

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 133/08  
5107089

BETWEEN ANNE MARIE SULLIVAN  
Applicant

AND ABI SERVICES  
(WELLINGTON) LIMITED  
TRADING AS CAVIT ABI  
REHABILITATION  
Respondent

Member of Authority: P R Stapp  
Representatives: Alison Douglass for Applicant  
Martin Round for Respondent  
Investigation Meeting: 28 August 2008, Wellington  
Determination: 30 September 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Sullivan has claimed that she was unjustifiably dismissed. She is seeking reinstatement, lost wages and compensation and costs.

[2] The respondent (Cavit ABI) denied the claims. It has responded that Ms Sullivan was a casual employee and is still on the books. She has not been rostered since 29 August 2007.

**Issues**

[3] Did the casual nature of Ms Sullivan's employment change to permanent part-time or full time employment after she started work for the respondent?

[4] Does Ms Sullivan have a personal grievance and if so, what is the nature of it?

### **The Facts**

[5] Ms Sullivan was employed by ABI Services (Wellington) Limited trading as Cavit ABI Rehabilitation on 9 April 2007. She accepted an offer of casual employment in a letter dated 20 March 2007. She worked various hours weekly from 9 April until 29 August 2007. The availability of casuals was obtained from the Nurses Diary and any other information, but the respondent says casual employees were used to fill any gaps due to absences and changes in occupancy rates.

[6] Ms Sullivan is an enrolled nurse. She was required to work for the respondent at the Porirua Hospital site. She was paid fortnightly \$19.65 per hour plus allowances for an On Site Responsibility (OSR) role, and her pay included holiday pay. Two weeks notice was required to terminate the agreement from the letter of offer.

[7] Cavit ABI did not give Ms Sullivan a copy of a collective agreement between the Nurses Organisation and Cavit ABI when she started. She later found out about that agreement when someone else informed her of its existence. She was not a member of the Nurses Organisation at the time she started work. She became a member on 23 July 2007.

[8] Ms Sullivan says she always wrote her availability in the nurses' diary, which the respondent did not disclose as requested. However, some copies of pages have been provided by Ms Sullivan. She regularly filled in on the roster during the time of her employment.

[9] Cavit ABI says Ms Sullivan's hours were irregular. Ms Sullivan says her hours varied but were on regular rosters and there was a distinct pattern of hours she worked and hours were planned in advance on the roster. Ms Sullivan worked various but regular hours from 9 April until 29 August. Ms Sullivan's hours of work averaged 39 hours per week prior to 29 August.

[10] On 20 August 2007 Ms Sullivan says she approached Ms Kieran Hobbs, the regional manager, to consider making her a permanent employee. She was requested to

attend a meeting the next day, but the meeting did not take place until 29 August. Both parties have a difference of opinion about what the meeting was about and what happened. The meeting became unpleasant because Ms Hobbs raised some other matters of a serious nature and Ms Sullivan believed the meeting developed into a disciplinary process, although without any formality. Ms Hobbs referred to the meeting being an opportunity to raise some matters informally. There is common ground that at the end of the meeting Ms Sullivan was not offered any further shifts. Ms Hobbs says that was because of Ms Sullivan's emotional state. She decided that Ms Sullivan would not have been fit to work the next day's shift and she rested Ms Sullivan without her agreement. Ms Sullivan says her availability for work was written in the nurses' diary not produced by the respondent, and her availability until 16 September was given Cavit ABI.

### **The Applicant's Case**

[11] The applicant says that the nature of her position became permanent after she started work as a casual. She says she was dismissed. It was submitted on her behalf that she was dismissed either as a permanent employee or as a casual, but the fall back position was that, if she was still a casual employee, then the employer's action was unjustified and disadvantaged the applicant in her employment.

### **The Respondent's Case**

[12] The respondent claimed the applicant was a casual employee and remained on the books. The respondent denied that there was any personal grievance.

### **What was the nature of Ms Sullivan's employment?**

[13] I am satisfied that Ms Sullivan was initially employed as a casual. I hold that Ms Sullivan became, during her employment, a permanent employee, because of her regular work and the average weekly hours she was working prior to 29 August. Although there was what I will call a loose arrangement about including casuals in the roster gaps it seems that Ms Sullivan's inclusion was certainly more planned and regular than filling the type of short gaps that would be expected to occur with intermittent and casual absences.

[14] Ms Sullivan was required to fill an On Site Responsibilities (OSR) role as an enrolled nurse. Cavit ABI says that when Ms Sullivan was given the OSR role it was still consistent with casual employment but working as OSR on a full shift. It was agreed that such a role was consistent with both casual and permanent employment where Cavit ABI has an off site registered nurse that it says it has to have overseeing any shift.

