

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 31  
5585365

BETWEEN MELAINE MURPHY  
Applicant

A N D HOBSONVILLE POINT  
MEDICAL CENTRE LIMITED  
t/a HOBSONVILLE POINT  
MEDICAL CENTRE  
Respondent

Member of Authority: Rachel Larmer

Representatives: Andrea Kelleher, Advocate for Applicant  
Seham Ayad, Advocate for Respondent

Investigation Meeting: 18 and 27 January 2016 at Auckland

Date of Determination: 28 January 2016

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] Ms Murphy was employed as a part time administrative receptionist by the Hobsonville Point Medical Centre Limited t/a Hobsonville Point Medical Centre (the Medical Centre).

[2] The Medical Centre initially denied employing Ms Murphy but Dr Ayad conceded at the Authority's investigation meeting today that the parties were in an employment relationship. That was a proper concession in light of Dr Ayad's email to Ms Murphy dated 15 July which says "*Welcome on board. Attached is your contract to read and sign.*".

[3] Ms Murphy was given an individual employment agreement which records that she would be employed for 20 hours per week over the period Monday to Friday and would be paid \$17 per hour. The employment agreement records that Ms Murphy was to commence work on 27 July 2015.

[4] The employment agreement says that Ms Murphy was to be given four weeks' notice of termination. It also included a variation clause that required any variations to the employment agreement to be agreed in writing and signed by the parties. The parties agree there were no variations that complied with the requirements of this clause.

[5] Ms Murphy says she had signed the employment agreement but had not had a chance to give it back to Dr Ayad (who is the sole director and shareholder of the Medical Clinic) because Dr Ayad had been so busy dealing with issues relating to the building work and had been coming and going from the Clinic on the days that Ms Murphy had been there.

[6] Dr Ayad had not signed the employment agreement. Dr Ayad acknowledged to the Authority at the investigation meeting yesterday that the employment agreement she had given Ms Murphy set out the agreed terms and conditions of the employment relationship and that the parties had intended to be bound by those terms and conditions.

[7] Ms Murphy says she attended work on 27, 28 and 29 July to help set up the Clinic which at that stage was still undergoing building work, so had not yet opened. Due to building and consent delays the Clinic did not formally open to the public until 17 August 2015.

[8] Ms Murphy has not been paid for attending work on 27-29 July so she claims wages arrears for that. The Medical Centre acknowledges that Ms Murphy was on the premises over 27-29 July but it disputes that she did any work so it has not paid Ms Murphy for these days.

[9] Ms Murphy claims she was unjustifiably summarily dismissed on 29 July 2015. Ms Murphy says she has not been paid anything to date (no notice and no wages for the days she says she worked).

[10] Ms Murphy claims that Dr Ayad told her to stay around at the end of the day on 29 July because she wanted to talk to her. Ms Murphy claims that when she met with Dr Ayad, Dr Ayad told her that her services were no longer required. When Ms Murphy asked why she says Dr Ayad told her she had not answered the telephone professionally and that her colleagues had “*issues*” with her.

[11] At that time Ms Murphy’s only colleague was Ms Jean Brownlee (the other then full time receptionist who subsequently resigned after she was not paid for working 27-29 July). Ms Brownlee told the Authority that she had no issues with Ms Murphy and they got on well together.

[12] Ms Murphy says she was very upset at being dismissed. Ms Murphy says that the next day she called the Clinic to speak to Dr Ayad about being paid and also texted Dr Ayad. Ms Murphy says Dr Ayad told her she would not be paid because the Clinic had not opened.

[13] Ms Murphy then engaged a representative who spoke to Dr Ayad by telephone and had further email communications with her in an attempt to resolve the issue. That was unsuccessful so on 04 August Ms Murphy’s representative wrote to Dr Ayad raising personal grievances and other various claims. No response was received so further emails and a follow up letter requesting a response were sent to Dr Ayad on 19 August.

[14] Dr Ayad says she did not get these letters. Dr Ayad says she instructed lawyers (who she says she paid) to “*sort out*” the problems with Ms Murphy. Dr Ayad says she received a letter back for her lawyers which she did not read because she was “*too busy*”. Dr Ayad admits she did not progress the matter from there.

