

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Angela Porfiriadis (Applicant)  
**AND** Dr Judy Gill t/a Auckland Metro Doctors (Respondent)  
**REPRESENTATIVES** Grant Pratt, Advocate for Applicant  
No appearance for Respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**INVESTIGATION MEETING** 26 June 2003  
**DATE OF DETERMINATION** 29 July 2003

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

The problem before me relates to a call by the applicant that she was unjustifiably dismissed by the respondent on 19 April 2002. To remedy her alleged grievance the applicant seeks lost remuneration, compensation ss.123(c)(i) & (ii) of the Act and recovery of holiday pay alleged to be owing.

**Note**

The respondent was generally uncooperative in many of her dealings with the Authority and the file also evidences that Dr Gill did not co-operate in attempts to have the matter resolved through mediation.

Having been advised that the matter had not been resolved in mediation a support officer for the Authority arranged with Dr Gill an agreed time for a conference call, the purpose of which was to discuss matters associated with progressing the application, including timetabling a date for an investigation meeting. The usual practice is to set a date for the investigation with the agreement of the parties. The agreed date for the telephone conference was Wednesday 16 April 2003 at 4pm.

Dr Gill did not make herself available for that call despite previously agreeing to be available. The Authority's usual practice in such circumstances was followed and a date set in consultation with the advocate for the applicant. The date set for the investigation meeting was Thursday 26 June 2003 and this was advised to Dr Gill on 23 April 2003.

In a subsequent discussion with Dr. Gill she advised the support officer she probably wouldn't attend due to the difficulty in obtaining a doctor to relieve her at her clinic. She advised that she was only available after 5pm weekdays and on weekends. At this time she was advised, at my direction, that the meeting would be held during normal business hours.

On 28 April Dr Gill advised the Authority in writing (among other things) that she was only available for an investigation meeting after 5pm weekdays, Saturday morning and Sundays.

In the same letter Dr Gill also advised in respect of the date set for 26 June that she would be able to make herself available for one hour on two occasions throughout Thursday 26 June. She reserved the right to leave immediately to attend any medical emergency that might arise. She requested the Authority to advise which hours she should allow for attendance at the investigation meeting.

The Authority wrote to Dr Gill on 9 May 2003 to respond to the issues raised in her 28 April letter and specifically addressed her concerns regarding her availability to attend the investigation meeting. On this point Dr Gill was advised:

*"If you wish to approach the Authority with a genuine and reasonable request for another date that does not involve undue delay in hearing and disposing of the matter your request will be considered"*

Dr Gill was also advised in that correspondence of the provisions of Clause 12 of the Second Schedule to the Act which provide that if, without good cause shown, any party to a matter fails to attend or be represented before the Authority, the Authority may act as fully in the matter before it as if that party had duly attended or been represented.

Dr Gill did not make any request for another date as she was invited to and on 15 May she wrote to the Authority stating among other things that she would not be in attendance at the investigation meeting on 26 June. The Authority replied on 30 May advising Dr Gill the hearing would proceed on 26 June as notified.

Despite Dr Gill's advice she would not attend the investigation meeting when she did not appear at the appointed time for the commencement of the investigation I had the support officer contact her. Dr Gill reiterated her earlier advice that she would not be attending the meeting.

Dr Gill was in no doubt of the time set for this investigation meeting and the consequences of her non-attendance. Accordingly I have proceeded to hear and determine the problem before me.

Despite her non-attendance Dr Gill has made available a great deal of documentary evidence. An Amended Statement in Response is expressed in the first person and I have treated it as a brief of evidence from Dr Gill. There are other briefs of evidence and annexed documentation in support of the respondent's position. I have carefully considered this material in arriving at my determination. Unfortunately due to Dr Gill's non-appearance I have been unable to clarify certain matters and my representation of Dr Gill's position is based solely on my reading of the documentation. Further, was not able to test that evidence in the normal way.

## **Background**

The determination in this matter hinges on a question as to whether or not the applicant was a casual worker or a permanent part timer.

The applicant commenced employment with the respondent in November 2000. She was employed as a Receptionist/Officer Manager. The Individual Employment Agreement (IEA) concluded at the time is dated 10 November 2000.

The IEA sets out at Clause 1

1.0

*Employment is on a casual basis and there is no expectation of ongoing work. The employee's services are required on an occasional and 'as required' basis.*

The accompanying job description is headed **Part Time** Receptionist/ Office Manager.

