

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 181
5424133

BETWEEN DR BERNARD KEITH HOLMES
and DR DEAN ALISTAIR
MACKAY trading as PAPAKURA
EAST MEDICAL CENTRE
Applicants

AND BERNADINE HULL
Respondent

Member of Authority: P R Stapp

Representatives: Helen Gilbert and Nadia Watson, Counsel for Applicants
Stephen Corlett and Ben Atkins, Counsel for Respondent

Investigation Meeting: 24, 25, 26 and 27 February 2014 at Auckland

Written Submissions
Received: 13 and 20 March 2014

Date of Determination: 9 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The employment relationship problem arises between Dr Bernard Holmes and Dr Dean Mackay trading as the Papakura East Medical Centre (the practice/the applicants) and their employee Bernadine Hull (the Respondent). Mrs Hull became the practice manager/morning receptionist during her employment at the practice. Discrepancies in the financial accounts came to the attention of doctors' Mackay and Holmes and they commenced an investigation and forensic analysis of the financial accounts involving Deloitte. The investigation, a two week audit and forensic analysis discovered an amount of missing money that led back to Mrs Hull. In the meantime Mrs Hull became aware of a verbal threat made against her from an unnamed patient. She took special leave from work over this; and returned to work

and was subsequently advised of the investigation into the finances. She decided to resign.

The issues

[2] Both parties have met and agreed on the issues, which I quote verbatim:

1. *Does the failure reconcile between cash receipted in Medtech and cash banked in the Practice bank account, mean that it was not possible to identify a person responsible or a cause of the discrepancy?*
2. *Were there regular afternoon reconciliations of the day's takings and did the lack of an afternoon reconciliation and/or an inaccurate reconciliation (if one was done) mean that Mrs Hull didn't know if there was a discrepancy between moneys to be banked and that recorded in the MedTech banking list?*
3. *Was there a legitimate explanation for the discrepancy between the amount receipted in MedTech and that which was banked in the Practice?*
4. *If there was not a legitimate explanation for the discrepancy, was Mrs Hull responsible for misappropriating the applicants' money?*
5. *What are the appropriate remedies in the event Mrs Hull did misappropriate the money? In particular are the applicants' claims for remedies time barred?*
6. *Was Mrs Hull constructively dismissed and/or disadvantaged by the applicants in relation to the applicants' conduct regarding:*
 - (a) *the assault threat;*
 - (b) *putting the theft allegations to Mrs Hull?*
7. *If so, what was Mrs Hull's contribution (if any)?*
8. *What are the appropriate remedies for Mrs Hull in the event that she was constructively dismissed and/or disadvantaged?*

[3] I agree that these are broadly the issues. It was agreed by Counsel (including another member earlier) that the investigation meeting would include cross examination of witnesses first instead of the usual inquisitorial process. I am satisfied that the serious issues and credibility matters involved and the detailed nature of the evidence supports the change of approach.

[4] Both parties presented before the Authority a witness, each whom they have called their expert witnesses. However, the two witnesses, Mr Jason Weir chartered accountant and partner at Deloitte for the applicants, and Mr Roy Horrocks chartered accountant for Ms Hull, are not technically experts called before the Authority to assist the Authority in accordance with the normal rules, because they are advocates for the positions of both parties. However, I accept they are experts in their fields and professional accountants. Both of them have been able to agree on certain facts, but hold their own opinions on various matters. Their agreed facts have been provided in a written statement of fact and used in my deliberations.

[5] There are two preliminary matters associated with the claims. The first is the application from the applicants to extend the time to bring the claim that was only formally made on the first morning of the investigation meeting. This is opposed by Mrs Hull. Second there is an issue about what rate of interest is to be applied on any remedies. The applicants have requested percentage rates of interest be applied retrospectively in accordance with different orders under the Judicature Act regulations. This is opposed by Mrs Hull. It was decided because of the preparation already undertaken, the evidence produced in advance of the investigation meeting and the organisation of witnesses that these two matters would be left for submissions in conjunction with the Authority making a determination on all the matters.

The facts

[6] It is common ground that Mrs Hull was employed by the practice in the role of practice manager/morning receptionist and that she was responsible for the practice's finances.