[15] Dr Ayad denies dismissing Ms Murphy. Dr Ayad says she told Ms Murphy that she (Ms Murphy) was not needed at the Clinic because it had not opened but that Dr Ayad would let her know when the building work had finished. Ms Murphy disputes that.

[16] Dr Ayad says that on 07 August she left a voicemail for Ms Murphy saying the Clinic would open on 13 August. Ms Murphy denies receiving a voicemail.

[17] Dr Ayad says that when she did not hear back from Ms Murphy in response to this voicemail she (Dr Ayad) claims she had left, she assumed Ms Murphy no longer wished to work for the Clinic so Dr Ayad decided to employ another receptionist. Dr Ayad told the Authority that interview of the new receptionist occurred on 15 August and the new person started work on 17 August, when the Clinic opened.

### **Other**

[18] At the Authority's investigation meeting today Ms Murphy withdrew her penalty claim that a penalty be imposed on the Medical Centre for failing to provide written reasons for dismissal. There is no provision to impose a penalty for a breach of s.120 of the Employment Relations Act 2000 Act (the Act).

[19] The penalty claim under s.130(4) of the Act for failure to provide wage and time records on request was withdrawn on the basis these had not actually been requested.

[20] The claims in the Statement of Problem which related to the alleged caregiver role for Dr Ayad's son did not form part of the Authority's investigation today on the basis the Authority does not have jurisdiction (in respect of this investigation) over such claims.

[21] The caregiver related claims do not involve an (alleged) employment relationship between the parties to these proceedings (i.e. the Medical Centre). Such claims involve an alleged employment relationship between Ms Murphy and Dr Ayad personally.

[22] Dr Ayad has not been personally named as a party in these proceedings so the Authority does not at this point (in the absence of a Statement of Problem or legal claims having being filed against Dr Ayad personally) have jurisdiction to determine a claim involving Dr Ayad personally.

### **Issues**

[23] The following issues are to be determined:

- (a) Credibility;
- (b) Is Ms Murphy owed wage arrears for 27-29 July?

- (c) If so, was Ms Murphy dismissed?
- (d) If so, was Ms Murphy's dismissal justified?
- (e) If not, what if any remedies should be awarded?
- (f) Did the Medical Centre breach the Act?
- (g) What if any costs should be awarded?

### **Credibility**

[24] Dr Ayad and Ms Murphy gave conflicting versions of events. This conflict is to be resolved by the Authority on the balance of probability (i.e. what is more likely than not to be correct).

[25] I did not find Dr Ayad's evidence convincing. I consider she gave internally conflicting evidence and also changed her story – when questioned in detail about events she was recounting she gave different versions of the same events.

[26] I also consider the documents do not support Dr Ayad's version of events and that her actions at the material times do not appear to align with her explanation of what she says did or did not occur.

[27] I further found many aspects Dr Ayad's evidence to be inherently unlikely. Dr Ayad was also quick to shift responsibility elsewhere for actions or inaction which were clearly her sole responsibility.

[28] This contrasted with Ms Murphy's evidence. I found Ms Murphy to be a straightforward and credible witness. Her evidence was corroborated by two other witnesses and it made logical sense. I also consider that Ms Murphy had also taken actions that were aligned with her explanations of what had occurred at the material times. In other words her actions were consistent with the evidence she gave, unlike Dr Ayad's actions/inaction.

[29] For these reasons, where there has been a material conflict in the evidence, I have preferred Ms Murphy's account of events over Dr Ayad's evidence because Ms Murphy impressed me as the more credible witness.

### **Is Ms Murphy owed wage arrears for 27-29 July?**

[30] Ms Murphy says Dr Ayad told her to start work at 10am on 27 July (as per the date recorded in her employment agreement) so she did. Ms Murphy says she and Ms Brownlee were not doing normal receptionist duties because the Clinic had not opened but they were assisting with setting things up whilst building continued on around them. Ms Brownlee corroborated this evidence.

[31] Dr Ayad denies this. She says there was no work to do and that she had told Ms Murphy she was not required at work. I do not accept that evidence because it is contradicted by the email Dr Ayad sent Ms Murphy on 22 July which records that they would be organising everything on Monday [27<sup>th</sup>] and Tuesday [28<sup>th</sup>] with a view to opening on Wednesday [29<sup>th</sup>].

