

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 368  
3141621

BETWEEN

OLIVIA FARRELLY  
Applicant

AND

ADVANCE OFFICE  
PRODUCTS LIMITED  
Respondent

Member of Authority: Rowan Anderson

Representatives: Simon Greening, counsel for the Applicant  
James Skinner, counsel for the Respondent

Investigation Meeting: 5 May 2022 at Auckland

Submissions received: 13 May 2022 from Applicant  
13 May 2022 from Respondent

Determination: 5 August 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Olivia Farrelly claims that Advance Office Products Limited (Advance Office), unlawfully discriminated against her by dismissing her from her employment because of her stutter.

[2] Advance Office denies it discriminated against Ms Farrelly and says that it lawfully terminated Ms Farrelly's employment within a valid 90-day trial period in accordance with s 67B of the Employment Relations Act 2000 ("ER Act").

[3] Advance Office, in the alternative, also relies, by virtue of s 106(1)(f) of the Act, on the exception to discrimination at s 29(1)(a) of the Human Rights Act 1993 (“HR Act”) and assert that Ms Farrelly could only satisfactorily performed the duties of the position with the aid of special services or facilities, and that it is not reasonable to expect Advance Office to provide those services and facilities. Advance Office also submits that, in the event it is wrong about the alleged discrimination, that any remedy awarded under section 123(1)(c)(i) of the ER Act should be reduced on account of contributing behaviour by Ms Farrelly for allegedly failing to disclose her stutter in a declaration contained within the individual employment contract.

### **The issue**

[4] The issue requiring investigation and determination was whether Ms Farrelly was discriminated against in her employment by being dismissed from her employment.

### **The Authority’s Investigation**

[5] The Authority held an investigation meeting on 5 May 2022. The investigation meeting commenced at approximately 10.00am and concluded at approximately 3.45pm.

[6] There were four witnesses that gave evidence at the investigation meeting. A brief of evidence for each of the witnesses was lodged in advance of the investigation meeting and each witness gave an affirmation at the investigation meeting. The witnesses were as follows:

- Ms Olivia Farrelly.
- Ms Cassidy Bond, former employee of Advance Office in the role of Outward Goods.
- Mrs Anna Roberta Marion Davis.
- Mr Campbell Charles Davis.

[7] At the conclusion of the evidence, the parties were directed to file and serve written submissions by Friday 13 May 2022.

[8] As permitted by section 174E of the Employment Relations Act 2000 this determination has stated findings of fact and law, expressed conclusions on issues

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **Background**

[9] Anna Roberta Marion Davis and Campbell Charles Davis, both directors of Advance Office, purchased Advance Office in 2007. The business employed approximately five persons with additional part-time staff. Mrs and Mr Davis were hands-on directors, both performing significant day to day roles within the business.

[10] Mrs Davis, at the time Ms Farrelly was employed, performed a range of functions but was eager to concentrate more on business development. Mr Davis worked both in and outside the office, including making deliveries in the mornings and afternoons.

[11] On 22 June 2020 Ms Farrelly applied for an advertised position with Advance Office as a Customer Service/Sales and Office Support worker. Ms Farrelly made that application by presenting herself to Advance Office's premises, immediately following which she was interviewed by Mrs Davis. A second interview took place on 23 June 2020, that time with both Mrs Davis and Mr Davis present. At the conclusion of the second interview, Ms Farrelly was offered the role, with a commencement date of 29 June 2020.

[12] Ms Farrelly was asked to attend two separate orientation sessions on 24 June 2020 and 26 June 2020. Mrs Davis gave evidence that Ms Farrelly did not attend the second of those orientation sessions.

[13] Whilst the facts are disputed, some concerns were held by Mrs and Mr Davis as to Ms Farrelly's communication with customers and staff members over the telephone. This ultimately led to Mrs Davis meeting with Ms Farrelly on 13 July 2020, at which time Ms Farrelly advised Mrs Davis that she had a stutter.