[7] Mrs Hull and the practice entered into an individual employment agreement commencing 7 June 1996 (IEA agreement) when Mrs Hull was employed as a junior receptionist.

[8] Around May 2001 Mrs Hull was promoted to the role of practice manager and morning receptionist. Her duties included financial arrangements and practises in the management of the practice's money, including morning reconciliations and the banking. There were supposed to be afternoon reconciliations done also and any money kept on the premises over night was kept in one place.

[9] In early 2007 Dr Holmes and Dr Mackay entered into a further individual employment agreement with Ms Hull for the practice manager/morning receptionist role. The second individual employment agreement sets out the contractual terms of her employment, together with a job description for the role as practice manager/morning receptionist. The terms of her employment included that she was to perform her duties with reasonable care and diligence and in the best interests of her employer and to deal in good faith.

[10] At some point during her employment Mrs Hull became a member of the New Zealand Nurses Organisation (NZNO) and became bound by the Primary Healthcare Multi Employer Collective Agreement (MECA). The current MECA at the time of Mrs Hull's employment was dated 1 September 2010-31 August 2012.

[11] In the course of Mrs Hull's duties as the practice manager/morning receptionist she was relied on and trusted to undertake proper reconciliations of the accounts and to honestly handle and deposit all moneys belonging to the practice. She was left alone in her role as it evolved.

[12] Discrepancies were found between the level of cash and cheque receipts recorded on the practice's computerised software patient management programme, known as Medtech, and the money being banked. Private investigators and forensic accountants were engaged to investigate the situation and put in place a live audit with the help of the doctors and Dr Holmes' wife and daughter's involvement. A live audit was conducted by Deloitte at the practice's premises from 25 June to 6 July 2012. The employees were not advised of the audit and the investigation, including the installation of 4 cameras in the office. It was discovered that a 1B4 exercise book used for banking was missing.

[13] At the conclusion of the live audit a shortfall of \$1,165.50 was found between the money counted and photographed each evening and the money deposited by Mrs Hull. This shortfall occurred over a two week period. On 5 July Mrs Hull was informed that there had been a threat made by a patient to "bash" her. Video footage showed Mrs Hull retrieving a white envelope located in the area where the banking bag was kept. Mrs Hull took the white envelop home, left it in her car, and she claims it got lost and/or mislaid at her home.

[14] On 6 July Mrs Hull was absent from work because of the threat. She did not return to work until Monday 16 July 2012.

[15] On Friday 13 July 2012 Dr Holmes telephoned Mrs Hull at home. She advised Dr Holmes that she had no cash with her for banking and stated that the last deposit she made was for \$521 as per the deposit book. She further advised Dr Holmes that all the receipts for provisions and cheques were at the Practice.

[16] Upon returning to work on 16 July, Mrs Hull confirmed her previous advice to Dr Holmes that no money remained for banking and she showed him the deposit book.

[17] On Tuesday 17 July Mrs Hull was called to a meeting and advised of the investigation.

[18] On 23 July Mrs Hull's representative, the New Zealand Nurses Organisation returned cash to the Practice totalling \$975 and a cash cheque for \$50, without explanation.

[19] The Practice discovered from the video evidence that the cash denominations did not match the cash denominations missing from the cash shortfall during the live audit. Mrs Hull was given an opportunity to look at the CCTV coverage and to comment, but she decided not to take up that opportunity at the time.

[20] On 27 July 2012 Mrs Hull resigned from her employment and she says this was because of the threat made against her by the patient, her safety at work and the allegations. She was asked by the doctors to reconsider her resignation, but on 31 July 2012 she confirmed through the NZNO that she was resigning. The practice decided to pursue Mrs Hull for the missing money taken during Mrs Hull's employment, together with the investigation and audit period and the costs of the investigation and the legal costs involved. A personal grievance was subsequently raised by Mrs Hull for constructive dismissal and unjustified disadvantage. Both parties have filed their own claims in the employment relationship problem that have been consolidated for one hearing.

