

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 93

3115552

BETWEEN

JANICE SMITH
Applicant

AND

VICE CHANCELLOR OF THE
UNIVERSITY OF AUCKLAND
Respondent

Member of Authority: Nicola Craig

Representatives: Adam Mapu, advocate for the applicant
Rachel Judge and Ronny Cabraal, counsel for the
respondent

Investigation Meeting: 16 and 17 June, 11 August 2021

Submissions [and further Information] Received: At the investigation meeting and 9 and 17 December
2021 from the applicant
At the investigation meeting, 6 September and 9
December 2021 from the respondent

Date of Determination: 18 March 2022

DETERMINATION OF THE AUTHORITY

- A. Janice Smith has not established her claims that:**
- (i) she was disadvantaged by unjustified actions of the University of Auckland;**
 - (ii) she was constructively dismissed;**
 - (iii) the University breached the terms from a collective agreement incorporated into her employment agreement; and**
 - (iv) the University breached the Holidays Act 2003.**
- B. The University deducted money from Ms Smith's pay, for time taken off work on pay, when that was not permitted by the Wages**

Protection Act 1983. Ms Smith was disadvantaged by this unjustified action and the University is to pay her the following as remedies for her grievance within 28 days of the date of this determination:

- (i) \$2,922.40 gross as lost wages; and**
- (ii) \$1,000 as compensation.**

C. Costs are reserved. The parties are encouraged to resolve costs. A timetable is set.

What is the Employment Relationship Problem?

[1] From September 2018 to March 2019 Janice Smith worked at the New Zealand National Eye Bank as a Co-ordinator. The Eye Bank is operated primarily by employees of the University of Auckland.

[2] Ms Smith makes a number of claims against the University including that she was unjustifiably dismissed. The University denies her claims.

How did the Authority investigate?

[3] An investigation meeting was held on 16 and 17 June 2021 and concluded on 11 August 2021. I heard evidence from Ms Smith and a friend of hers in support. An Eye Bank Co-ordinator (referred to as Ms Y) appeared under summons sought by Ms Smith. I also heard evidence from Louise Moffat (Eye Bank Manager), Professor Charles McGhee (Head of the Ophthalmology Department and Eye Bank Scientific Advisor) and Caelum Price (University HR advisor).

[4] Submissions were heard at the investigation meeting. The University also sought to file additional submissions after the meeting regarding a claim introduced during the meeting that s 81 of the Holidays Act 2003 was breached. Its submissions were received. The Authority sought subsequent comment on whether sufficient evidence had been heard regarding a University claim of unjust enrichment. This is referred to in more detail below. Both parties commented.

[5] As permitted by s 174E of the Employment Relations Act 2000, this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[6] The issues to be investigated are:

- (i) Was Ms Smith disadvantaged due to unjustified actions on behalf of the University and/or did the University breach its duty of good faith regarding:
 - (a) Misleading her about the nature of the co-ordinator role, failing to address her concerns about enucleations (see below), putting her mental health and wellbeing at risk and failing to provide a safe workplace; and/or
 - (b) Deducting money from her final pay?
- (ii) Was Ms Smith unjustifiably constructively dismissed?
- (iii) If Ms Smith establishes a grievance, what remedies (if any) should she be awarded?
- (iv) Did the University breach the relevant collective agreement (as those terms were incorporated in Ms Smith's agreement) regarding:
 - (a) Failure to provide a good and safe working environment (cl C6.1(a));
 - (b) Deduction made later than the pay period following when an absence occurred (cl H6.1); and/or
 - (c) Failure to agree on a finishing date (cl C4.1)?
- (v) Did the University breach ss 4, 5, 5A and/or 6(3)(c) of the Wages Protection Act 1983?
- (vi) Did the University breach ss 18, 19 and/or 81 of the Holidays Act 2003 and if so, should a penalty be ordered?
- (vii) Does the University owe Ms Smith arrears for holiday pay deducted?
- (viii) Does Ms Smith owe the University for holiday pay?

[7] I will deal with issues covering the same factual material together.

Was credibility an issue?

[8] There are some significant areas of disagreement between Ms Smith's evidence and that of other witnesses, particularly Ms Moffat, Prof McGhee and Ms Y. I found the latter witnesses to generally provided clear and consistent accounts of what occurred. On a number of occasions

Ms Smith contradicted her own evidence and that of Ms Y, for whom she had sought a summons. Ms Smith refused to make concessions when cross-examined on facts clearly established by the evidence. Where necessary, I prefer the evidence of Ms Moffat, Prof McGhee and Ms Y.

What does the Eye Bank do?

[9] The Eye Bank is an independent trust, affiliated with the Ministry of Health to provide corneas and donated eyes for transplant throughout the country. A 24-hour, 365-day service is provided, co-ordinating eye donations from hospitals and the community.

[10] Since the late 1980's, the Eye Bank has funded staff positions with the University being the employer. Prof McGhee as Head of Department is the line manager of the Eye Bank Manager Ms Moffat.

[11] Ms Moffat has Eye Bank co-ordinator, as well as management, duties. During Ms Smith's employment there was one other full time co-ordinator, Ms Y. Both Ms Moffat and Ms Y have been undertaking the work for many years. The co-ordination role includes the entire donation process from referral of a deceased potential donor, discussion and consent with next of kin, evaluation of medical history, surgical retrieval of eye tissue, transport to the laboratory, processing of tissue, storage, testing and evaluation of the cornea and distribution for transplant. Travel throughout the country at short notice is required, although most donations occur in the wider Auckland region. The national transplant schedule is also managed.