[32] Dr Ayad admits that she saw Ms Murphy at the Clinic on 27-29 July. Dr Ayad claims she told Ms Murphy not to come to work because there was nothing to do but that Ms Murphy just turned up anyway. Dr Ayad claims she told Ms Murphy each day (27-29 July) not to be at work but that she “*was powerless to stop Ms Murphy*” who just walked in through the open doors each day despite allegedly being asked by Dr Ayad not to.

[33] Dr Ayad has given different explanations as to why Ms Murphy would ignore the instruction not to attend work and insist on turning up at the Clinic contrary to what she had been told to do.

[34] Dr Ayad said that Ms Murphy was visiting the other receptionist Ms Brownlee who Dr Ayad claimed was a good friend of Ms Murphy's. Ms Murphy and Ms Brownlee told the Authority they are acquaintances as a result of having worked at the same place a number of years ago but they had not kept in contact and did not socialise together. They initially did not even recognise each other when Dr Ayad interviewed them at the same time for possible employment by the Medical Centre.

[35] I consider there was no credible reason for Ms Murphy to defy her new employer's instructions in order to spend time with Ms Brownlee so I find that evidence inherently unlikely.

[36] Dr Ayad also said that Ms Murphy was with her partner who was working on a nearby work site so she (Ms Murphy) decided to pop in to the Clinic to say “hello” each day then did not leave.

[37] Ms Murphy’s partner is employed as a digger driver on a major building site – he does not take Ms Murphy to work with him and she does not even have safety clearance to be at the site he is working on.

[38] Ms Murphy’s partner told the Authority that he was not with Ms Murphy at the material time on 27-29 July because he was at his normal full time job. He says that on each of these days Ms Murphy had got dressed into her work clothes and he had lent her his vehicle so she could attend work from 27-29 July. As far as he was concerned Ms Murphy was attending work each day as normal as she had recently been employed to do. Dr Ayad’s evidence that Ms Murphy just “popped in” to the Clinic from her partner’s worksite makes no sense.

[39] Dr Ayad also claimed to the Authority that Ms Murphy said (to Dr Ayad) that she wanted to volunteer her time at the Clinic. Ms Murphy denies that and says she had no intention of working for free and was not aware that Dr Ayad did not intend to pay her for the days and hours she worked. Ms Murphy says if she had been asked not to go to work then she would not have done so. Ms Murphy says she attended work each day because Dr Ayad had specifically asked her to.

[40] Ms Murphy says she asked Dr Ayad each day if she was required the following day and then turned up at the time she had been told to be at the Clinic. Dr Ayad disputes that and says she told Ms Murphy not to come to work until the Clinic opened. Dr Ayad did not have a satisfactory explanation as to why Ms Murphy would elect to work for free when her employment agreement clearly states she is to start work on, and therefore will be paid from, 27 July.

[41] Dr Ayad acknowledges that there was no signed variation to the start date recorded in Ms Murphy’s employment agreement and that there is no documentation that supports her assertion that there was a mutual agreement to change Ms Murphy’s start date. I consider Ms Murphy’s actions in attending work each day and Dr Ayad’s failure to ensure Ms Murphy did not attend work contradict the assertion that a mutual agreement was reached to change Ms Murphy’s start date.

[42] Dr Ayad claims that Ms Murphy agreed not to start work until the Clinic opened. However I consider the evidence contradicts that. Namely Ms Murphy's actions of actively seeking payment of wage arrears for 27-29 July, engaging a representative, having her representative call and email Dr Ayad to obtain payment of her wage arrears, raising personal grievances and wage arrears claims, sending a follow up letter asking why no response had been received to her claims, and then filing proceedings.

[43] It is also odd that Dr Ayad says she allowed another volunteer (N – someone who had been interviewed for the receptionist position but who was not successful, with Ms Murphy being appointed instead) to attend the Clinic premises to “*help out*” on an unpaid basis instead of Ms Murphy who was the person who had already been employed to actually be at work over that period.

[44] In any event the Medical Centre as Ms Murphy's employer had an obligation to provide Ms Murphy with work and wages on the days and dates she had been employed to work. Ms Murphy was a permanent part time employee – she was not a “*zero hours*” or a “*casual on call only*” employee.

[45] The absence of suitable work for Ms Murphy to do does not alleviate the Medical Centre's contractual obligation to pay Ms Murphy wages for the hours recorded in the employment agreement. That did not occur.