[15] For the above reasons Ms Sullivan's employment was more aligned to permanent employment as opposed to a casual and an intermittent arrangement. Indeed there were no separate renewals of her employment on each occasion she finished a roster.

**Does Ms Sullivan have a personal grievance, and if so what is it?**

[16] Ms Sullivan has claimed that she was dismissed on 29 August and that this is based on her employment becoming permanent. A dismissal does not need to be predicated on permanent employment. A casual can also be dismissed if the employer has acted outside any agreed arrangements existing on an as required basis.

[17] It is common ground that Ms Sullivan was rested by Ms Hobbs on 29 August and Ms Sullivan was not required to attend the next day's shift that had been arranged for her to work. There was no agreement reached with Ms Sullivan on that decision. A fair and reasonable employer would not have made a unilateral decision without agreement. The failure to do so was unjustified. Ms Sullivan's employment was affected to her disadvantage when she was not offered on-going work, which averaged 39 hours per week prior to 29 August.

[18] Thus, Ms Sullivan has a personal grievance.

**Remedies**

[19] Ms Sullivan seriously and genuinely wants to work. There is evidence of some inter-personal problems existing between the parties arising from the matters discussed on 29 August and the personal grievance.

[20] An employer is entitled to fairly and reasonably raise matters with employees: the Act requires parties to be responsive and communicative. It would be hoped that in doing so best practice would apply.

[21] Clearly what happened on 29 August caused some considerable upset and discord. However Ms Sullivan says she has no animosity and ill feeling towards Ms Hobbs and indeed says she has regard for her professional input to the work and respects Ms Hobbs.

[22] Ms Sullivan is under going counselling at the present time, lacks confidence, and would need on-going counselling to return to work, according to her doctor. She has recently obtained 9.5 hours to work elsewhere. The doctor deposed that returning to work would be helpful for Ms Sullivan.

[23] I conclude that there is no reason why Ms Sullivan should be denied an opportunity to work. Indeed she is regarded by Cavit ABI as still being on the books without an adequate explanation why she was not called.

[24] I hold that it is not impracticable to reinstate Ms Sullivan, although Cavit ABI says it will have to manage Ms Sullivan's role around any protocols and professional guidelines that exist in regard to the attendance of registered and enrolled nurses. Cavit ABI did not produce any regulatory evidence to support not reinstating Ms Sullivan. Cavit ABI has not relied on any disciplinary issues to oppose reinstatement.

[25] Therefore it is my decision that Cavit ABI Services (Wellington) Limited is to reinstate Anne Sullivan to her position or a position not less favourable as soon as practicable. I suggest that should the parties not be able to manage this they obtain the services of the Department of Labour for mediation.

[26] I hold the very strong view that both parties should have done more to resolve the matter before the Authority's investigation meeting. I would expect best practice would and must involve the parties on their own in some discussions and it will undoubtedly help if Ms Sullivan, with a support person of her choice, and Ms Hobbs

and the team leaders participate in the process of reintegrating Ms Sullivan back to work.

[27] I accept that Ms Sullivan has tried to obtain alternative employment and has been partially successful but I have some doubts that Ms Sullivan was fully available for work because of her illness and the length of time it has taken her to obtain work.

[28] I have assessed that Ms Sullivan has lost wages from 29 August 2007. Her pay at the time was \$19.65 per hour. There is evidence of Cavit ABI rostering casuals. There is evidence that Cavit ABI would have been aware of Ms Sullivan's availability at least until 16 September. Nothing more was done. There is a clear indication that Ms Sullivan and Cavit ABI decided that the personal grievance needed to be resolved before she was reinstated.

[29] Also during this time Ms Sullivan became ill, but there is no indication that the illness was entirely attributable to the personal grievance.

[30] Therefore I have restricted the loss of wages to 3 months under the Act. Ms Sullivan is entitled to \$9,962.55 lost wages.

[31] I am not satisfied that Ms Sullivan's evidence establishes a causal link between the employer's action and the full impact on her given the information she provided to her own doctor and a lack of any other full medical disclosure that might have been relevant and any independent evidence .

[32] There is enough evidence to attribute some impact on Ms Sullivan of Ms Hobbs' unilateral decision to rest Ms Sullivan. I accept Ms Sullivan needed medical help and her feelings were hurt.

[33] She is entitled to compensation and I assess this as \$6,000 for hurt feelings.

[34] I order Cavit ABI Services (Wellington) Limited trading as Cavit ABI Rehabilitation to reinstate Anne Sullivan to her position or a position not less favourable as soon as practicable, to pay Anne Sullivan \$9,962.55 lost wages and \$6,000 compensation.

[35] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority