

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 133/07
File number: 5036969

BETWEEN CATHERINE RASMUSSEN
 Applicant

AND MEDLAB CENTRAL
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Peter Cranney, Counsel for Applicant
 Ruth Oakley, Counsel for Respondent

Investigation Meeting: 5 June 2007 at Palmerston North

Determination: 28 September 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Rasmussen) seeks a compliance order, compensation and arrears of wages to remedy a default which she alleges the respondent (Medlab) has been guilty of in relation to her employment. Ms Rasmussen says that, in breach of its obligations, Medlab has paid her as a medical laboratory assistant notwithstanding the fact that she is, in terms of the applicable collective employment agreement, not a medical laboratory assistant at all but a medical laboratory scientist.

[2] Medlab resists Ms Rasmussen's claim first by raising a limitation argument but then by alleging that Ms Rasmussen was performing the work of a medical laboratory assistant and not the work of a medical laboratory scientist, that she was appointed to a position as a medical laboratory assistant and in consequence ought to expect payment at that rate rather than at the higher rate.

[3] Ms Rasmussen commenced employment with Medlab in 2000 having previously been a full time mother to her three children. She gained her professional qualification in 1989. She accepts that when she was offered and accepted the position at Medlab on 28 August 2000, the position subject to that offer and acceptance was one of *medical laboratory assistant*.

[4] Her contract required that she cover night shifts and weekend work.

[5] Ms Rasmussen told me during my investigation meeting that she was absolutely clear at the end of the interview process by which she was appointed to this role that *scientist hours* became available *from time to time* and that there would be opportunities for those scientist hours *to be transferred to my shift*.

[6] Ms Rasmussen said in answer to one of my questions that she *believed scientist hours were randomly allocated as and when required*. Her evidence was that she raised the matter of *scientist hours* prior to the interview with the *second in charge* and that she raised the matter again at interview which, according to her recollection, involved only the charge scientist, Ms Walker, from Medlab.

[7] Ms Rasmussen was very clear that, as a consequence of the initiative that she had taken prior to the interview, and raising the matter again at interview, she *walked out of the interview believing I could aspire to scientist hours soon*.

[8] In essence then, Ms Rasmussen's evidence is that her mindset was that although she had been appointed to the position of medical laboratory assistant, she could reasonably aspire to career advancement to the position of scientist once scientist hours became available.

[9] She says that this view of matters was reinforced during her employment *in conversations with senior personnel*. She describes the senior personnel she was speaking about in that connection as Ms Walker and Ms Deroles-Main.

[10] As Ms Rasmussen understood it, and as she explained to me at my investigation meeting, she thought that once scientists left the employ of Medlab, the hours that those scientists had previously occupied could in effect be reassigned and that that reassignment could be to the shift which Ms Rasmussen worked.

[11] On 6 December 2005, Ms Rasmussen made application to Medlab to be paid as a scientist because hours were becoming available from another shift. Medlab had made it clear over time that Ms Rasmussen could apply for scientist hours on other shifts; her position, which was absolutely central to her argument with Medlab, was that her family obligations precluded her from working any hours other than the ones she actually worked so for her the only way to progress was to have Medlab agree to the transfer of hours rather than her agree to her physical transfer to another shift.

[12] Ms Rasmussen's request to that upgrade was turned down by Medlab pursuant to a letter from Dr Pang dated 20 February 2006. In that letter, Dr Pang attempts to deal with a central argument that Ms Rasmussen raised, namely that there was another individual working other night shift hours, and therefore in a similar position to Ms Rasmussen, who was being paid as a scientist, thus establishing the precedent.

[13] Dr Pang's response to this argument was to say that Medlab was not able to discuss the individual rates of staff.

[14] Ms Rasmussen says that Medlab could have chosen to recognise her in exactly the same way that it clearly chose to recognise her colleague.

[15] Furthermore, Ms Rasmussen relied on the resignation of a laboratory scientist who worked a midnight to 8am shift (a night shift, but a different one from the one Ms Rasmussen worked), and who resigned her position and was replaced by a laboratory assistant. Ms Rasmussen says that, consistent with what she was told at interview and around the time she was engaged, Medlab could have reallocated those scientist hours (including to her) if it chose to. She described its approach as *random and indiscriminate*.