[12] The removal of the eyeball, or enucleation, from a deceased donor's body is undertaken as part of the retrieval process by the Eye Bank Manager or a coordinator. Prof McGhee spoke of this procedure being undertaken by a technician (such as the co-ordinators) rather than a nurse, doctor or mortician as in keeping with his long experience in the field in Australasia and North America.

[13] In 2018 it decided that an additional staff member was needed to manage the co-ordination work and share the on-call workload. The Eye Bank's work had increased over time. There was also the prospect of Ms Y retiring at some stage in the future.

What was Ms Smith's background?

[14] Ms Smith did not have formal qualifications as a health professional. She described herself as not having nursing or biomedical experience. She had previously undertaken a short course in phlebotomy (the extraction of blood) in order to undertake drug and alcohol testing on miners in Australia. Prior to returning to New Zealand she worked for an organisation which collected and processed donated bone femoral heads. In that role she initially collected the bone from hospital receptions, not going into operating theatres. Later she went into theatres to watch procedures but with the bone being removed by surgeons. Ms Smith had also picked up cord blood which had been collected by others after babies' births.

What was the appointment process?

[15] The new co-ordinators' position was advertised and on 6 September 2018 Ms Moffat, Prof McGhee and Mr Price interviewed Ms Smith.

[16] The three university representatives who attended the interview did not give exactly identical evidence regarding what occurred there. I did not find this surprising as they were giving evidence nearly three years after the interview had occurred. However, I generally found their evidence believable.

[17] There were two other applicants with health-related experience who were possible candidates but Ms Smith was decided to be the best fit for the role. She was seen as enthusiastic and willing to be trained on those aspects of the job she was not familiar with.

[18] A letter of 21 September 2018 set out specific terms and conditions for Ms Smith and recorded that in addition she was subject to terms based on the collective agreement between the Tertiary Education Union, the Public Service Association and the University. Ms Smith did not become a union member and so she remained on an individual employment agreement which incorporated terms from the collective agreement.

[19] The agreement offered was fixed term as there was an upcoming review to be undertaken on technical roles.

Did the University mislead Ms Smith about the role?

[20] The Eye Bank co-ordinator's role included enucleation from deceased donors' bodies. Ms Smith asserts that she would never have taken the role if she had known that was part of the job.

[21] Part of Ms Smith's first disadvantage grievance is an allegation that she was misled about that aspect of the co-ordinator role. The same allegation founds part of her breach of good faith claim. The University denies any misleading behaviour and also points out if such behaviour is found (which is denied), it occurred prior to employment commencing and can thus not be part of a personal grievance claim.

Ms Smith's application

[22] Ms Smith's application letter and CV referred to her having worked in operating theatres and having experience storing cord blood and tissue.

Advertisement

[23] There is a dispute about the availability of a position description possibly electronically linked to the job advertisement. But in any event the advertisement itself refers to the following "key element" of the role:

...retrieval, processing, storage, testing and evaluation of eye tissue...

[24] Further:

This unique position presents the opportunity to combine your interpersonal, surgical and technical skills.

...

Surgical and scientific aptitude is required, for which training will be provided.

[25] The advertisement refers to the role suiting a person with experience in the nursing or biomedical fields.

[26] Ms Smith relies on the 2019 re-advertisement of the position, after she left, being more explicit. It includes reference to "routinely dealing with deceased donor" and "surgically retrieving eye tissue from deceased donors".

Interview

[27] Questions prepared before the interviews included asking whether candidates would be able to undertake the surgical removal of eyes from a deceased donor, given training and guidance.

[28] Ms Moffat recalls phrasing the question slightly differently for Ms Smith given Ms Smith's previous donation experience in Australia. She says she still mentioned the removal of eyes from deceased donors. She had a sense of needing to distinguish this aspect from Ms Smith's previous bone donation role. Ms Moffat recalls a question about lab experience as well.

[29] Prof McGhee was certain that he had raised, with all candidates interviewed, that it was a requirement of the role to collect the eye from a deceased donor, as this was a critical part of the job. He asked Ms Smith a follow up question as she seemed so enthusiastic. She remained enthusiastic describing it as her forever job. It was explained to her that eye retrieval was not like the collection of femoral heads she had been involved with previously. She said she would require training and it was indicated that that would be given. He estimates that the discussion on this aspect of the role took a few minutes.

[30] Mr Price's recall was that Ms Moffat had been specific to ensure that the difference between this and Ms Smith's previous role was understood. According to him, Ms Moffat said to Ms Smith that she would be required to surgically remove eyes. This led to a follow up question by Prof McGhee.

[31] Ms Smith's evidence was that she was asked at the interview if she would be okay seeing dead bodies. She replied yes. When asked about the two references in the advertisement to "surgical" Ms Smith replied on one occasion "it did not register with me as surgical" and on another, as it "registered with me as lab work". However, when asked if she would refer to lab work as "surgery" she replied no.

[32] Ms Smith initially recalled "retrieval" being the word that had been mentioned. It was suggested that the word retrieval could be seen as picking up, rather than surgical removal. However, Ms Smith accepted that someone may have asked whether she believed she could

perform the surgical removal of eyes from deceased donors. She responded “definitely” when asked by the Authority whether her enthusiasm for the donor programme aspect (or potential aspect) of the role perhaps meant she did not focus on what was being said to her at the interview.