[46] I therefore find that the Medical Centre owes Ms Murphy \$255 unpaid wages for 27-29 July (being 15 hours x \$17 per hour).

### **Was Ms Murphy dismissed?**

[47] The Medical Centre denies dismissing Ms Murphy on 29 July or at all.

[48] Dr Ayad says she was expecting Ms Murphy to come to work when the Clinic opened on 17 August. From the evidence I heard that seems inherently unlikely.

[49] Dr Ayad explains the ending of the employment relationship as being due to Ms Murphy having just (suddenly and unexpectedly) changed her mind about wanting to work for the Medical Centre. Dr Ayad says that was entirely Ms Murphy's decision and did not have anything to do with her (Dr Ayad) or the Medical Centre.

[50] Dr Ayad also says Ms Murphy's employment was considered to have ended as she (Ms Murphy) did not reply to the voicemail message Dr Ayad claims she left Ms Murphy on 07 August. Ms Murphy denies receiving this alleged voicemail.

[51] Ms Murphy bears the onus of establishing on the balance of probabilities that she was dismissed.

[52] I do not accept Dr Ayad's evidence that she was expecting Ms Murphy to come to work when the Clinic opened on 17 August because I consider both parties' actions are inconsistent with that scenario.

[53] I prefer Ms Murphy's evidence that she phoned and texted Dr Ayad asking to be paid and that when that was unsuccessful she instructed her representative to call and communicate with Dr Ayad to resolve the various issues that had arisen.

[54] The Authority was given an email from Ms Murphy's representative to Dr Ayad which refers to their phone conversation about Ms Murphy's personal grievance letter dated 04 August (which raised dismissal and disadvantage grievances). This email also records that Dr Ayad had advised Ms Murphy's representative that she would be talking to her lawyer about Ms Murphy's claims.

[55] I consider it more likely than not that Dr Ayad was on notice that Ms Murphy considered she had been unjustifiably dismissed on 29 July but that Dr Ayad had not provided any substantive response to the grievances that had been raised with her.

[56] It is also odd that Dr Ayad would leave a voicemail for Ms Murphy asking her to come to work on 17 August when Dr Ayad knew that Ms Murphy had a representative who was dealing with the unresolved employment relationship problems that had been raised. I therefore prefer Ms Murphy's evidence that there was no voicemail.

[57] I consider it more likely than not that Ms Murphy's account of the exchange between her and Dr Ayad on 29 July is correct. Ms Murphy's partner confirmed that Ms Murphy had arrived home crying and had told him she had been dismissed.

[58] Ms Brownlee confirmed that Ms Murphy had phoned her on the evening of 29 July and was very upset. Ms Brownlee says Ms Murphy asked if she or the other

“volunteer” (N) had any problems with her. Ms Brownlee says she assured Ms Murphy that they did not.

[59] The actions Ms Murphy took subsequent to the 29 July meeting all support her view that she had been dismissed. They are also inconsistent with a scenario where Ms Murphy had agreed to stay at home without pay until the Clinic finally opened.

[60] I am satisfied on the balance of probabilities that Ms Murphy was dismissed on 29 July. I accept Ms Murphy’s evidence that the employment relationship ended at her employer’s initiative, she did not voluntarily resign and she did not fail to attend work on her scheduled (and agreed) start date which I find was 27 July 2015.

### **Was Ms Murphy’s dismissal justified?**

[61] Having established that a dismissal has occurred, the onus now passes to the Medical Centre to establish on the balance of probabilities that it has complied with the justification test in s.103A of the Employment Relations Act 2000.

[62] This requires the Authority to objectively assess whether the Medical Centre’s actions and how it acted, were what a fair and reasonable employer could have done in all of the circumstances at the time Ms Murphy was dismissed<sup>1</sup>.

[63] A fair and reasonable employer is expected to comply with its s.4(1A) good faith obligations and with each of the four procedural fairness tests in s.103A(3) of the Act. Failure to do so is likely to undermine an employer’s ability to establish justification in accordance with s.103A(2) of the Act.

#### *Good faith*

[64] Section 4(1A) of the Act requires an employer who is proposing to make a decision which may adversely impact on an employee’s ongoing employment to provide that employee with relevant information and an opportunity to comment on it before a final decision is made.