[16] Ms Rasmussen also draws my attention to the fact that as a registered medical laboratory scientist, she is required to undertake certain professional development work by the effect of the Medical Laboratory Scientists Regulations 1982. She told me that she does in fact maintain her registration and she does undertake the required professional development work.

[17] Ms Rasmussen says that Medlab has benefited from her skills, expertise and additional qualifications but effectively taken advantage of her by not paying her for those additional attributes.

[18] During March and April 2006, there were meetings between the parties with a view to trying to resolve matters by agreement. Those attempts were ultimately unsuccessful and the claim was filed in the Authority for a determination, Ms Rasmussen claiming a compliance order, arrears of wages and compensation for breach of the employment agreement term of fair and proper treatment.

Issues

[19] The first matter to be inquired into and decided is the basis on which Ms Rasmussen entered into her employment with Medlab.

[20] Next, the Authority needs to consider the nature of the employment agreement covering the relationship between the parties, and in particular whether either party can derive any comfort from its provisions.

[21] Next, we must consider whether there has been a breach of either an express or implied term of the employment agreement.

[22] Finally, the Authority needs to consider whether issues of limitation apply.

The engagement

[23] In her evidence before the Authority, Ms Rasmussen very clearly advanced the view that she had believed, when she accepted employment with Medlab, that she might have a reasonable expectation of advancing in terms of remuneration from the position offered and accepted as a medical laboratory assistant to the position of medical laboratory scientist.

[24] Medlab's position is that Ms Rasmussen was always able to apply for scientist vacancies working on other shifts and that she could progress in that way; Ms Rasmussen, on the other hand, had no wish to work other shifts because of her family commitments and she maintained her evidence that she had *continually been reassured that this career advancement would become available on my current shift*.

[25] The matter was never formally raised until Ms Rasmussen made a written request on 6 December 2005 to Medlab, the effect of which was that she sought to be paid and acknowledged as a medical laboratory scientist on her present shift.

[26] In support of this argument which developed quickly from that initial application in December 2005 to the raising of a personal grievance in the winter of 2006, Ms Rasmussen drew attention to the fact that Medlab was already paying scientists on the same shift and fulfilling the same role and, in at least one case, Medlab was paying a laboratory assistant at the scientist rate on what might be called a *personal to holder* situation.

[27] I am not satisfied Ms Rasmussen herself is claiming anything untoward in relation to her engagement. She readily concedes in her evidence that she applied for and was appointed to a medical laboratory assistant position. She was at that time qualified for and experienced as a medical laboratory scientist. Not unnaturally, she sought to progress financially to the latter role and understood that that was possible, not just at the time of the engagement, but subsequently.

[28] When she made a formal application in December 2005 to receive both the status of scientist and the rate of pay associated with it, she was turned down by the employer.

[29] I am satisfied there was no representation made on the basis of the evidence I heard which induced Ms Rasmussen to enter into her engagement as a medical laboratory assistant and indeed her own evidence does not claim that. That being my finding on the evidence I heard, it is not necessary for me to consider the liability question at this juncture.

The nature of the employment agreement

[30] The heart of the dispute between the parties really revolves around what it is that Medlab is entitled to do in the organising of its business pursuant to the relevant collective employment agreement. Simply stated, Ms Rasmussen's position is that the effect of the collective employment agreement, and in particular the relevant coverage clause, is to require that a worker who has the qualifications, experience and training to entitle them to aspire to a position as a medical laboratory scientist must be employed as a medical laboratory scientist, irrespective of the employer's requirements.

[31] Conversely, Medlab's position is that it is entitled, under the terms of the relevant collective employment agreement, to employ workers in a range of capacities depending on the needs of the business and that, in particular, there is no requirement on Medlab to either remunerate, or remunerate and acknowledge, workers at a higher level than the dictates of the business require for the job the worker is actually performing.

[32] In order to unravel these completing views, it will be necessary to consider the relevant provisions and to consider Ms Rasmussen's submission that the dispute between the parties can be dealt with exclusively by an interpretation of the relevant collective employment agreement and without any recourse to other evidence. I note for the sake of completeness that that last mentioned view is contested by Medlab which asserts that it is not possible to determine the employment relationship problem *within the four corners of the collective employment agreement*.