Determination

[21] The applicants have requested that the Authority extend the time to bring the claim for recovery beyond the six years applying under s 142 of the Employment Relations Act (*Limitation period for actions other than personal grievances*). I note that an extensive list of matters was raised to support the claim to extend the time limit. The Authority does have jurisdiction to extend the time particularly under s 221 of the Act. However, I decline to grant the application to extend the time because:

- a. The type of case where the issues need to be resolved on the balance of probabilities in regard to credibility, which is even more difficult to establish more than six years later.
- b. This is a continuing cause of action; where each breach relates to a separate sum of money until it was discovered missing, over the period of time, and the length of the time is a factor.
- c. The inadequacy of arrangements in the practice that enabled money to go missing without any checking and monitoring of the delivery of the practice's financial management systems. This is a business responsibility.
- d. I am not satisfied that the applicants' list does amount to good reasons why the claims could not have been brought within the time if the applicants had proper procedures in place to monitor the effectiveness of the accounting records and cash handling systems.

[22] The matter dates back to 1 July 2007 in the time of the filing of the cause of action (from the filing of the statement of problem on 1 July 2013). The sum claimed is \$266,040 (including costs and interest set at 5% per annum).

[23] Discrepancies were found by Dr Holmes in the practice's cash receipts and the cash banked and recorded in the practice's financial management system called "Med Tech", which produces banking lists of the money to be banked. One of Mrs Hull's roles was to complete a reconciliation between the banking lists and the cash to be banked, and also, secondly to carry out the banking. The banking was not done every day and when money was kept on the premises it was hidden in a hiding spot (behind files in a cubby hole). It is common ground that other employees, the doctors and Mrs Hull knew the hiding spot.

[24] I hold that Mrs Hull was more likely than not to have used the information in the Med Tech banking list to make an assessment of the money available for banking from cash received. Because of the cash transactions there was a difference in the totals, including cash available and which was not part of the banking list. I reach the conclusion that Mrs Hull knew this based on her length of experience in the role; the role that she was required to undertake; and that Mrs Hull was the practice manager and she was recognised as the person responsible for the financial role, even although this evolved over time and in the absence of any written policy and practice note. I hold that Mrs Hull accepted responsibility for the tasks, given the time she was in the role, and that she undertook the tasks without any protest. It has been established in the evidence, particularly through Mrs Hull's cross examination, that she can be seen checking the banking lists before undertaking various activities with the money, which included her putting aside money (for various purposes) and taking money home (established during the live audit), but also including using cash that she cannot account for and including items where there was no receipt. This is especially in regard to buying milk and sundries at the dairy, where everybody else using the dairy says they obtained receipts, which I accept occurred in most circumstances. I will come back to this shortly.

[25] I am satisfied Mrs Hull has been identified as being responsible for the missing money, especially through the live audit, which in part supports the conclusion that it is more likely than not that she was responsible for the missing money before the audit. There is no disagreement on the sums of the missing money. I hold that there is a balance between it being more likely than not that Mrs Hull took money home and later she mixed the use of the practice's money with her own without keeping a proper record. This is supported by her taking money home over the audit period and the difficulties identifying the denominations and the reasons Mrs Hull has advanced for having the money at home. It is more likely than not that over time she took advantage of her employer's poor accounting records system and poor cash handling system where there was inadequate monitoring and controls.

[26] I do not accept that there were not regular afternoon reconciliations undertaken in the practice as Mrs Hull claims. This is because the overwhelming evidence of the practice's witnesses is that the reconciliations were done frequently, and if reconciliation was missed, this was an infrequent occurrence as one of the practice's witnesses explained. The practice's witnesses' evidence was reliable and not shaken

under cross examination, and was to the effect that there were frequently carried out reconciliations. I note that a number of the employees including family of the doctors knew where the money was placed, but there is no evidence that any of them took the missing money and/or any likelihood they took the money. Mrs Hull could not identify any evidence to support her claim that any other employees should have been investigated more thoroughly by the practice and the Authority heard from the practice's witnesses and I have accepted their evidence.

[27] I accept that Mrs Hull did know of the extra money between money to be banked and the money recorded in the Med Tech banking lists and the cash received. The regular occurrence of missing cash and the CCTV supports this conclusion as does Mr Weir's assessment, analysis and evidence.

[28] Mrs Hull has raised a number of reasons to try and explain the discrepancy between the amounts in Med Tech and the amount actually banked. On balance Mr Weir's evidence is more reliable and plausible.