Conclusion

[33] There was little advantage to the University of fudging the issue about this aspect of the job. It was not desperate to fill the role immediately. Prof McGhee and Ms Moffat wanted to ensure that the person appointed understood the nature of the job, would fit into the team and make an on-going contribution to the work.

[34] I accept that “retrieval” is the standard term used to describe the recovery and removal of organs and tissues from deceased donors. It is used across donation services, here and overseas.

[35] It is possible that Ms Smith did not understand the application of the word “retrieval” in the context of eye donation. However, even on her evidence she accepts she may have been asked about whether she could perform the surgical removal of eyes from deceased donors. I can only conclude that she was wilfully deaf to the references on behalf of the University at the interview, along with the advertisement’s references to surgical skills and aptitude, to the need for the co-ordinator to collect, or surgically remove, the eye from deceased donors.

[36] Ms Smith was so enamoured with the donor programme potential part of the role that she was not listening.

[37] As set out below, Ms Smith’s reactions when she started the job and witnessed enucleations did not support her claim to have been misled. There was no suggestion expressed by her of misleading conduct until much later, despite her seeming to have a good working relationship with Ms Moffat and Ms Y. Her letter of resignation does not suggest that she was misled about the role.

[38] The University did not mislead Ms Smith about the role. The personal grievance and good faith claims in this regard are not established.

What occurred during Ms Smith's first few months at the Eye Bank?

[39] Ms Smith started work on 24 September 2018. This was not ideal timing for the Eye Bank as Ms Y was on leave but Ms Smith was eager and ready to start, having found accommodation in Auckland. Ms Moffat agreed to that date.

[40] On 25 September Ms Smith accompanied Ms Moffat on a donor retrieval, with Ms Moffat carrying out the procedure. Ms Moffat describes Ms Smith as not displaying any negative reactions including on the return flight, rather expressing that the experience was very positive, respectful and quite a simple process.

[41] The following few weeks were spent learning procedures and attending retrievals. Then in mid-October Ms Smith let the University know that her sister, who lived in Tauranga, had had a stroke. Ms Smith took two paid days off work.

[42] In about early November 2018 Ms Smith was told that her sister had cancer. There was discussion about an arrangement to assist her visiting her sister often. On days throughout November Ms Smith adapted her work practices, leaving early on Fridays and/or arriving late on Mondays in order to go to Tauranga to be with her sister. It appears this time was at least largely, made up elsewhere. Ms Moffat became aware that Ms Smith had discussed the Eye Bank's donation programme with people she had met at the hospital.

[43] Ms Smith later learned that her sister's cancer was terminal. The pattern of leaving early or starting late either side of the weekend continued in December.

[44] Ms Moffat and Ms Y were sympathetic to Ms Smith having to deal with these difficult events. Ms Smith's training and induction into the role was being affected. Given these hard times for Ms Smith, she mentioned to Ms Moffat the possibility of resigning. Ms Moffat indicated she valued Ms Smith's employment and wanted to see if they could work something out. In mid-December 2018 Ms Moffat and Ms Smith agreed that, in addition to Christmas leave, Ms Smith could have a month off work, the nature of which is discussed in more detail below. Ms Smith was away from shortly before Christmas until early January, returning to work for two days before starting on the month off, paid at her usual rate. No leave form was requested or submitted.

Did the University fail to provide a good and safe working environment?

[45] Ms Smith claims that the University failed to provide a safe workplace or respond to her concerns, with a focus on the requirement to undertake enucleations. Elements of these issues are included in the good faith claim, one of the disadvantage grievances and a breach of terms of employment claim, based on cl C6.1(a) of the collective agreement. That clause required the employer to provide “good and safe working conditions”. Overlapping with these claims is a claim that the University put Ms Smith’s mental health and wellbeing at risk.

[46] Ms Smith describes getting anxious when thinking about work, having difficulty sleeping and experiencing nightmares.

[47] In terms of grievance particularly, the question is whether on an objective assessment, did the University act as a fair and reasonable employer could have done?¹

The work environment

[48] Enucleations are an essential part of cornea transplants. These transplants provide a vital means of restoring hundreds of peoples’ vision each year. Someone has to undertake the removal of the eyeball. The evidence was that internationally technicians, who are not registered health professionals, usually carry out this function. They receive specialised on-the-job training, this being a very niche area with no courses available in Australasia.

[49] Some people could find viewing dead bodies and undertaking surgical removal of the eyeball upsetting. The Eye Bank staff were aware that undertaking enucleation could be difficult for some people and looked for any signs of concern.

Training

[50] A comprehensive induction and training programme had been arranged for Ms Smith. She has attended around six procedures, watching others undertake enucleation. She then participated in later enucleations although did not carry out the complete procedure by herself. She was always accompanied by one of the other Eye Bank staff.

[51] The training programme was envisaged to take at least six months. Ms Moffat and Ms Y were ready and willing to provide support and supervision to Ms Smith. However, Ms Smith

¹ The Act, s 103A(2).

was taking time off to enable her to spend time with her sister. There was uncertainty about when and for how long further absence would occur. Ms Moffat acknowledged that this was a very emotional and stressful situation for Ms Smith.