[33] The interpretative issues turn particularly on the meaning of the provisions in the collective employment agreement relating to coverage. The law in this area is clear. An employee who is a member of a union which, together with the employee's employer is a party to a collective employment agreement, is covered by that collective employment agreement by force of law (s.56(1)(b) Employment Relations Act 2000) where the coverage clause applies.

[34] The expression *coverage clause* is a term of art. It is defined in the Employment Relations Act 2000 and in essence it is defined to mean either a provision that specifies the **work** covered or a provision that specifies the **employees** covered and it is expressed to include provisions in agreements referring to named employees or to the work or type of work done by named employees.

[35] It is clear then that in terms of the generic definition offered by the statute, both parties in the present employment relationship problem can derive comfort because in a generic sense, both the type of work and the type of employee can be specified by a coverage clause.

[36] That makes the actual provision in the relevant collective employment agreement all the more critical. There have been a succession of collective employment agreements which have applied to the work performed by Ms Rasmussen for Medlab since her employment by Medlab on 28 August 2000.

[37] When Ms Rasmussen was appointed to her position, she was covered by a document styled the Medical Laboratory Employees Collective Employment Contract “B” which applied from 1999 through to 2001. This document, according to Ms Rasmussen, has *qualification based coverage* and, in her submission, having been employed under the terms of the original 1999-2001 contract, which it is said is qualifications-based, Ms Rasmussen is unable to be employed subsequently on terms inconsistent with the terms of her original engagement.

[38] Whether that submission can be made out or not, it would seem that on a proper construction of the applicable collective employment agreement, that is to say the 2005-2007 agreement, the coverage clause operates by reference to determining the types of employees for whom there is coverage rather than the types of work. It will be remembered that the effect of the definition in s.5 of the Act (a)(i) is to create a disjunctive principal definition referring either to types of work **or** types of employees. The applicable collective employment agreement here refers to the latter.

[39] However, all that coverage clause does is identify in broad compass that Ms Rasmussen is covered by the document because:

- (a) She is employed by Medlab Central; and
- (b) She is not a class of employee who is excluded.

[40] In order to take the matter further, it is necessary to find in the document definitions of the individual grades or classifications of employee. These definitions are contained in provisions headed *Remuneration Classifications*.

[41] I set out now in full the portions of the relevant provision that relate to the present matter: *Medical laboratory scientist (staff scientist) is a ... person who is a registered medical laboratory scientist under the Medical Laboratory Scientist Regulations 1982 and is qualified to engage in the examination of human tissue, fluid and excretions for medical purposes.*

[42] It is plain that that definition is qualifications-based rather than work-based.

[43] That definition can be compared with the definition of the role of medical laboratory assistant which of course is the role that Ms Rasmussen actually occupies. That provision, which is contained in clause 34 of the applicable collective employment agreement, requires the following elements to be present:

- (a) The role reports to a medical laboratory scientist or registered medical practitioner;
- (b) The role works under the supervision of a medical laboratory scientist or registered medical practitioner;
- (c) The role is employed in a medical pathology laboratory;
- (d) The role engages in manual or technical work;
- (e) The manual or technical work must be ancillary to medical laboratory technology.

[44] There can be little debate about some of the elements in this definition. Clearly, the role involves employment in a medical pathology laboratory. Arguably, the role involves engagement in manual or technical work which is ancillary to medical laboratory technology. But there was real debate, on the evidence I heard, about whether Ms Rasmussen's position had her under the supervision of a scientist or medical practitioner.

[45] There is considerable debate about whether Ms Rasmussen was under the supervision of a medical laboratory scientist (as the provision in the applicable collective employment agreement requires) or whether she worked pretty well independently (as she herself claimed). Ms Rasmussen says that, in fact, she worked independently and regularly had to make decisions without recourse to other staff. Dr Pang, a pathologist who gave evidence at my investigation meeting, appeared concerned that Ms Rasmussen was *interpreting and discussing results*. His view was that as a

medical laboratory assistant, she should only *report results*, not interpret, advise or suggest further tests.