[14] Ms Farrelly was dismissed from her employment at that meeting 13 July 2020.

## Relevant Law

[15] Ms Farrelly’s employment was subject to a trial provision in terms of s 67A of the ER Act. However, a trial provision does not prevent an employee from bringing a personal grievance on any of the grounds specified in ss 103(1)(b) to (j) of the ER Act, which for present purposes includes a claim for discrimination.

[16] The claim by Ms Farrelly is brought as a personal grievance in terms of s 103(1)(c) of the ER Act alleging that Ms Farrelly has been discriminated against in her employment. Section 103(1)(c) provides that a claim that an employee has been discriminated against in the employee’s employment is a personal grievance.

[17] Ms Farrelly raised a personal grievance with Advance Office on 7 August 2020.

[18] Section 104(1)(b) of the ER Act provides:

### **104 Discrimination**

(1) For the purposes of section 103(1)(c), and employee is discriminated against in that employee’s employment if the employee or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105...

...

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not have been dismissed or subjected to such determinant; or

...

[19] The relevant principles applying to discrimination in the context of the ER Act have been addressed by the Supreme Court in *McAlister v Air New Zealand Ltd*.<sup>1</sup> Those principles include:

- (a) The choice of comparators is often critical and should be determined having regard to that which best fits the statutory scheme.<sup>2</sup>
- (b) Causation is a necessary factor, and in determining that, the basis for the alleged discrimination must be shown to have been a “material factor” in the relevant decision.<sup>3</sup>

[20] In *Idea Services Ltd v Crozier*<sup>4</sup> the Employment Court, in setting out the basic principles applying to a discrimination grievance, noted that “Deciding discrimination

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<sup>1</sup> [2009] NZSC 7.

<sup>2</sup> *McAlister v Air New Zealand Ltd* [2009] NZSC 7, at [34].

<sup>3</sup> *McAlister v Air New Zealand Ltd* [2009] NZSC 7, at [40].

<sup>4</sup> [2017] NZEmpC 77.

cases requires a court to compare the position of the claiming employee with that of other employees who are “employed ... on work of that description”.<sup>5</sup> Further, the Court held that the correct approach to the comparator issue under s 104(1)(b) of the ER Act is to consider the circumstances of the applicant, and those of other staff differing only in respect of the particular health issue.<sup>6</sup>

[21] Section 105 of the ER Act lists, in referencing s 21(1) of the HR Act, the prohibited grounds for discrimination for the purposes of s 104 of the ER Act. These relevantly include disability.<sup>7</sup>

[22] Section 106 of the ER Act deals with exceptions in relation to discrimination. Advance Office relied upon s 106(1)(f), which provides an exception in relation to disability by reference to s 29 of the HR Act. In particular, Advance Office asserts that if the Authority determines that discrimination occurred, that special arrangements would have been needed for Ms Farrelly to perform her phone duties by having someone else carry out those duties, and that was not a realistic option.

### **Has Ms Farrelly has been discriminated against in her employment?**

#### *Engagement and the requirements of the role*

[23] Mrs Davis gave evidence that she took responsibility for the management of sales, that she was very hands-on, and that Advance Office that were seeking to develop sales and business and to attract bigger clients. She said that Ms Farrelly was employed in order to take up some of the day-to-day work so that Mrs Davis could focus more on development of the business.

[24] Mrs Davis emphasised that COVID-19 had an impact on the business and that had meant a change from in-person service to an increasingly internet and phone-based service. As a result the shop itself was closed to the public and they moved away from sales based on physically driving to locations in the rep car.

[25] Mrs Davis gave evidence that the number of phone calls to the office varied, that there could be 15 a day, but there could also be up to 40 a day. She says that the

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<sup>5</sup> *Idea Services Ltd v Crozier* [2017] NZEmpC 77, at [225 c)].

<sup>6</sup> *Idea Services Ltd v Crozier* [2017] NZEmpC 77, at [229].