[52] Ms Moffat assessed it was better to be flexible and adjust the speed of the training to enable Ms Smith more space to be able to cope with her family situation.

What concerns were raised?

[53] Ms Smith argues that the University failed to address her concerns about enucleations.

[54] Looking firstly then at the evidence of the nature of her concerns and what was raised at the time, taking into account that Ms Smith was present at an enucleation within her first couple of days at the Eye Bank.

[55] At times Ms Smith questioned, in discussion with Ms Moffat and Ms Y, whether she would be able to undertake the enucleation work. She was reassured that it was early days and she would receive training. They did not observe concerning signs of distress or discomfort until the very end of Ms Smith's employment.

[56] Ms Y did not consider Ms Smith to express any abnormal or extreme concerns until the final enucleation Ms Smith attended with her in February 2019, which Ms Y acknowledged was difficult. Ms Smith did not express any concern to either Ms Moffat or Ms Y that she was not qualified for enucleation or that it was not what she thought she would be doing in the role.

[57] Prof McGhee described his interactions with Ms Smith as including two where she came to his office. At the first she expressed enjoyment in the role and did not mention concerns. The second involved Ms Smith enthusing about the education and promotion aspects of the work, after a trip to Tauranga. Prof McGhee emphasised the need to undertake all aspects of the role. No concerns about the retrieval aspect of the role were mentioned. Ms Smith explains that she "played it down", not wanting to spoil her chances of running the donor programme.

[58] Ms Smith accepted under questioning that she definitely downplayed her concerns as she wanted to be seen as capable. Ms Smith accepted that she did not raise at work any view that she had not been told at the interview about the requirement to undertake enucleations, or had otherwise been misled. She did not explicitly raise health and safety concerns or indicate

that she needed psychological assistance or other support. This includes not raising any concerns about enucleations with Prof McGhee or Mr Price.

[59] There is a question about whether it was enucleations which were really the key issue for Ms Smith. Her attitude to the work seemed to change once her sister was diagnosed with terminal cancer. Just before the month off to look after her sister, it seems Ms Smith became increasingly anxious about dealing with deceased bodies and particularly unable to cope being in the Auckland Hospital Coroners Mortuary when post-mortem examinations were undertaken. This was both Ms Moffat's impression and the feedback which Mr Price received during later discussions with Ms Smith after she provided her resignation letter. Neither were critical of Ms Smith for developing this concern given what was going on for her.

Was enough done?

[60] The people Ms Smith worked directly with appreciated that enucleations were a challenging part of the role. There was no expectation that Ms Smith started to undertake the procedure herself or to attend unaccompanied at any particular time.

[61] This was a workplace where discussion, including after difficult work events, was encouraged. Ms Moffat and Ms Y provided reassurance to Ms Smith. Both were sensitive to what it was like to be a new person in the role. They assured her that some initial discomfort was usual. I conclude that they both genuinely cared about how Ms Smith was settling into the job and wanted to support her. Ms Moffat describes having extensive discussions with Ms Smith over months including exploring Ms Smith's feelings and such discussions being individualised rather than just a standard discussion. Ms Smith acknowledges that Ms Moffat was sympathetic.

[62] The University has an employee assistance programme available and also offers additional training support on a case-by-case basis. However, despite looking, Ms Moffat did not observe any sign of trauma which would have warranted encouraging Ms Smith to attend the programme or making a referral herself.

[63] By the time she handed in her resignation, Ms Smith's work days only totalled around thirteen full work weeks, according to the University's records. She was given periods of time off to accommodate her needs. It decided to delay aspects of her training to accommodate that time off and her personal situation.

[64] When asked what else should have been done, Ms Smith replied it would have been nice to have more support for the stress and trauma, although not necessarily counselling. No medical or psychological evidence was supplied in support of her claim.

Conclusion

[65] As outlined above, I have concluded that the University did not mislead Ms Smith regarding the role.

[66] Ms Smith did not raise significant concern about enucleations for almost all of her employment. The impression gained by staff late in her employment is that it was exposure to mortuary situations after her sister became unwell which began causing difficulties for Ms Smith. Although her claim was not framed in this way, Ms Smith acknowledged that she found the morgue environment difficult. Being in that environment was a necessary part of the role for enucleations. It is possible that the University may have been able to do more if Ms Smith had been more upfront earlier on regarding the type and level of her concerns. However, she was not. The Eye Bank staff were caring, sympathetic and available to discuss her concerns.

[67] I conclude that the University did not act in an unjustified manner in its treatment of Ms Smith in this regard nor did it breach its duty of good faith or its obligation under her agreement.

What happened in February?

[68] About a week before Ms Smith was due back at work after the month away, she phoned Ms Moffat, who was in a meeting. Ms Smith was upset and angry, indicating that she felt bad about doing the work with donors, particularly at the Auckland mortuary. Ms Moffat suggested they talk in person once Ms Smith returned.

[69] On 18 February 2019 Ms Smith came back to work. She and Ms Moffat met on 19 February. Ms Smith expressed her feelings around surrounding working with deceased donors and particularly the Auckland Hospital Mortuary situation. She did not think she would get used to these situations over time.

[70] Ms Smith wanted to be able to work out the rest of her contract, about seven months, without having to undertake enucleations. She asked if the role could be split so she could operate the donor programme and someone else could perform the enucleations. Ms Moffat,

although expressing sympathy, indicated that that was not an option. She describes both of them as sad. Ms Smith describes there being much discussion during the meeting.