[46] The evidence I heard suggested that Ms Rasmussen was in fact interpreting, advising and suggesting further tests, not on a continuous basis, but certainly from time to time and it also seemed, from the evidence I heard, that Ms Rasmussen was not actually supervised by a scientist as Medlab seemed to contend. This supervision was plainly not physical; Ms Rasmussen worked alone. The supervision was at the end of a telephone but on Ms Rasmussen's evidence, there was little or no use made of such supervision. Given the hours that Ms Rasmussen worked, that may not be particularly surprising.

[47] The essence of Ms Rasmussen's submission in this regard is that her work is covered by the relevant collective employment agreement, that her job classification is that provided for in clause 32 (medical laboratory scientist) and that for reasons just advanced, her job classification falls well outside clause 34 which is the clause relating to a medical laboratory assistant, in effect the position to which she was appointed.

[48] What Ms Rasmussen says is that, notwithstanding the fact that she was actually appointed to that role, as a matter of law, the collective employment agreement requires that she be paid at the scientist rate (and presumably treated as if she were a scientist) because the applicable collective employment agreement is qualifications-based rather than work-based and, her having the qualifications of a scientist, she is entitled to be treated as if she were a scientist, irrespective of the work that she actually performed.

[49] Ms Rasmussen goes on to say that the work that she performs is not work which would be performed by a medical laboratory assistant because she does not conform to the definition of a medical laboratory assistant in the applicable collective employment agreement. It follows that the only role she can have is that of a medical laboratory scientist rather than a medical laboratory assistant.

[50] For its part, Medlab says that neither the current applicable collective employment agreement nor its predecessors preclude the employer from applying work-based rather than qualification-based criteria to the employment of employees under the document. Indeed, Medlab says that the original 1999-2001 collective employment contract is not a qualification-based document and it then goes on to argue that nothing in that original collective employment contract or the current collective employment agreement, prevents Medlab from remunerating its staff based on the work they perform.

[51] Then, its analysis continues with a submission that Ms Rasmussen's employment does indeed fall within the terms of clause 34 of the applicable collective employment agreement (that is the clause relating to medical laboratory assistant).

[52] Medlab's analysis of Ms Rasmussen's fit to the role of medical laboratory assistant is that she does in fact conform to that role or position rather than to the role or position of scientist.

[53] I do not accept Medlab's submissions in these two regards. I think it does violence to the evidence which I heard. It seems to me plain on the evidence before the Authority that Ms Rasmussen is performing work which is best characterised as that of a medical laboratory scientist and that to try to contend that her work falls within the terms of medical laboratory assistant is to do violence to what the evidence discloses she was actually doing. Furthermore, I do not accept the submission that the applicable collective employment agreement, or indeed the original collective employment contract, are either of them anything other than qualification-based documents. It does violence to the words in those agreements, in my view, to reach any other conclusion.

[54] It follows that, in my considered opinion, that the nature of the employment agreement that Ms Rasmussen works under, or indeed the nature of the employment agreement that she was employed under, is qualifications-based and, by reason of the fact that the evidence suggests that Ms Rasmussen was doing work falling within the definition of a scientist rather than an assistant, supports Ms Rasmussen's view that she is entitled to be treated as a scientist, at least in terms of rate of pay and arguably in terms of status.

Breach of term

[55] In the amended statement of problem filed in this matter on 21 March 2007, Ms Rasmussen adds a new para.2.8 which argues she has suffered a breach of the contractual terms of fair and reasonable treatment.

[56] In essence, Ms Rasmussen says that because as a matter of fact she is a registered medical laboratory scientist, she is entitled to be paid as such in terms of the collective employment agreement and in breach of those terms, she is being paid at the lower rate of a medical laboratory assistant.

[57] Further, Ms Rasmussen says that because of Medlab's refusal to both pay her at the higher rate and recognise her as a medical laboratory scientist, Medlab is in breach of the contractual term of fair and proper treatment.

