was going to happen to her income with the change to her permanent role. She then attended her doctor on 10 and 18 November 2015 and it is clear from the notes her mood was very low, she was weepy, unable to sleep, losing confidence and was hiding away from others. The notes support the doctor was quite concerned. She was prescribed anti-depressants. By 2 December 2015 the notes show she thought everything was piling up and had a rash because of the stress.

[96] The ACC application was not made until after 9 November. It was clear that the medical adviser at page 113 of 130 of the ACC report did not regard the 20 August incident as wholly and substantially the cause of her current stress. I do not accept therefore the medical information supports Mr Riches submission that the difficulties suffered are attributable solely to that incident. There was reference to other factors including grief and work as well.

[97] I also accept that because of the significant delays in getting any ACC compensation Ms Olsen was in a precarious financial position. She was in a very small town with limited opportunities. I cannot however be satisfied to the required level that Mr Benson, because of what he is recorded as saying in the ACC notes, expressed those views in the township exacerbating the impact of her dismissal.

[98] In all the circumstances I am of the view that a suitable award is the sum of \$15,000 for compensation.

[99] I order Peninsula Health 2010 Limited to pay to Tracey Olsen the sum of \$15,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

Contribution

[100] The Authority is required under s 124 of the Act where it has determined there is a personal grievance to consider whether the actions of Ms Olsen contributed towards the situation that gave rise to the personal grievance and if those actions so require reduce any remedies accordingly.

[101] I do not find any issue of contribution toward the situation that gave rise to the personal grievance of unjustified action causing disadvantage. That is the unilateral change of hours and breach of the employment agreement.

[102] Mr Riches submits that Ms Olsen contributed significantly to her unjustified constructive dismissal by refusing to comply with her contractual obligations to enrol in the training course. I do not find on the balance of probabilities that Ms Olsen ever refused to enrol in a training course. There is evidence that she enquired about a course on 19 August however there was then the incident of 20 August. There was I accept a delay in enrolling and Mr Benson did question her about it but not in the nature of a warning. I am also satisfied that she was quite unaware of the audit requirement because of Peninsula Health's contract with the DHB until that information was provided for the Authority investigation.

[103] Mr Benson could have instructed Ms Olsen to enrol and given her a period in which to do so in a measured and fair way that did not damage the relationship. If he wanted to keep her out of the dispensary in the meantime he could have maintained her level of income. That is not what happened. In the circumstances I am not satisfied there is a causal connection between the delay to enrol and the situation that gave rise to the dismissal. I do not conclude the delay in all the circumstances could be categorised as blameworthy requiring a reduction to remedies.

[104] I do not reduce the remedies for reason of contribution.

Orders Made

[105] I order Peninsula Health 2010 Limited to pay to Tracey Olsen the sum of \$9,620 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.

[106] I order Peninsula Health 2010 Limited to pay to Tracey Olsen the sum of \$15,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

Penalties

[107] Ms Oberndorfer seeks penalties for breach of the employment agreement and breach of good faith. The penalty for a breach of the employment agreement is on all fours with the unjustified action grievance. To award a penalty for a breach of the employment agreement would be another award for the same behaviour under a different head. I do not award a penalty for the breach of the employment agreement in those circumstances.

[108] I accept there were breaches of good faith. Peninsula Health is a small employer. One of its directors acted without advice and careful thought about the impact of what he was doing and saying. There was no proper process that satisfied good faith obligations in dealing with concerns, frustrations and changes and that was destructive of the relationship. There had also been a significant out of work incident that would have been a shock to both parties. Whilst Ms Olsen did not really want to discuss that incident because she just wanted to get on with her work that frustrated Mr Benson. When I weigh all those matters I do not find that the high threshold for a penalty for breach of good faith has quite been reached. Equally the breaches of good faith have already been considered in the findings and remedies for the unjustified disadvantage and constructive dismissal grievances. I do not award a penalty for a breach of good faith.

Costs

[109] I reserve the issue of costs. Failing agreement about these Ms Oberndorfer has until 18 October 2017 to lodge and serve submissions as to costs and Mr Riches has until 3 November to lodge and serve submissions in reply.

A handwritten signature in black ink, appearing to be 'H. Doyle', written in a cursive style.

Helen Doyle
Member of the Employment Relations Authority