[71] Ms Smith said she was going to resign. Ms Moffat was disappointed at that although she could not see any realistic alternative if Ms Smith was unwilling to attend retrievals. Ms Moffat advised she would discuss the situation with HR to see what the next steps would be.

[72] The same day the two also talked about it not making sense for Ms Smith to stay and work out her notice period when there would be no benefit in her continuing her training. Ms Moffat said she would talk to Prof McGhee.

[73] For the next few hours Ms Smith kept asking if there had been any response from HR or Prof McGhee. Ms Smith then drafted a resignation letter expressing her regret and sadness. The letter states that Ms Smith found enucleation a very difficult task which she does not think she will be able to harden up to. She notes retrieval is a major requirement.

[74] Ms Smith claims that she submitted the resignation letter after Ms Moffat reported an agreement with Prof McGhee that any annual leave balance outstanding would be written off. I am not persuaded that that is the case. Both the Professor and Ms Moffat are clear that that did not occur. Prof McGhee was off site on Tuesday the 19th when Ms Smith resigned. Ms Moffat confirms that she had not spoken to Prof McGhee before Ms Smith's resignation was submitted. I prefer the evidence of Ms Moffat and Prof McGhee.

[75] The resignation letter refers to "...thank you and as agreed my last date being 27th February 2019". The letter is not expressed to be conditional on any higher approvals within the University.

[76] Later Ms Moffat and Prof McGhee discussed how to deal with the one month on pay Ms Smith had had off work. There was some feedback or discussion with Ms Smith, but I do not accept her evidence that a deal had been struck. However, she did agree to extend her notice period to Friday 1 March 2019, at Ms Moffat's request to allow further discussions and hopefully resolution.

[77] Discussion occurred between those involved, which now included Mr Price from Human Resources. The University regarded the one month as annual leave in advance which needed to be accounted for. However, ultimately Mr Price and Ms Moffat decided that reductions for

a week's sick leave (for the support provided to her sister) and a generous allowance of a week for Ms Smith's informal discussion at Tauranga Hospital about the Eye Bank programme would be made.

[78] Unsuccessful attempts were made to reach an arrangement agreeable to all. In particular, on 26 February 2019 a proposal was sent by Ms Moffat with Ms Smith finishing on 1 March, with what would otherwise have been paid as the rest of the notice period would be regarded as recompense for the leave. Mr Price replied that the University had a stance of not writing off debts.

[79] The next day, 27 February 2019, Mr Price emailed Ms Smith to confirm her outstanding leave balance and state that it would be recovered from her final pay. The two met that day to discuss options, including a repayment plan. Ms Smith did not agree to the plan proposed.

[80] On 28 February 2019 Mr Price, Ms Moffat and Ms Smith met. Ms Smith requested to work out an additional six week notice period. The University did not accept that as Ms Smith was not prepared to fulfil all the requirements of the job, particularly retrievals and enucleations.

[81] Mr Price emailed Ms Smith later that day reiterating two options; her last day of employment would be 1 March in which case the amount the University regarded as outstanding annual leave in advance would be deducted from her final pay or, she worked out one month and made regular deductions to pay of the amount owed.

[82] The email indicated that if Mr Price did not hear from Ms Smith by 4pm on 1 March 2019 the University would assume that she wished to proceed with the first option and 1 March would be her last day of employment.

[83] Ms Smith responded and did not agree to either option. She was unhappy with the approach and indicated she would not meet with Mr Price again. The University saw her correspondence as becoming rude and Mr Price's manager, the University's HR Manager, took over.

[84] The first of March arrived. Ms Smith did not attend work that day, although she was paid for it. Neither of the University's options had been accepted by Ms Smith. The HR Manager emailed in the morning indicating that unless Ms Smith accepted option 2 (one

month's notice with regular repayment), the University would proceed on the basis that 1 March 2019 was her last day.

[85] The HR Manager received an email from an employment advocate, not being the current advocate. The advocate sought Ms Smith's employment agreement and letter of resignation. Those were provided, along with confirmation that there was a deadline of 4pm that day for indication that Ms Smith wished to work out her notice. The advocate replied that Ms Smith's resignation was not valid and there was no mutual agreement about termination date. The HR Manager disagreed and indicated that the deadline remained. The advocate indicated that Ms Smith reserved the right to pursue various claims.

[86] On 5 March Mr Price wrote to Ms Smith confirming the amount to be deducted from her final pay.

[87] On 12 April 2019 a personal grievance is raised by the advocate acting at that time. The University responded. In mid-2020 another letter setting out the personal grievance was sent and the University responded.

[88] In August 2020 the claim was lodged in the Authority.

Was Ms Smith dismissed?

[89] Ms Smith brings a constructive dismissal claim. Such claims identify whether what was otherwise a resignation can really be seen as a termination brought about by the employer's actions. The categories are often identified as, but not restricted to, situations where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with a deliberate and dominant purpose of coercing the employee to resign; and
- (c) A breach of a duty by an employer causes an employee to resign.²

[90] In terms of the first category, although Ms Moffat discussed resignation on 19 February 2019 with Ms Smith, she did not give Ms Smith the choice between resigning or being dismissed.