[58] For its part, Medlab says that Ms Rasmussen applied for and was appointed to a role as a medical laboratory assistant and the fact that she happens to have a superior qualification is neither here nor there. Medlab continues by pointing out that there is no allegation that Ms Rasmussen relied on any contractual representation that she would be elevated to the position of medical laboratory scientist in some particular timeframe, or indeed that she took the role of medical laboratory assistant on the basis of some commitment from Medlab that it would elevate her at some point in the future.

[59] However, it is alleged by Ms Rasmussen that there were informal representations at the time she was appointed that she could aspire to positions as a medical laboratory scientist and Ms Rasmussen further alleges that during the course of her employment, until she raised the matter formally in December 2005, that she could expect scientist hours to be available to her. That is not denied by Medlab, but there is dispute, as I have already made clear, about whether those scientist hours would be available to Ms Rasmussen on her shift (which is what she says), or whether in order to access those scientist hours, Ms Rasmussen would have to change shifts (which is what Medlab says).

[60] Insofar as any breach of contract can be made out, it seems to me capable of being dealt with by an appropriate interpretation of the employment agreement and need not be the subject of any further detailed analysis.

[61] One matter that does need to be dealt with under this heading though is Ms Rasmussen's claim that another employee in *circumstances similar to hers*, is paid as a medical laboratory scientist. This of course is an argument around disparate treatment. Medlab accepts that this factual matrix is accurate, but argues that in essence the other employee is in a *personal to holder* situation. I accept that argument. The employer must have the right to deal appropriately with the individual circumstances of particular employees. Perhaps it could be said that the employer in this case might have treated Ms Rasmussen similarly; the fact that Medlab chose not to is in the end a matter for it and not one that it seems to me the Authority ought to disturb.

Issues of limitation

[62] Medlab says that Ms Rasmussen is barred by the limitation provisions of s.142 of the Employment Relations Act 2000 from advancing her claim insofar as it is based on Medlab's classification of Ms Rasmussen as a medical laboratory assistant rather than a medical laboratory scientist. This is because Ms Rasmussen commenced employment with Medlab on 28 August 2000

and began her proceedings in the Authority on 14 December 2006, more than six years after the date that the cause of action arose.

[63] There is dispute between the parties as to whether the limitation pleading of Medlab is still alive. Ms Rasmussen says that Medlab agreed not to plead limitation. Medlab says that it agreed not to plead limitation on the basis of Ms Rasmussen's amended statement of problem dated 21 March 2007 and the briefs of evidence filed in support.

[64] However, Medlab says that Ms Rasmussen has changed the basis of her claim by resiling from some parts of that already amended proceeding and adding new claims. Medlab says it is prejudiced by Ms Rasmussen's allegedly frequent changes of course in relation to her claim.

[65] I think there is some force in Medlab's complaint. On the face of the file, there do seem to have been a number of changes of direction which have certainly not assisted Medlab, nor indeed the Authority.

[66] It follows that I consider, in the circumstances that Medlab found itself in, it is perfectly appropriate for it to resurrect its pleading of limitation and I also find that its pleading of limitation is made out.

[67] However, that does not take us very far, because it seems to be tacitly accepted by Ms Rasmussen, as it is plain on the evidence, that Ms Rasmussen was only both qualified **and** registered as a medical laboratory scientist from 2004 and Ms Rasmussen appears to accept that ... *any back pay claim is limited to the commencement of the existing CEA (collective employment agreement).*

[68] I find that, the limitation pleading being allowed, the Authority accepting Medlab's submission that Ms Rasmussen's claim is to an extent statute-barred, that, in the event Ms Rasmussen has an entitlement, such entitlement will only arise by a proper interpretation of the collective employment agreement and then only from the date in 2004 at which Ms Rasmussen became registered as a medical laboratory scientist.

Determination

[69] I am satisfied on the balance of probabilities that Ms Rasmussen is entitled to a declaration that she be paid back pay as a medical laboratory scientist from the date in 2004 that she achieved registration as a medical laboratory scientist and for the period from that date to the date of this determination.

[70] I do not consider that any compensation is due to Ms Rasmussen. She has, in my view, no compensatable injury having not satisfied me that there is any breach of contract or breach of the term of fair and proper treatment which creates a compensatable non-economic loss.

Costs

[71] Costs are reserved.

James Crichton
Member of the Employment Relations Authority