[29] Mrs Hull's explanations I hold are not supported based on her role, her activities and the extensive CCTV footage and with the use of four cameras recording her activities during the audit period, and Mr Weir's replies. No one else is seen that might provide any explanation for the missing money. Even if Mrs Hull was right her behaviour in undertaking her role and her activity on the CCTV footage and in the management of the cash for the practice has left her as the only person responsible, because she had responsibility to conduct the morning reconciliations and was discovered during the audit to have money at home, and this supports my finding I hold. In addition the sum she had at home was excessive for any business related activity and was only returned by her union after the matter came to light and after she had said to Dr Holmes that she had no money at home. She has claimed that some of the money was to pay Mr Hull for work, for example sewing sheets that he never did, but the problem with this is that it was not authorised and there was no record properly kept of Mr Hull's activity.

[30] Also, she has claimed the doctors might be responsible for taking money by using cash for wages and buying alcohol that has caused the discrepancies. I hold that this is improbable given their evidence, the evidence of the practice's witnesses and the live audit to account for such a discrepancy. Mr Weir has allowed for discrepancies and incidental mistakes and omissions in his calculations. The amounts

missing far exceed the allowance. Mrs Hull has not established that any wages have been improperly paid and that the doctors took any cash without accounting for it and that anybody else used money from the bag improperly. Further Mrs Hull's own evidence has been seriously questioned under cross-examination, including for example:

- a. That there was a discrepancy about her saying that she informed Dr Holmes that she did not have any money at home and there was no money for banking. Mrs Hull did have money at home and she made arrangements for it to be returned later.
- b. That there is an issue about where the white envelope containing money was located in the hiding place, where it was at Mrs Hull's home and whether or not it was lost and/or mislaid at her home. Mrs Hull's and Mr Hull's conflicting evidence has not assisted her.
- c. That there was an issue with an explanation about the purchase and return of sheets some twenty months before the hearing, and that the sheets produced were proved to have expired bar codes.

[31] I will comment on each of the above. First Mrs Hull did return money and has not been able to explain adequately the missing money (that has been calculated and there is no disagreement on the sums). I am further supported in my finding by Mrs Hull not being able to account fully for the money she had at home and the different denominations from the cash countered and checked each night during the audit. It follows that the doctors have established their claims that Mrs Hull is responsible for the missing money based on the discrepancies arising during the audit period and Mr Weir's evidence and his conclusions. The reliance by the doctors on the audit results outweighs the explanations that Mrs Hull has raised for other missing money in the period.

[32] Second Mrs Hull's evidence was not consistent with Mr Hull's evidence during their cross examination about the whereabouts of the white envelope containing the practice's money in it. This conclusion is supported by evidence about the transfer of the white envelope between Mr and Mrs Hull's two vehicles when Mrs Hull's car was serviced. Both of them got the service date for her vehicle wrong. It was telling that Mr Hull accepted the correct date for the car's service, and he referred

to documents (including the white envelope containing the practice's money) being on the front seat of Mrs Hull's car when he removed the documents to the office inside their home (where the envelope was apparently lost), and that Mrs Hull said that the documents were in the glove box of the car.

[33] Third Mrs Hull's explanation about the purchase of the packets of sheets for Mr Hull to sew was unlikely given that she did confirm that they were the sheets she bought and returned at the time, but when the bar code had expired. She did not explain that there had been any mistake. These matters have affected her credibility and reliability as a witness, I hold.

[34] Mrs Hull has relied upon the alleged failure of the doctors to put in place controls and checks and written detailed policies to be followed. Mrs Hull has a point in regard to this explanation, but overall she was responsible for managing the money and banking it, maintaining the \$80 float and ensuring petty cash. Indeed it was unwise for her to have taken any money home without checking and obtaining approval first and/or at least keeping some proper record. The doctors were entitled to rely on her trustworthiness and were entitled to rely on her giving them any information, including reporting if there was a problem with the process, which she did not do. Her omission is more than being inadvertent given the amount of money she took home during the audit and the amounts missing. It is reasonable to expect an employee to have raised such an issue, even if the doctors were not interested. Instead Mrs Hull took advantage of the looseness of the arrangements. The allegations against her are serious and as such the evidence has to be at a high level as the allegation is as grave. At the very least Mrs Hull is responsible, given her role and responsibility and that she was found taking money home during the audit without any approval and the amount she took home during the audit was significant. The live audit and the evidence from the practice's witnesses (including past and present employees) makes it more likely than not that she has taken money home and it has not been accounted for over the time in the absence of any other records. There is the missing 1B4 book for banking that was at the premises and its whereabouts remains unexplained. Mrs Hull could not produce any evidence of her looking for the book having regard to the CCTV footage, which was taken up with her during her cross examination, and there is no recording of the book being removed from where it was during the audit period. Mrs Hull confirmed that she did not know of anyone else taking the money. She could not match the funds on hand with the cash count. She

took cash with the banking bag from the premises every night she was there, except on 26 June and 4 July 2012. Mrs Hull could not accurately say that there were seven nights when banking was kept overnight on the premises. These conclusions are supported by the evidence that Mrs Hull accepted she checked the Med Tech reports regularly.

[35] For the above reasons I accept the applicants' evidence and the claim for 6 years that Mrs Hull was responsible for the missing money. In allowing the 6 years' claim I have accepted Mr Weir's evidence, in particular the detailed calculations from the original source document (document 30), his reply evidence on Mrs Hull's explanations, the allowance for petty cash and the cash returned, that Mrs Hull's leave was checked and the staffing and family arrangements over the period. It does appear more likely than not that Mrs Hull is responsible for the missing money and took money home.

Mrs Hull's personal grievance claims

[36] Mrs Hull claims she resigned from work because of a threat made by a patient to "bash" her. It has been claimed by the practice's witnesses that Mrs Hull upset people with her directness when she spoke to them. In this context and when the threat was made the doctors did not prevent Mrs Hull taking leave and although they did not provide Mrs Hull with the name of the person involved who made the threat, they did investigate the matter. This was not challenged and certainly not rebutted. I accept that the doctors came to a conclusion that the threat (a) would not be carried out and (b) involved a patient that they were satisfied was not an ongoing risk. That was an appropriate response I hold, albeit Mrs Hull thinks differently about it. I hold this was not enough for her to resign over and claim constructive dismissal. Indeed she was quite properly advised by the NZNO not to resign. She also claims that there was an unsafe work environment. This is unsustainable as it lacks supporting evidence.

[37] Finally, Mrs Hull claims her employer has raised false allegations against her. Mrs Hull is entitled to believe that, but her employer had grounds to investigate a very serious matter of alleged misappropriation and missing money based on the information they had at the time. They were obliged to put such serious allegations to her that they believed she may have had some involvement in. This is especially so, given her role in the practice and her responsibility for the finances.

[38] The doctors came to an honestly held belief about Mrs Hull's conduct and behaviour, therefore it follows Mrs Hull's claim for unjustified disadvantage and constructive dismissal cannot succeed.

The remedies for the practice

[39] The practice has claimed:

- (a) The missing money as quantified as being misappropriated by Mrs Hull.
- (b) Penalties against Mrs Hull for breaches.
- (c) Damages for the mental distress caused to the doctors as a direct result of Mrs Hull's conduct.
- (d) Special damages for executive, forensic and legal expenses.
- (e) Interest on the sums claimed.

[40] Both parties' accountants (Mr Jason Weir (Deloitte) for the practice and Mr Roy Hollocks (accountant) for Mrs Hull) agreed that there was a total of \$157,816 missing from 2001. I have calculated the sums missing from 1 July 2007 until 12 July 2012 (the last shortfall calculated) from the monthly shortfall less the allowance for petty cash and the money Mrs Hull returned. I have excluded costs and interest because they should be separated. From the details provided the sum for the period is \$103,378.42.