<sup>7</sup> Section 105(1)(h) of the Employment Relations Act 2000.

market was very competitive and that what set Advance Office apart from its competitors was that their service was always 110%.

[26] Ms Farrelly was employed to work 40 hours per week and on her evidence the rate of pay was to be approximately \$22.00 per hour. She accepted that she was asked specifically about telephone communications at the first interview she attended with Mrs Davis. Ms Farrelly also accepted that she was provided a copy of a position description<sup>8</sup> prior to commencing her employment.

[27] Mrs Davis said that telephone use comprised approximately 75% of the duties Ms Farrelly was employed to perform. Mrs Davis also gave evidence that telephone communication was so important that she emphasised it to Ms Farrelly at the interview, specifically emphasising the importance of it and asking her about it at the end of the second interview before offering Ms Farrelly the role.

[28] Ms Farrelly estimated that the phone calls accounted for approximately 20% of the role and stated that “it was not the biggest part” of the role. Ms Farrelly agreed that in training she was told of a requirement that phone calls be answered within three rings.

[29] Ms Farrelly was adamant that she could perform the role she was employed for without issue. In support of that, Ms Farrelly gave evidence that she had previously been employed in customer service roles without issue, including for three years at a McDonald’s drive through restaurant and more recently at a hotel.

[30] I find that Ms Farrelly was aware, from the outset, that telephone communications were an important aspect of the role she was employed to perform.

*Ms Farrelly’s stutter and performance concerns*

[31] Ms Farrelly gave evidence that she had had a stutter her whole life, and that it had been apparent from at least the age of two.

[32] Ms Farrelly, Mrs Davis and Ms Bond all worked in the same relatively small area and would be able to observe what was going on in the office.

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<sup>8</sup> The position description for the role of “Customer Service / Sales and Office Support” is attached to the statement of problem and marked “A”.

[33] Mr Davis gave evidence that he had concerns about Ms Farrelly's communications on the phone and that a certain greeting was expected. He said that one issue was that there might have been confusion by customers as to which business they were calling when Ms Farrelly answered the phone.

[34] Mr Davis could not recall much of the circumstances relating to the calls he made during which he said he noticed issues with Ms Farrelly's speech. It is apparent from his evidence that he believed there was an issue. However, he could not recall whether the issues were so significant as to impede the purpose of his calls.

[35] Mr Davis did not receive any complaints from customers and said he didn't talk to other staff about the issues. Mr Davis's evidence was that the main issue was with the pronunciation of the company name, but that he also observed an issue relating to a phone call with a supplier. Mr Davis said that he raised the communication issue directly with Ms Farrelly, in the nature of a "gentle chat".

[36] Mrs Davis gave evidence that she had observed Ms Farrelly taking calls and processing the orders and that speech was an issue every time Ms Farrelly answered the phone and communicated with customers. Mrs Davis said she was particularly concerned about the name of the business not being pronounced correctly and the losing of custom as a result.

[37] Mrs Davis said that Ms Farrelly's speech difficulties in the workplace were not limited to the opening lines of the standard phone introduction. She says that she sat side by side with Ms Farrelly in the office and would hear most things that were said. She said that she heard Ms Farrelly answer calls "mumbling" and "incoherently". She initially, in the first week or so, thought that it might just have been nervousness given Ms Farrelly was new to the role.

[38] Mrs Davis gave evidence that she talked to Ms Farrelly about her communication concerns on several occasions. On the first occasion she said that she encouraged Ms Farrelly just to slow down and relax when answering the phone. Mrs Davis's evidence was that when she raised issues with Ms Farrelly that Ms Farrelly's reaction was to fob it off and that she "kind of ignored it".