Clause 6 Remuneration Details (IEA 10 November 2000) reads:

6.0

<i>Hourly Rate:</i>	<i>\$12.00</i>
<i>Holiday Pay @ 6%</i>	<i>\$ 0.72</i>
<i>Total Hourly Rate</i>	<i>\$12.72</i>

6.1

*You will be paid holiday pay calculated at 6% of your total gross remuneration, which will be paid to you on an ongoing basis, and will be paid in your weekly pay.*

There is no dispute that Ms Porfiriadis was paid holiday pay on a 'pay as you go basis.'

Ms Porfiridas was dismissed from her employment by email on 19 April 2002. That email read:

*19 April 2002*

*Angela Porfiridias  
14 Claude Rd  
Epsom*

*Dear Angela*

*Thank you, for your contribution to the Practice at Auckland Metro Doctors since November 2001 (sic). As you know the Practice has become increasingly busy over this time, and unfortunately I am now no longer able to manage with only one receptionist/and clinical assistant.*

*Consequently as from 28 April 2002 I will be employing two full time staff. This means I will no longer have a **part time** position available for you after 28 April.*

*You are welcome to use myself or Neil as referees when applying for future positions.*

*Please return your three office shirts, key to the cash drawer, and keys to the office and Dingwall Building either in person one evening to Steve, who is house minding this coming week, at 34 Atarangi Rd, or in person to the city office, so that these can be signed for on receipt.*

*Yours sincerely  
Judy Gill*

*(emphasis mine)*

Ms Porfiriadis claims she was a permanent part time worker and her dismissal was unjustified.

The respondent's position is that Ms Porfiriadis was a casual employee and that her termination was simply a case of not rostering a casual employee for work following a restructuring which meant that work was no longer available to be offered to her.

## Applicant's Position

Ms Porfiridas' evidence was that she started work as a receptionist/office manager with the respondent in November 2000.

Her initial rate of pay was \$12.72 per hour but this increased with effect from 8 February 2001 to \$15.90 per hour. She acknowledged that both these figures had 6% built into them to compensate for holiday pay.

Ms Porfiriadis recognised her IEA describes the employment as casual. She submitted, however, that the job description she was given refers to the position as that of a *part time receptionist/ office manager*. Ms Porfiriadis also referred to other documentation that supported her contention that in reality she was a permanent part-time worker.

- A letter written to her by Dr Gill on 30 Oct 2001 regarding her employment from March 2002. It commences "*Please advise whether you will be available for part time employment in the New Year, on or after 4 March 2001 (sic)*"
- The letter of dismissal emailed to Angela on 19 April 2002 reads "*This means I will no longer have a part time position available for you after 28 April.*"

Ms Porfiriadis gave evidence that throughout her employment, her employment was always referred to as part time, the only reference to 'casual employment' being the reference in the IEA.

Ms Porfiriadis confirmed that she worked for Dr Gill over two university vacations and four university semesters from November 2000 until her dismissal on 19 April 2002. She said it was normal practice that prior to the commencement of semesters Dr Gill would ask her and other part – time staff to indicate their availability for the coming semester. Once their availability was advised rosters were prepared by Dr Gill on a month by month basis taking into account the staff member's university commitments, other commitments (planned holidays for example) and Dr Gill's own needs for coverage. Once the roster was fixed the worker was obligated to work the rostered hours. Ms Porfiriadis said that if something arose that prevented her being able to meet her rostered commitment to work at the practice she was required to obtain Dr Gill's approval not to work and to arrange another worker to cover for her. Ms Porfiriadis gave evidence that once when she wanted time off Dr Gill suggested that she pay one of the other girls \$50 out of her own pocket to entice her to provide cover.

In response to a statement submitted by Dr Gill that Angela had failed to attend work on a rostered work day because she had been offered a large sum of money to model in a Greek dance production, Ms Porfiriadis said that she did ask for time off to take part in the production. She explained it meant a lot to her. She was told she had to provide cover for her roster. She could not arrange cover and intended to attend work as rostered. However, on the evening prior to the event Dr Gill rang her and gave her permission to take the time off work.

Ms Porfiriadis told the Authority that until the events immediately preceding her termination, she was not aware of any problems with her employment and had not received any warnings.