² *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

[91] Moving on to the second category, the University did not follow a course of conduct with a deliberate and dominant purpose of coercing Ms Smith to leave. Rather the University believed the employment relationship would continue. During the Authority's meeting, Ms Smith accepted that the Eye Bank staff, including Ms Moffat, had been hoping that she would remain working there.

[92] For the third category to be established it is not sufficient for the employer's conduct to be inconsiderate thus causing some unhappiness to the employee.³ What is required is dismissive or repudiatory conduct; a breach of the employer's duty to the employee. If that is established, the questions are:

- (a) Did the conduct caused the resignation; and
- (b) Was the breach of duty sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing? Was there a substantial risk of resignation?⁴

[93] I have not found that Ms Smith was misled about the role nor that the University failed to provide a safe and healthy work environment.

[94] Enucleations were a core requirement of the role. The University was unwilling, not unreasonably, to establish a role tailored to Ms Smith's preferences. The University's conduct has not been shown to be dismissive or repudiatory. No breach of duty is established.

[95] I conclude that Ms Smith resigned voluntarily on 19 February 2019 having just returned from a month's time off and having told the University that she was not willing to perform a core requirement of the role. This was her choice.

[96] During the investigation meeting it was suggested that Ms Smith's resignation occurred in the heat of the moment. However, Ms Smith was adamant both at the time and during the Authority meeting that she was not going to undertake enucleations. Also, the timing of her decision does not assist her. She had had a month away from work, giving her time to think about what she wanted to do. She had rung the week before indicating she did not want to undertake some of the work.

³ *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC).

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] NZLR 415 (CA).

[97] Also, Ms Smith decided to put in her resignation letter despite Ms Moffat advising her that Ms Moffat would discuss the next steps with HR and that Ms Smith was to wait until the discussion with HR before doing anything further. She was offered a cooling off period but chose not to take it.

[98] Even if I had found that Ms Smith was constructively dismissed, I may have concluded that the dismissal was justified. Ms Smith was unwilling or unable to carry out one of the core functions of her role. The University had given her much support including the provision of substantial paid time off work. It was unreasonable to require the University to establish a new position focused solely on the donor programme, without any of the enucleation tasks.

Was Ms Smith able to withdraw her notice?

[99] It was suggested that Ms Smith either did, or should have been allowed to, withdraw her notice of resignation.

[100] Generally, when notice of termination has been given and the giver of the notice wishes to withdraw it, it is open to the other party to agree to it being withdrawn but they are not required to do so.⁵

[101] In the circumstances of Ms Smith being unable or unwilling to undertake a task, namely retrieval or enucleation, involving a significant portion of the role, I do not see any refusal to allow her to withdraw her notice as unreasonable.

Did the University and Ms Smith fail to agree on a notice period?

[102] This is an aspect of Ms Smith's breach of good faith claim and also the basis for the assertion that the University breached clause C4.1 of the collective agreement, as incorporated in Ms Smith's individual agreement. The University argues that by confirming Ms Smith's termination date as a date two days later than the "agreed" termination date referred to in Ms Smith's resignation letter, following extensive consultation with her, it complied with its obligations.

[103] The collective agreement's clause C4.1 states:

⁵ *NZ Labourers etc IUOW v Hodder & Tolley Limited* [1989] 1 NZILR 430 and *Stiffe v Wilson & Horton AC* 94/100, AEC 106/00, 5/12/00 at 21.

For employees other than casual and fixed term employees, written notice of termination shall be one month by either party but this may be reduced by mutual agreement. For casual and fixed term employees notice will be deemed to have been given at the time a finishing date is agreed. This shall not prevent the employer from summarily dismissing an employee for misconduct. Employees engaged on fixed term or temporary or casual employment agreements may agree with the employer to a notice period.

[104] As Ms Smith was on a fixed term agreement a finishing date was to be agreed. A timeline of discussion on dates was:

- Ms Smith's resignation letter refers to an "agreed" last day of 27 February
- Ms Smith then agreed with Ms Moffat to extend her notice period to 1 March
- After discussion with her about recovery of annual leave in advance, the University presented options of 1 March (as already agreed) or working a further one-month notice period (aligning with standard notice period for permanent employees)
- Ms Smith requested a six week notice period
- The University re-presented the one month option, advising that if that was not accepted it would proceed on the basis that her last day of work was 1 March.

[105] For Ms Smith it is argued that the agreement on a termination date with Ms Moffat was conditional on higher approval within the University and when that was not obtained, the agreement fell away. I do not accept that that was the situation.

[106] The 1 March date was agreed at an earlier stage. Subsequent discussions and communications proposed other arrangements but no other agreement was reached on those proposals. Good faith obligations support discussion occurring. The agreed date of 1 March remained. In her statement of problem Ms Smith confirmed that 1 March was agreed. There was no breach of good faith or the incorporated provision from clause C4.1 of the collective agreement.

Was the University entitled to deduct money from Ms Smith's final pay?

[107] Ms Smith makes several overlapping claims relating to the University's treatment of her January to February 2019 time away from work and the deduction from her final pay. These

are argued to amount to breaches of sections 4, 5, 5A and/or 6(3)(c) of the Wages Protection Act, sections 18 and 19 of the Holidays Act, as well as provisions of the employment agreement and to found an unjustifiable disadvantage grievance.

[108] The University deducted \$2,922.40 from Ms Smith's final pay which it saw as recompense for leave taken in advance of entitlement. After making allowances as outlined above, only two weeks of wages were deducted.

Nature of the time off

[109] Ms Smith acknowledges that she and the University agreed that she would be "absent from work on pay" from 16 January to 17 February 2019. She saw this as an arrangement that was "off the books" with two weeks' paid "compassionate leave" and the remaining being a swings and roundabouts arrangement whereby she could make up the time off at some indefinite future point. She did not regard any of the period as being annual leave.

[110] Ms Smith's evidence included the following:

- (a) When asked if it was agreed that she would get the whole month off paid due to her discussions with people in Tauranga about donation, she replied, yes and it would be worked off on her return;
- (b) When asked about the Tauranga work Ms Smith indicated it was an hour a day for a day or two. A follow up question whether three and a half weeks (or 145 hours) of her time off would have been made up on her return she responded in the affirmative;
- (c) She agreed she had a strong sense when she went to Tauranga that she would not be able to continue to do enucleations. When asked about what she thought would happen on her return Ms Smith replied that the Eye Bank would let her take over the donor/donation programme, splitting the role. However, that does not sit comfortably with her evidence that time would be made up with call outs and overtime, arrangements which seemingly related to the retrieval work; and
- (d) Ms Smith accepted she had reassured Ms Moffat that she would continue working on her return from Tauranga.

[111] The University claims that the paid time was annual leave in advance. The evidence in support is:

- (a) Ms Moffat confirmed to Ms Smith that she did not have any entitlement to annual leave but out of compassion the University would grant her an additional month's paid time off and it would be accounted for on her return. Ms Moffat emphasised to Ms Smith that the time off was dependent on her returning to the job and continuing her work. Ms Smith confirmed her intention to return;
- (b) Ms Moffat decided for compassionate reasons not to ask Ms Smith to fill out a leave form;
- (c) Prof McGhee's understanding was that the leave was annual leave in advance, although this was from his discussions with Ms Moffat as he was not directly involved in talking to Ms Smith on this topic; and
- (d) Mr Price worked with Ms Moffat to identify any days where she had agreed to Ms Smith off-setting her leave by working additional hours or had otherwise agreed to waive leave days.

[112] It is unlikely that an employee with three months' service would have been offered a month's paid time off without conditions. Ms Smith acknowledges that she would have had to "work" off the time, so it was not a gift.

[113] At the investigation meeting it was raised for the first time on Ms Smith's behalf that no leave form was filled out. Although that may not be fatal to the University's claim, it does reinforce Ms Smith's position that this was not annual leave.

[114] Clause 7 (annual leave accrual) of Ms Smith's terms of employment includes reference to "[a]ll applications for leave are to be discussed with your manager in the first instance and then submitted through our electronic employee self-service system for formal approval". This envisages submission before leave is taken. That did not occur here.

[115] Ms Smith also relies on clause G2.3 of the collective agreement, as incorporated in her agreement, which states:

... With the written approval of the employer an employee may take annual leave in anticipation of entitlement. The number of days anticipated shall not exceed the amount of accrued annual leave.

[116] This appears not to fit easily with aspects of clause 7 in the individual terms which specifies:

The University at its discretion allows anticipation of annual leave before it is accrued. If you apply for and are granted annual leave in advance of your accrued entitlement, and then subsequently resign or otherwise leave the employment of the University prior to accruing the leave you have taken in anticipation, the value of the anticipated annual leave shall be recovered in your final pay.

The agreement reached

[117] Ms Moffat and Ms Smith reached an agreement that Ms Smith would keep being paid at the ordinary basis during the month she was away from work looking after her sister. I conclude that it was not agreed that this was all to be compassionate leave but equally it was not explicitly agreed that it would be annual leave taken in advance. Rather the arrangement was that Ms Smith would make up the time in other ways. Ms Moffat likely saw sufficient leave accruing on Ms Smith's return whereas Ms Smith envisaged some compassionate leave with further work-related activity, talking to people at Tauranga Hospital and on her return working the remaining time off.

[118] This was a collateral arrangement not envisaged by Ms Smith's employment agreement.

[119] What was not agreed was what would happen if Ms Smith finished at the University before she had completed working off the remaining time. Some may consider Ms Smith should simply have agreed to a deduction in those circumstances, but I cannot put in place an agreement which the parties did not reach. Except in some limited circumstances which are not applicable here, the Authority does not have the power to fix terms of employment.⁶

[120] The question is then whether there was already a provision allowing the University to make a deduction for that time off.

Deduction under clause H6.1?

[121] For Ms Smith it was argued that the University had breached clause H6.1 of the collective agreement, which provides:

Notwithstanding anything contained elsewhere in this agreement the employer shall be entitled to make a rateable deduction from the salary of an employee for time lost

⁶ The Act, s 161(2)(b).

through sickness (other than as provided in the agreement) or default provided that such deduction shall be made not later than the pay period following that such deduction shall be not later than the pay period following that in which the absence occurred.

[122] The University did not purport to rely on this provision in making the deduction. Mr Price did not regard the clause as applicable as this was not a sickness or default situation.

[123] The provision gives the employer an entitlement to make a deduction but that does not mean that the clause was breached if there is some other basis on which to justify the deduction.

Deduction under clause 7?

[124] The Wages Protection Act prevents deductions from wages except as provided for in that Act.⁷ Deductions may be made with the worker's consent but not if the deduction is unreasonable.⁸

[125] The University justifies the deduction on the basis of clause 7 of Ms Smith's terms and conditions letter, which is set out above.