[39] Mrs Davis's evidence was that customers would hang up on Ms Farrelly because of the communication issues. When asked how she knew that they had done so, she pointed to the short duration of calls. Mrs Davis could not identify any actual customers that were lost as a result of the alleged issues, and I consider her evidence as to the supposed phone calls to be little more than conjecture. Mrs Davis's conjecture as to what may have occurred on the calls, and her perception as to the duration of the calls, does not support a finding that the calls were ended due to any fault on Ms Farrelly's part.

[40] In cross-examination Mrs Davis acknowledged that she could not provide any details about the three incidents mentioned in her brief of evidence,<sup>9</sup> that she didn't know who the customers were, and that despite observing issues she did not ask Ms Farrelly to try and call the customers back.

[41] Ms Farrelly's evidence was that she did not consider her stutter was an issue in terms of her employment with Advance Office. She maintained that at no time did any customers of Advance Office hang up on her, and that she did not have any issues communicating with customers over the telephone. Ms Farrelly also maintained that she was not spoken to about any alleged issues and that no concerns were raised with her by customers, other employees, or the directors of Advance Office.

[42] Ms Farrelly gave evidence that no issues or concerns were raised with her about not answering the phone within the three rings. Additionally, she gave evidence that the phones might at times ring more than three times, but that there was no reluctance on her part to answer them and that on any such occasions could be explained by, for example, her being engaged with other tasks.

[43] Ms Bond was employed in an Outward Goods role. She would take orders by phone and email and pick and pack those orders to make them ready for collection/distribution. Ms Bond's evidence was that she observed Ms Farrelly taking phone calls but that she couldn't recall any specific occasion on which there was an issue.

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<sup>9</sup> Brief of evidence of Anna Roberta Marion Davis dated 19 April 2022, at [9].

[44] Ms Bond gave evidence that Ms Farrelly had difficulty pronouncing the vowels in the phrase “advance office products” and that manifested itself as a “slurring” of words. The only issue with communication she observed was the introduction used when Ms Farrelly was answering the phone. She said that, after having some trouble with the words of the introduction, Ms Farrelly would continue with calls without any difficulty. Ms Bond said that she specifically observed that occurring and that she did not observe any instances which led her to believe that customers had hung up on Ms Farrelly because of the difficulties with the introduction.

[45] Mrs Davis gave evidence that she placed a note on Ms Farrelly’s desk to try and address the difficulties she was having in answering the phones correctly. Ms Bond did not see Mrs Davis place the note on Ms Farrelly’s desk, although she said that she thought that that had been done at about the middle of the period of Ms Farrelly’s employment. Mrs Farrelly denied receiving the note.

[46] Ms Bond says that she could recall only one occasion on which she observed an issue where Ms Farrelly had let the phone ring more than three times. Ms Bond said that she did not raise the issue with anyone, including Mrs Davis.

[47] Ms Bond did not receive, and was unaware of any complaints, from customers. Ms Bond’s evidence was that Mrs Davis raised a concern with her asking her if she had noticed an issue as well. Her evidence was that there was some discussion between them that included Mrs Davis indicating that she would monitor the situation and give Ms Farrelly a chance.

[48] I do not accept that there was no issue at all with Ms Farrelly’s communication when answering the telephones. However, having regard to the evidence, I consider that the communication issue was limited to the words of introduction used when answering phone calls and that, so far as it was an issue, it was not one that actually impacted on Ms Farrelly’s ability to perform her duties. I find that Ms Farrelly had a noticeable stutter when saying the words “advance office products” as part of the standard introduction when answering calls on the telephone, but that it did not actually impact Ms Farrelly’s ability to appropriately communicate with customers and deal with their enquiries appropriately.

[49] I also conclude that whilst there were some concerns held as to Ms Farrelly's communication abilities, they were not raised with Ms Farrelly as serious performance concerns, at least until the meeting on 13 July 2020.

[50] I accept that the issue may have been raised with Ms Farrelly in one form or another prior to 13 July 2020. However, I make no adverse finding as to Ms Farrelly's credit having regard to her evidence denying that the issues were raised with her. I find that the issue was not raised with Ms Farrelly in any formal or significant way that would necessary have led her to take note of the issue.