Ms Porfiriadis said that prior to her termination, on Saturday 13 April 2002 some money (\$245) went missing from the petty cash draw whilst she was on an approved lunch break. She advised Dr Gill of this and was told not to worry because it would probably turn up at the end of the day when cashing up. The money did not show up when the cashing up was completed. Dr Gill told her not to worry. She advised it would probably turn up. Ms Porfiriadis again searched for the missing money when she worked on Monday 15 April. Again she was told by Dr Gill not to worry about it. Ms Porfiriadis' evidence was that she was not accused by Dr Gill of taking the money. Nor did she have any reason believe Dr Gill suspected her of having done so but the next day she attended work she was told she was required to make good the loss as the money had been under her care. Ms Porfiriadis was advised in writing by Dr Gill on 16 April that that \$245 would be deducted from an amount previously made available to her (\$800) as a bonus to be used by her to purchase books at Whitcoulls and USB.

Ms Porfiriadis said that she had no choice but to accept this as she needed her job. She advised Dr Gill that if she was going to have to bear the loss she wanted it reported to the police. Dr Gill told her that that would not be necessary as insurance would not make good the loss. Angela said she told Dr Gill she was reporting the loss to the police and did so.

The next day April 19 Ms Porfiriadis was dismissed by email sent at 8.02am.

Ms Porfiriadis challenges the reasons given for her dismissal. She asked the Authority to consider all of the following.

- On 30 March 2002 Angela was asked (in writing) by Dr Gill to sign an agreement related to Technology, Security and Confidentiality. She did so.
- On 13 April 2002 Angela was issued with a new winter blouse and requested in writing to sign a contract regarding 'uniform use and care for all employees.' She did so.
- On the afternoon of April 18 2002 (prior to her advising Dr Gill she would be reporting the lost money) she and Dr Gill had a discussion regarding venupuncture training she was to have the following week.

Ms Porfiriadis described the impact the dismissal has had on her. She said that when she received the email dismissing her she noted that she was to return her uniform and keys directly to the practice or to Dr Gill's home where a person named Steve would be house sitting. She said she was too embarrassed to go to the surgery so she took the items to Dr Gill's home.

She was upset to find that the 'Steve' referred to was a family friend who is active in the Greek community. Dr Gill knew of the connection and she could not believe that Dr Gill would have submitted her to this. She was very embarrassed to have him signing off on her return of the items in question particularly when he made a remark referring to "what she had been up to." She had subsequently met someone who remarked "what does Steve know about you." She and her family as active members of the Greek community had been deeply humiliated by this.

## Respondent's Position

As best I can determine the respondent's position (without the benefit of clarification from her) it may be summarised as follows:

- The applicant's employment agreement entitled her to one hour's notice of termination and states that "*Employment is on a casual basis and there is no expectation of ongoing work. The employee's services are required on an occasional and 'on required' basis.*"
- The applicant was included on the roster on a month by month basis having advised of her availability. She only worked when she wanted to work and in fact had not even conformed to the respondent's stated preferences for work availability from March 2002. Angela was not asked to find replacements to cover her rostered commitments except after she had already agreed to work on a certain day and a roster had been distributed.
- The business had a need to restructure and Angela knew this having been asked to sign an employment agreement re technology security and confidentiality. The letter attached to that agreement (dated 30 March 2002) referred to "impending changes and expansion of the business"
- There were plans to engage locum doctors from 20 April and another full time doctor from 29 April. They required support staff that could undertake phlebotomy tasks particularly on the weekends. While Angel had undertaken that training in November 2001 she had not undertaken phlebotomy work in the practice and had not returned for further training to give her additional practice.
- The full time receptionist/ office and clinical assistant (appointed in February 2002) undertook phlebotomy training from 22- 26 April and thereafter Cara and Buffy Gill (another casual) were offered new employment agreements which described their positions as receptionist/ office and clinical assistant.
- Cara Cantwell and Kirsten Kerr completed computer training from March 21 2002 to enable them to carry out computerised invoicing of medicines and vaccines, drug labelling and preparation of vaccination certificates.
- Angela came to the end of a defined task of data entry into MYOB by 15 April. Her Monday work finished on this date.
- There was a seasonal reduction in available hours from Easter 2002.

In response to some of Angela's evidence the respondent submitted (among other things):

- The provision of the winter blouse on 13 April and the completion of the uniform agreement do not constitute an offer of permanent employment.
- Angela was not booked for venupuncture training in the week following 18 April. Her statement in this regard is false.
- The loss of cash is incidental to the evolving situation (restructuring). It is a "red herring." Management already knew at this time (13 April the day the cash went missing) that there

would be no more work for Angela after 28 April and the fact she was offered work in addition to her rostered hours on 18 April is inconsistent with Angela's claim that her termination was related to the missing money.