[41] The practice has claimed penalties and damages. I refer to each claim as follows:

- (a) The practice claims penalties under s 134 of the Act for breaches. These are that Mrs Hull has breached her duty of good faith that includes misappropriating money and concealment, and breaching the express and implied terms of her employment agreement. It is claimed that Mrs Hull's actions were an ongoing breach that culminated in her taking money home during the audit two weeks (July 2012). The claim was brought on 1 July 2013, and is in the year required for filing under s. 135 (5) of the Employment Relations Act 2000 as it relates to what

was discovered during the one year period before the matter was filed. This is not a matter for penalties, although Mrs Hull's actions leave her responsible for the missing money. She has not accounted for it and her management of money that she took home. Also, as the matter goes back for such a long period of time without identifying each breach and being out of time it has made it more difficult to prove the breaches when the doctors failed to put in place their own controls. It has to be acknowledged she did return money. In any event imposing penalties does not fix the problem as that is addressed by damages and special damages.

- (b) For the costs of the investigation into the discrepancies and forensic evidence that essentially involved the full assessment of the entire losses backdated to July 2001. I have dismissed the full claim because it includes the entire Deloitte investigation, bank fees for traces and doctor's and their families' executive time and interest. The doctors' executive time is part of the running of the business and could have been avoided if they had ensured there was monitoring to avoid the situation from arising in the first place. The preliminary investigation by the doctors and their families goes with the business and would be part of the doctors' role in ensuring monitoring, checking and any investigation of their own. Also, such claims for costs as they relate to assessing amounts and making claims is usually the part of the costs for litigation for any claim. Also, there is no basis for Deloitte to claim interest on the costs. The above considerations would reduce the amount of the claim significantly. Other factors to dismiss the full claim include:

- (i) The basis of the claim relates to work associated with the period of time that reasonably would have been part of the work normally associated with bringing a claim in the Authority. In other words that is part of the preparation.
- (ii) That the doctors failed to put in place any monitoring of the financial management systems.

- (c) There is the matter of the audit costs including scope investigation costs included in the claim for special damages. These are costs over and beyond the expertise of the doctors and their families. The Deloitte costs were \$5,466 excluding GST for securing evidence, preparing an investigation plan, the investigation, the task of the live audit and reconciliation. The scope investigation amounts to \$6,533.23 excluding GST for video cameras, reviewing the footage and reporting. These costs have been supported by invoices. Mrs Hull is directly linked to the cause of these costs and is required to pay \$12,029.23.
- (d) The claim for mental distress to the doctors caused by Mrs Hull's conduct is dismissed. My reasons are
- (i) That the doctors were responsible for managing their affairs including the financial systems and employees could expect that the doctors monitor their systems or have professionals that would do it for them.
 - (ii) That the risks go with running a business.

[42] On the interest I hold that the Judicature (Prescribed Rate of Interest) Order 2011 is clear to apply to every judgment given on or after 1 July 2011 and to apply 5% per annum. There is no provision to apply retrospectively the previous orders with different rates of interest, especially since the statement of problem was filed well after 1 July 2011. I do not have an express power to retrospectively apply previous orders that have been replaced by the 2011 order.

Orders of the Authority

[43] Mrs Hull is required to pay Dr Bernard Keith Holmes and Dr Dean Alistair Mackay trading as Papakura East Medical Centre the following sums:

- a. The missing amount of \$103,378.42 from 1 July 2007 until 12 July 2012 using Mr Weir's evidence of calculations in paragraph 146 of his SOE and his amendments and document JLW 30. Leave is reserved for any recalculation of the sum by the parties and to enter an order if necessary.

- b. Interest is set at 5% per annum on the above amount because the doctors have been deprived of the use of their money. As such the sum payable for interest has been calculated from the date that the money would reasonably have been expected to have been repaid and factoring in that Mrs Hull has always denied the doctors' claims. The amount of interest is from the date of the filing of the statement of problem (1 July 2013) until the date of the Authority's determination (8 May 2014). Interest is \$4,432.53.
- c. \$12,029.23 special damages for the audit and scope investigations.

[44] The claim for penalties is dismissed.

[45] The claim for a sum for the doctors' distress is dismissed.

Summary of orders

[46] Mrs Bernadine Hull is required to pay Dr Bernard Keith Holmes and Dr Dean Alistair Mackay trading as Papakura East Medical Centre:

- (i) \$103,378.42 missing money;
- (ii) \$4,432.53 interest;
- (iii) \$12,029.23 special damages for the audit and scope investigations.

Costs

[47] Costs for the Authority's investigation are reserved.

P R Stapp
Member of the Employment Relations Authority