*The meeting of 13 July 2020*

[51] Ms Farrelly stated that she arrived for work on 13 July 2020 at approximately 9.45am to 10.00am. She gave evidence that she did not believe there was an incident that morning that triggered Mrs Davis to call the meeting which followed. Ms Farrelly said that Mrs Davis approached her that morning and said words to the effect of "are we able to talk", and that she subsequently left the office with Ms Davis to have a meeting across the road at the Tent Café.

[52] Mr Davis was not in the office on the morning of 13 July 2020 and gave evidence that he did not discuss possible termination of Ms Farrelly's employment with Mrs Davis prior to the meeting that was held.

[53] Ms Farrelly's evidence as to the meeting was that Mrs Davis commenced the meeting by saying that she was not happy with the level of communication. It was in response to that issue being raised that Ms Farrelly says she first raised the fact that she had a stutter.

[54] When asked about other measures that might have been taken to accommodate her in light of Mrs Davis's concerns, Ms Farrelly said that she suggested that the phone work could be taken out of her job description.

[55] Ms Farrelly stated that she declined an offer made by Mrs Davis of an alternative role the warehouse at a lower rate of pay. She also gave evidence that she did not consider accepting the alternative role because she would not want to continue to work for people that made her feel inferior.

[56] Mrs Davis's evidence was that the intention of the meeting on 13 July 2020 was to have a performance discussion. She said that she was then shocked when Ms Farrelly disclosed the stutter, but nonetheless sought to see if there was a way forward by asking Ms Farrelly what could be done.

[57] Mrs Davis maintained that Ms Farrelly was not dismissed from her employment because she had a stutter. Mrs Davis's evidence was that Ms Farrelly "...it was only after Olivia disclosed her inability to perform the role that I had to initiate termination...".<sup>10</sup> Ms Farrelly made no such disclosure and I find that she was able to perform her role. I find that instead, Mrs Davis concluded that Ms Farrelly could not perform the role because she had a stutter.

[58] Having considered all of the evidence in relation to the meeting of 13 July 2020, in addition to the preceding events relating to Ms Farrelly's employment, I am satisfied that Ms Farrelly has been discriminated against in her employment.

[59] Advance Office submitted that Ms Farrelly acknowledged that she does not consider her stutter a disability. There is no dispute that Ms Farrelly has a stutter. I conclude from Ms Farrelly's evidence that she does not consider her stutter to hold her back or prevent her from being able to perform work of the nature she was engaged to perform for Advance Office. However, I find that her stutter is a disability for the purposes of the HR Act.

[60] I accept the submission made on behalf of Ms Farrelly to the effect that the meeting was to be an informal catch up, but that upon being informed by Ms Farrelly that she had a stutter, the decision to dismiss was made.

[61] I find that Advance Office would not have dismissed Ms Farrelly at the relevant time had the disability not been disclosed at the meeting on 13 July 2020. I also find that Advance Office would not have dismissed another employee in the same position who differed from Ms Farrelly only in respect of her disability.

[62] Mrs Davis was no doubt concerned about the potential implications on the business. However, that does not mean that the disclosure of the disability was not the

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<sup>10</sup> Brief of evidence of Anna Roberta Marion Davis dated 19 April 2022, at [24].

reason for the dismissal. I find that the disability was a “*material ingredient*” in the decision to terminate the applicant’s employment. Advance Office dismissed Ms Farrelly from her employment because she had a stutter.

*No exception in relation to discrimination*

[63] Advance Office submitted that, in the event the Authority determines Ms Farrelly was discriminated against (despite their primary submission that she was not), that an exception applies in terms of s 106(1)(f) of the ER Act.