- Angela was not subjected to humiliation. It was not discussed with staff members in the practice. On the contrary Angela had sent correspondence to the practice without adequate advice of confidentiality and had thereby exposed herself to humiliation.

## Findings

### Credibility

Ms Porfiriadis presented as a careful and truthful witness and I have no difficulty in accepting her evidence.

### Was Angela a casual employee or a permanent part timer?

Before I examine the facts on this point, it would be helpful first to gain some appreciation what the term "casual" implies in employment terms from being employed "part time."

There is no legal definition of casual and part time employees. The Act simply defines an "employee" as:

*"any person...employed by an employer to do any work for hire or reward under a contract of service."*

The definition clearly includes casual and part time employment. Generally speaking, it is accepted that part time workers are employed on a permanent basis for less than the ordinary number of hours per week.

Casual employees are generally for short term only. Employees do not know if and when they will be employed. Usually they are employed on an on call basis without expectation of on going employment.

It is a question of fact that will determine this matter with regard to the intention of the parties, if ascertainable, when they entered into an employment relationship.

In this case the IEA denotes an intention that Ms Porfiriadis' employment would 'casual'

As noted, however, the respondent has recognised that the employment relationship was in fact (or at least it evolved into) part-time employment. (See head to Job Description, the respondent's letter to the applicant dated 30 October 2001 where she sought the applicant's availability for part-time employment from March 2002 and the email dismissing Ms Porfiriadis which referred to there no longer being part time employment available for her).

It is my finding based on the evidence and relying on a substantial amount of case law that Ms Porfiriadis was a permanent part time worker whose rostered hours were set by agreement between herself and Dr Gill. (*Canterbury Hotel etc IUOW v Fell (t/a Leeston Hotel* [1982] ACJ 285; *Avenues Restaurant Ltd (t/a Avenues Restaurant and Wine Bar) v Northern Hotel etc IUOW* [1991] 1 ERNZ 420; *Barnes and Whangarei RSA* [1997] ERNZ 626 EC; *Scholfield Airport Hotel v Clarke* AC 81/98). Her employment could not be terminated by omitting to roster her for duty.

The dismissal and the reason for it.

Dr Gill has, I find, dismissed Angela. The onus rested with her to show that the dismissal was justified and carried out in a fair manner.

That Dr Gill has not done. She relied solely on the position that Angela was a casual employee who was not rostered for work because no work was available for her after 28 April due to restructuring of the business.

While Dr Gill does not submit this was a redundancy situation, in arriving at findings with respect to the reason for Angela's dismissal I consider the evidence given for failing to roster Angela i.e. because the business was changing and work was not available for her. I see the following:

- When the April 2002 roster was put out it was anticipated that Angela would be working on April 29. Angela had no knowledge that the May roster would not have work scheduled for her.
- On 30 March 2002 when the respondent asked Angela to sign the Technology, Security and Confidentiality Agreement it was noted in the accompanying letter that the agreement was needed 'due to impending changes and expansion of the business' The letter finished "***We trust you will continue to be a valuable member of the team at Auckland Metro Doctors***". I find then, that on 30 March, in contemplation of changes to the business, Dr Gill fully anticipated that Angela's employment would be continuing in the restructured environment.
- Dr Gill advised that at the time the money went missing on 13 April that management knew there would be no further work for Angela after 28 April 2002. Why then, on that day, did Dr Gill arrange for Angela to obtain a blouse for her winter uniform and sign the agreement relating its use and care?
- I also accept that on the afternoon of 18 April Dr Gill and Angela had a discussion about her updating her venupuncture skills. I accept that at that point Angela had not booked further training but that she told Dr Gill she would confirm her arrangements with the clinic on Monday 22 April 2002.

Finally I note that it is not in dispute there was no full time appointment to a reception/clinical assistant role with the practice (which is the implication given in the letter of dismissal). Neither did the medical appointment planned for 29 April eventuate.

It is my finding that Angela's dismissal had nothing to do with any changes that were occurring at the practice. Further, had I found that the dismissal occurred for reasons of a genuine redundancy it would have been found woefully short of justification given the basic rules of fairness to be followed in such situations were absent.