[65] I find that this did not occur with Ms Murphy. Ms Murphy was not given any relevant information before being dismissed on 29 July. She was therefore denied an opportunity to respond to the Medical Centre’s concerns.

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<sup>1</sup> Section 103A(2) of the Act.

[66] I therefore find that the Medical Centre breached its s.4(1A) good faith obligations under the Act which fundamentally undermines its ability to justify Ms Murphy's dismissal.

*Procedural fairness*

[67] I also find that Hobsonville Point Medical Centre is unable to discharge the onus of establishing it complied with any of the four procedural fairness tests in s.103A(3) of the Act. I find that this failure also fundamentally undermines the Medical Centre's ability to justify Ms Murphy's dismissal.

[68] I therefore find that Ms Murphy's dismissal was procedurally unfair and unjustified.

*Substantive justification*

[69] An employer must have a good reason based on reasonable grounds for dismissing an employee. The Medical Centre has failed to discharge the onus of establishing that it had a good reason for ending Ms Murphy's employment.

[70] I therefore find that Ms Murphy's dismissal was substantively unjustified.

*Outcome*

[71] I find that the Medical Centre's dismissal of Ms Murphy was procedurally and substantively unjustified. Ms Murphy's unjustified dismissal grievance succeeds.

**What if any remedies should be awarded?**

*Notice*

[72] I find that the written notice period specified in the employment agreement of four weeks should have been paid in lieu of actual notice of termination being given. However I do not make a separate award under this heading because the unpaid notice period falls within the period for which Ms Murphy is claiming lost remuneration.

### *Mitigation*

[73] Ms Murphy gave detailed evidence that she proactively sought new employment of any kind. I am satisfied that she has discharged the onus of establishing that she has taken appropriate steps to mitigate her loss.

### *Lost remuneration*

[74] Ms Murphy seeks lost remuneration of \$4,420 (being 13 weeks x 20 hours x \$17 per hour).

[75] On 19 January 2016 Ms Murphy started work in a part time position (15.5 hours per week) on an hourly rate of \$15. She is currently on a 90 day trial period. Ms Murphy told the Authority she has not earned any income since the Medical Centre dismissed her.

[76] I am satisfied Ms Murphy has lost more remuneration than the amount she is seeking. The Medical Centre is ordered to pay Ms Murphy \$4,420 lost remuneration under s.128(2) of the Act.

### *Distress compensation*

[77] An award of distress compensation must be supported by evidence. Ms Murphy gave considerable evidence about the adverse effects her unjustified dismissal had on her on many different levels (personal, medical, social, career, relationships and financial).

[78] Ms Murphy was distressed and tearful when giving her evidence. She is obviously still embarrassed, hurt and humiliated by her unjustified dismissal. I find that the evidence supports an award of distress compensation of \$6,000.

[79] The Medical Centre is ordered to pay Ms Murphy \$6,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she has suffered as a result of her unjustified dismissal.

### *Contribution*

[80] Having determined that Ms Murphy has a successful grievance, s.124 of the Act requires the Authority to assess to whether or not Ms Murphy's actions

contributed towards the situation that gave rise to her grievance and if so to adjust remedies accordingly.

[81] Contribution denotes blameworthy conduct and I find that Ms Murphy did not engage in any blameworthy conduct. Accordingly remedies are not to be reduced on the grounds of contribution.

**What if any costs should be awarded?**

[82] Ms Murphy as the successful party is entitled to a contribution towards her actual legal costs. Neither party identified any factors which they say should result in the Authority's notional daily tariff (currently \$3,500) being adjusted. I therefore apply the tariff on a pro rata basis.

[83] This matter involved two investigation meetings. The first investigation meeting on 18 January 2016 involved one hour. The second investigation meeting involved two and a half hours. Costs are therefore awarded based on three and a half hours of investigation meeting time.

[84] The Medical Centre is ordered to pay Ms Murphy \$1,750 towards her legal costs together with \$71.56 to reimburse her filing fee.

[85] Dr Ayar told the Authority that she intends to close her Medical Centre as the result of Ms Murphy's claims. I therefore order that the Medical Centre must pay Ms Murphy the full amount she has been awarded in this determination within 28 days of the date of this determination.

**Rachel Larmer**  
**Member of the Employment Relations Authority**