[64] I accept that both Mrs Davis and Mr Davis were genuinely concerned about Ms Farrelly’s communication abilities, and that they were particularly concerned with her ability to clearly state the name of the business when answering telephone calls. However, I do not accept that the issue was as significant as Advance Office has claimed, and I consider the evidence of Ms Bond supports the fact that any communication issues were limited to the phrase “advance office products”.

[65] When regard to both the relevant position description,<sup>11</sup> and the individual employment agreement,<sup>12</sup> it is apparent that Ms Farrelly was able to fully and satisfactorily perform the duties required of her role. I find that Ms Farrelly was able to clearly communicate with customers and there is no reliable evidence that she did not meet customer expectations. I have no reason to doubt that Ms Farrelly had good phone etiquette or that had a clear and friendly telephone manner. I accept that she was able to deal with customer enquires appropriately, despite some slight difficulty in the introductory phrase.

[66] Even if I had accepted that the communication issues were of more significance, there was simply no real consideration of special services or facilities. Expecting Ms Farrelly to provide immediate responses as to how Advance Office’s concerns could be dealt with, and then moments later dismissing her from her employment on the purported basis that there was no way forward, was inherently unreasonable.

[67] I do not accept that it was necessary to remove telephone duties from Ms Farrelly’s role, nor do I accept that special services or facilities were actually needed to enable Ms Farrelly to perform the duties of her role satisfactorily. I find that Ms

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<sup>11</sup> Attachment “A” to the statement of problem.

<sup>12</sup> Attachment “B” to the statement of problem.

Farrelly, despite perceptions to the contrary, was able to effectively communicate with the customers and there is no reliable evidence that her stutter impacted the performance of her actual duties in any negative way. I conclude that the exception to discrimination claimed by Advance Office under s 106(1)(f) of the ER Act does not apply.

## **Remedies**

### *Compensation – section 123(1)(c)(i)*

[68] Ms Farrelly gave evidence that she was shocked, that she cried, that in the period following the dismissal she was depressed, that she wouldn't leave the house and didn't eat, that she otherwise had a hard time coping, and that the dismissal impacted her confidence. I find that the actions of Advance Office had a reasonably significant impact on her.

[69] Ms Farrelly gave evidence that she was significantly impacted by the dismissal and the circumstances in which it occurred. She made particular reference to the 13 July 2020 meeting being held in a public place (the Tent Café) and humiliation she felt in that she considered other employees knew about the meeting and that she was to be dismissed.

[70] I accept that Ms Farrelly was humiliated by the experience and that it had a significant impact on her. Whilst I accept that there was no ill intention in holding the meeting at the Tent Café, also noting that it was not initially envisaged that Ms Farrelly was going to be advised of dismissal at the meeting, I do consider that doing so in such a public location was likely to cause and/or unnecessarily exacerbate the impacts of the dismissal. Whilst suggestion was made that it was a better location than the office, that does not mean that they were the only reasonable locations at which to deliver such news.

[71] Ms Farrelly had the impression that others, and in particular family members of Mrs Davis, would have been aware of the meeting and its purpose. I accept the evidence of Mrs Davis that the termination was not a certain outcome of the meeting, and that she amended an available draft termination letter upon returning to the store. Mr Davis gave evidence that he was not aware in advance that Ms Farrelly was to be advised of the dismissal at the meeting on 13 July 2020. Ms Bond also gave evidence that she was

unaware that Ms Farrelly was to be terminated and was not aware of the meeting in advance.

[72] I find that the other employees of Advance Office were not aware in advance that Ms Farrelly was to be dismissed from her employment at the meeting. However, Ms Farrelly had that perception at the time and I find that the public location of the meeting, and having to return to the office immediately after the meeting, added to her sense of humiliation.