What was the reason for Angela's dismissal? It is hard to imagine it could be the case but the evidence shows the most probable reason is that Angela reported the money missing to the police contrary to Dr Gill's wishes.

Quite apart from the fact that this could not give justifiable grounds for a dismissal the basic principles of procedural fairness were absent. Angela was not advised of the allegations against her. She was not told her employment was in jeopardy. She was not given the opportunity to respond to

those allegations, to have representation or to have any representation on her behalf considered in an unbiased manner. Ms Porfiriadis was simply dismissed by email on 19 April contrary to all principles requiring dismissal to be for a good reason and attended by fair and reasonable treatment.

Ms Porfiriadis' dismissal was abrupt, harsh and unjustified on any basis it is looked at.

## **Determination**

Ms Porfiriadis was a permanent part-time employee. Her dismissal was unjustified and she has a personal grievance against her former employer.

## **Remedies**

### Lost Remuneration

In setting lost remuneration I am required to make some assessment of the likely period that Ms Porfiriadis would have continued her employment with Dr Gill. I am absolutely certain that but for this dismissal Angela would have continued in her employment until the end of the then current semester and would in all likelihood have seen out the 2002 year in this employment. There are too many uncertainties to say with any confidence that the employment would have continued past Christmas 2002.

In setting lost remuneration I allow for 33 weeks at lost or greatly reduced remuneration by Angela. This covers the period 21 April to 9 December 2002 after which date Angela's combined earnings in her other jobs exceeded her earnings with Dr Gill.

Lost earnings awarded are based on the average weekly earnings earned by Angela over April 2001 – April 2002 i.e. \$241.34 gross less other earnings obtained during that period.

I therefore direct Dr Gill to pay to Angela Porfiriadis the sum of **\$5964.22 gross** as lost remuneration calculated as follows:

Average weekly earnings \$241.34 gross x 33 weeks = \$7964.22 less earnings received  
\$2000 = \$5964.22 gross

### Compensation for Hurt and Humiliation (s.123(c)(i))

This was an arbitrary, harsh and completely unjustified dismissal and it was accompanied by careless insensitivity to Angela's standing in her own community. In involving a member of Angela's community in matters associated with the dismissal the humiliation which accompanies any dismissal was greatly exacerbated.

Dr Gill is directed to pay to Angela Porfiriadis the sum of **\$5000 net** to compensate her for the hurt, humiliation and injury to feelings this unjustified dismissal has caused her.

### Loss of Benefit (123(c)(ii))

Angela was in receipt of a summer survivor's bonus of \$800 net. It took the form of a credit with local university book shops. But for the dismissal Angela would have enjoyed the benefit of this credit available to her.

Dr Gill sought to reduce this credit by the amount of the sum of money lost from the practice on 13 April. Angela had no choice but to agree to this deduction.

This was an unjustifiable disciplinary action taken against Angela in the sense it was not accompanied by a fair and reasonable inquiry into the matter of the missing money. Angela was not given a statement of the employer's concerns or any opportunity to make representations with respect to the missing money or the employer's proposals to handle it.

On this basis I reinstate the full amount of the bonus (i.e. the amount unspent by Angela at the date of the termination).

Dr Gill is directed to pay to Angela Porfiriadis the remaining value of the 'summer survivor' bonus **\$534.79 net**

#### Holiday Pay

While it is contrary to the Holidays Act 1981 to pay 'pay as you go' holiday pay to workers (other than casual employees) no obligation to pay holiday again arises where the parties have turned their minds to it and have agreed that holiday pay will be paid on that basis. The parties to this employment did turn their minds to the subject. Holiday pay has been added to the hourly rate and paid on that basis. No order is made under this head. (*Gladstone Milk Bar Ltd v Henning* [1998] 1 ERNZ 296; *Sally Feather (Labour Inspector) v Peter Wilson t/a Papamoa Milk Supply* HT 90/98; *Labour Inspector, Catherine Jane Scullin v Waugh Contractors Ltd* HT 74/99; *Labour Inspector Mark Horn v Kevin Brooker t/a Brooker Farm Service*).

### **Summary of Orders**

Dr Gill is directed to pay to Angela Porfiriadis the following sums:

Lost Remuneration	\$5964.22 gross
Compensation under s.123(c)(i)	\$5000.00 net
Compensation under s.123(c)(ii)	\$ 534.79 net

### **Costs**

Costs are reserved. The parties are to file and serve submissions on the subject within one calendar month of the date of this determination.