[126] The University asserts that clause 7 is more than a general deductions clause as it is specifically about deduction for anticipated leave from an employee's final pay. Specific deductions proposed to be made under a general deductions clause must be the subject of consultation with the worker.⁹ In any event, the University did consult with Ms Smith before making the deduction from her final pay.

[127] I do not accept that this provision covered the present situation where it was not agreed that Ms Smith's time off was anticipated annual leave. Even if I am wrong and this should be regarded as anticipated annual leave, there remain difficulties with the University's claim.

[128] The first is withdrawal of consent. Workers may vary or withdraw consent for the making of deductions by giving written notice to that effect.¹⁰ Employers must comply within two weeks where practicable or otherwise as soon as practicable.¹¹ There is an argument here that Ms Smith withdrew her consent.

⁷ Wages Protection Act, s 4.

⁸ Wages Protection Act ss 5 and 5A.

⁹ The Act, s 5(1A).

¹⁰ The Act, s 5(2).

¹¹ The Act, s 5(2).

[129] The second difficulty for the University relates to what Ms Smith's final pay was. The University decided to call Ms Smith's final two pays her "final pay" and deduct from that. This was because the last pay would have been small, too small to cover the deduction the University wanted to make.

[130] The final question would be whether the deduction was a reasonable one as required by s 5A of the Wages Protection Act.

Outcome

[131] The University should not have deducted \$2,922.40 from Ms Smith's pay as it did not have a sound basis on which to do so. However, I do not regard this as a matter which should lead to a penalty being imposed. Rather it is best dealt with as a disadvantage grievance. That avoids double dipping and recognises that the University understood it had a legitimate basis on which to make the deduction.

[132] Ms Smith was disadvantaged by not receiving the full amount for her last two pays due to the University's unjustified deduction action. In terms of lost wages or other money resulting from the grievance, the figure is \$2,922.40 gross.

[133] There was little evidence specifically focused on the effects on Ms Smith of this grievance, as distinct from the health and safety and dismissal claims. However, I accept that the reduction of a substantial figure from her pay towards the end of her employment was distressing for Ms Smith. A compensation figure of \$1,000 would be appropriate.

[134] I now assess whether Ms Smith should be found to have contributed to the situation giving rise to her grievance. To make a deduction for contribution her conduct must be blameworthy and causative of the situation giving rise to the grievance. Ms Smith's decision to resign in circumstances where she was not willing to be involved with a core component of the job was not blameworthy.

[135] No deduction for contribution should be made. The University is ordered to pay Ms Smith \$2,922.40 gross lost wages and \$1,000.00 as compensation within 28 days of the date of this determination.

Unjust enrichment

[136] In an alternative argument, if it was unsuccessful regarding the lawfulness of the deduction, the University sought a declaration that Ms Smith is required to pay it \$2,922.40. This was based on a claim that if the Authority ordered the University to pay Ms Smith that sum she would then have been overpaid and would be unjustly enriched.

[137] The prospect of an unjust enrichment was only raised in closing submissions. In the process of preparing this determination the parties' views were sought on whether this was a matter which could properly be dealt with now. The University considered that it could be. Ms Smith did not agree. I accept that view. Without wishing to be unduly technical, there are issues regarding an unjustified enrichment claim including defences to such claims which were not explored in evidence. The University is entitled to pursue that claim if it wishes to do so but that must be the subject of another application.

Did the University breach the Holidays Act?

[138] Ms Smith claims the University breached ss 18 and/or 19 of the Holidays Act. A penalty is sought. During the investigation there was also reliance on s 81 of the Holidays Act.

Taking and requiring holidays

[139] The taking of annual holidays is covered by s 18 of the Holidays Act. Section 19 allows employees to be required to take holidays if agreement cannot be reached on the timing of holidays.

[140] The assertion is that Ms Smith did not agree to take annual holidays from 16 January to 17 February 2019 and that the University did not give her the requisite notice to take her holidays in that period. I have found that the arrangement was not that Ms Smith took annual holidays in January to February 2019. By agreement she was permitted not to work but still be paid.

[141] The time is not correctly categorised as annual leave so the employer did not fail to allow Ms Smith to take holidays under s 18 nor require Ms Smith to take annual leave, thus there is no breach of s 19 of the Holidays Act.

Leave record

[142] Section 81 of the Holidays Act requires employers to keep holiday and leave records. For Ms Smith it is asserted that s 81(2)(g) was not complied with as the University did not enter in its records the dates on which annual leave was taken.

[143] The University relies on the phrase, leave which “has been taken”, submitting that this contemplates completion of the record after the leave has been taken. The record must be retained in written form or alternatively in a form or in a manner which allows the information to be easily accessed and converted into a written form.¹²

[144] As the time away from work was not annual leave, this provision is not relevant.

Costs

[145] Costs are reserved. Ms Smith has had mixed success, not having established constructive dismissal, some disadvantage claims or contractual or statutory breach claims, but succeeding at least in part on her deduction claim. Those matters are likely to be taken into account in any costs assessment.

[146] The parties are to seek to resolve any question of costs between themselves. If they cannot, Ms Smith shall have 14 days within which to lodge a memorandum of cost seeking costs. The University shall have a further 14 days to provide a response.

Nicola Craig
Member of the Employment Relations Authority

¹² Holidays Act, s 81(3)(b).