[73] In her statement, Ms Farrelly indicated that it took her some weeks to have the courage to apply for any jobs again following the termination, but that she had to do so because of the financial burden.<sup>13</sup> Ms Farrelly provided the Authority a list of vacancies applied for in that period, which confirms she applied for jobs on the day of the dismissal and also on 16, 17, 18, 19, 23, and 27 July 2020.<sup>14</sup> The statement is somewhat incongruous with the evidence from the job applications. However, I accept ultimately that there was an impact on Ms Farrelly's confidence resulting from Advance Office's treatment of her, particularly given her age and the discriminatory basis of the dismissal.

[74] Having heard from Ms Farrelly, I am satisfied that the impacts were reasonably severe and caused humiliation, loss of dignity, and injury to feelings. The actions of Advance Office impacted Ms Farrelly's self-worth and self-esteem. Given what I consider the discriminatory basis for the dismissal, and the evidence of Ms Farrelly as to the impact Advance Office's actions had on her, I am satisfied that there was a significant loss of dignity resulting from being devalued on account of her physical disability.

[75] Counsel for Ms Farrelly submitted that an appropriate award of compensation under s 123(1)(c)(i) would be \$20,000. Having regard to generally comparable cases and the impacts on Ms Farrelly, I consider that an appropriate award of compensation is \$17,500.

#### *Lost earnings*

[76] Ms Farrelly's evidence was that she was unable to secure alternative work until 26 August 2020. Counsel for Ms Farrelly submitted that a sum of \$4,860 should be awarded for lost wages for the period 20 July 2020 to 26 August 2020.

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<sup>13</sup> Statement of Olivia Farrelly dated 28 March 2022.

<sup>14</sup> "Document 2" attached to the statement of Olivia Farrelly dated 28 March 2022.

[77] I accept that an order should be made in that amount noting Ms Farrelly's attempts to mitigate her loss.

### *Contributory Conduct*

[78] I have considered the extent to which the actions of Ms Farrelly may have contributed towards the situation that gave rise to the personal grievance. I do not accept that Ms Farrelly's actions in signing the employee acknowledgement, nor any other of her actions, contributed to the situation giving rise to the grievance.

[79] The relevant individual employment agreement<sup>15</sup> contained the following acknowledgement:

In signing this agreement, I Olivia Farrelly accept the terms and conditions of my employment as detailed within this offer and declare that:

...

- I have told my employer about any existing physical and/or health conditions that might be worsened by doing the job, or might affect my ability to do the job.

[80] I do not consider that Ms Farrelly was dishonest, nor do I accept that she misled or misrepresented herself or physical condition. Ms Farrelly, noting her previous employment background, did not consider herself to have a significant impediment. Whilst I accept there was a limited communication issue in terms of the telephone introduction, I do not accept that the issue was so material as to impact on Ms Farrelly's ability to perform the duties of her role satisfactorily.

[81] Ms Farrelly was, to her credit, open about the importance of communications as part of the role she was engaged to perform. I find that Ms Farrelly, having regard to her previous employment history, did not consider that she had a condition that would affect her ability to do the job.

[82] It was not unreasonable of Ms Farrelly to sign the acknowledgement without disclosing her condition. There was no reason for her to consider that her stutter might impact the performance of her role with Advance Office. Ultimately, her stutter did not

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<sup>15</sup> Employment Agreement, signed by Advance Office and Ms Farrelly respectively on 22 June 2020 and 23 June 2023.

actually impact the performance of her duties in any meaningful way and she should not have been dismissed from her employment.

[83] I find that there were no actions requiring a reduction in remedies.

### **Orders**

[84] Advance Office Products Limited is ordered, within 28 days of the date of this determination, to make payment to Ms Olivia Farrelly the following sums:

- (a) \$17,500 as compensation for hurt and humiliation under s 123(1)(c)(i) of the ER Act; and
- (b) \$4,860 for lost earnings under ss 123(1)(b) and 128 of the ER Act.

### **Costs**

[85] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Farrelly may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Advance Office would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[86] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>16</sup>

Rowan Anderson  
Member of the Employment Relations Authority

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<sup>16</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costsremedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costsremedies/#awarding-and-paying-costs-1).