

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 136/10
5166952**

BETWEEN

JACQUI KAIN
Applicant

AND

PARNELL LABORATORIES
NEW ZEALAND LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Joanne Watson for Applicant
No Appearance for Respondent

Investigation Meeting: 24 November 2009 at Hamilton

Submissions Received: 14 January and 12 February 2010 from Applicant
9 March 2010 from Respondent

Determination: 24 March 2010

DETERMINATION OF THE AUTHORITY

[1] Ms Kain was employed as the North Island Area Manager for Parnell Laboratories New Zealand Limited (“Parnell Laboratories”) from 6 March 2006 until 16 December 2008 when she was dismissed by reason of redundancy. Ms Kain claims her dismissal is unjustified, and that Parnell Laboratories has breached its employment agreement with her by failing to provide written notice of redundancy, failing to pay bonuses and commissions, and when it made a deduction from her final pay.

[2] In its statement in reply Parnell Laboratories denied Ms Kain's claims and raised a counter-claim against Ms Kain for breaches of express and implied duties owed to the company. At the investigation meeting the respondent did not make an appearance. Prior to the Investigation Meeting, on 11 November the Authority was advised that Parnell Laboratories would not be attending the investigation meeting due to the company no longer trading or having any assets.

[3] At the commencement of the hearing Ms Watson, on behalf of Ms Kain, made an oral application for the counter-claim to be dismissed. The Notice of Investigation Meeting notes that where the applicant does not attend, the matter may be dismissed and costs may be awarded against the applicant. With respect to the counter-claim, the respondent becomes the applicant. Given the absence of any representative from the Respondent I have concluded that the Authority should do no more in investigating the counter-claim against Ms Kain. Instead, acting as I think fit in equity and good conscience, and confirming my oral decision at the investigation meeting, the counter-claim is dismissed.

[4] The issues for determination in this matter are:

- Was Ms Kain unjustifiably dismissed by reason of redundancy and if so, what, if any remedies will follow?
- Did Parnell Laboratories breach its employment agreement by failing to provide written notice of redundancy?
- What, if any commission and bonus, and holiday pay remains outstanding?
- Was \$509.96 unlawfully deducted from Ms Kain's final pay?

Background

[5] Parnell Laboratories is a wholly owned subsidiary company of Parnell Laboratories (Aust) Pty Limited. The Authority was advised on 11 November that the Australian parent company had been restructured on 1 July 2009 and that it was no longer active, had no assets, no employees and was no longer trading. The Authority was advised that as a result, Parnell Laboratories was also no longer trading, had no assets or employees and was in the process of being wound up and de-registered.

[6] At 10.00am on 24 November Parnell Laboratories remained registered on the New Zealand Companies Register and continues to be so as at the date of writing this determination. Ms Kain was aware of the circumstances of the company and chose to proceed with her personal grievance claim in the knowledge that enforcement of any orders may present difficulties.

[7] I consider Parnell Laboratories had no good reason not to attend the investigation meeting. The respondent lodged its Statement in Reply and Counter Claim after 1 July when it says it was no longer operational. Further, prior to the

investigation meeting the respondent sought an extension of time to file its briefs of evidence. Pursuant to clause 12 of Schedule 2 to the Employment Relations Act 2000 I proceeded to hear and determine the matter as if Parnell Laboratories had attended or been represented.

Was Ms Kain was unjustifiably dismissed by reason of redundancy and if so, what, if any remedies will follow?

[8] In reaching my conclusions under this heading I am required to scrutinise Parnell Laboratories actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[9] The test of justification does not change the longstanding principles about justification for redundancy¹.

[10] The Authority must be satisfied on two general points – that the business decision to make a position redundant was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Ms Kain redundant and otherwise act in a way that was not likely to mislead or deceive her, that is, in good faith?

[11] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*², cemented an employers right to:

...make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[12] Further, the Employment Court in *Simpsons Farms*³ reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees

¹ *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, [2006] 1 ERNZ 825.

² [1991] 1 NZLR 151.

³ *Supra* n 1.

redundant. A genuine redundancy is determined in relation to the position, not the incumbent⁴.

[13] Section 4 of the Employment Relations Act 2000 requires Parnell Laboratories to deal with Ms Kain in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[14] With respect to the process used by Parnell Laboratories, the duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[15] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd*⁵, the Court discussed the meaning of consultation in the context of redundancy and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ*⁶. In particular, the Court noted:

- (a) Consultation requires more than mere notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their views.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change or even start anew.

[16] On 8 December 2008 the company emailed a document to all its New Zealand employees outlining the financial situation of the New Zealand business. In that document Parnell Laboratories identifies a new strategic direction and seeks constructive submissions from employees to assist in its decision making. Ms Kain, through that correspondence, was notified that depending on the business strategy

⁴ *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739.

⁵ [1993] 2 ERNZ 429.

⁶ [1993] 1 NZLR 671 (CA).

ultimately agreed upon, some current positions may become redundant. Ms Kain made a submission within the stated timeframe.

[17] The 8 December document simply sets out a number of key factors which will be taken into account when Parnell Laboratories make any decisions with regard to the strategy moving forward. It does not go so far as to make any proposals with regard to a new structure.

[18] Ms Kain was invited to attend a meeting with other staff on 16 December where she was shown a power point presentation. The presentation included information that indicated there would be two positions available in the North Island. One was a Key Account Manager's position, and the other a Farm Business Development position. Only one of the existing three North Island sales positions was to be disestablished.

[19] This was the first time a proposed new structure was advised to Ms Kain. Immediately following this meeting Mr Reynolds met with Ms Kain individually and advised her of the decision to make her redundant. In providing verbal notice of redundancy, Ms Kain was provided with two alternatives: to terminate the contract immediately by payment in lieu of notice; or Ms Kain could elect to remain in employment but on garden leave for the duration of the one month notice period with continued use of the company car and a cash payment equivalent to her commission for September to December 2008.

[20] Ms Kain did not respond to the offers but left the meeting advising Mr Reynolds that she needed to seek legal advice. Before she left the meeting Ms Kain was required to hand in her mobile phone and her laptop, but was advised she could retain the company vehicle until 13 January 2009.

[21] While the document dated 8 December outlined in broad terms the new strategy, there were a number of factors which were still to be determined, for example the document stated that Parnell Laboratories still needed to identify what its key accounts were, where they were located, and how many account managers would be needed to service their needs. The 8 December document is clear that no decision about the number of key account managers had been made. Quite the contrary, the number of key account managers was specifically to be part of the review.

[22] Following consideration of the submissions from staff, Parnell Laboratories made a decision that only one key account manager was necessary in the North Island and that the lower North Island Area Manager would be retained. Parnell Laboratories failed to consult with Ms Kain about that decision and to seek her input about the impact on her position. Ms Kain was consulted over a broad strategy with regard to key account management but was never provided with an opportunity to have input to the proposed new structure. Neither was she provided with information about the criteria against which those to be selected for redundancy would be assessed.

[23] Given that the new structure was to have a direct impact on Ms Kain's employment, Parnell Laboratories were obliged to consult about the change and ought to have allowed Ms Kain the opportunity to contest the North Island sales positions that remained.

[24] There does not appear to be any reason why Ms Kain could not have been consulted on the criteria for selection for redundancy and its application, or given time to obtain representation or legal advice. Certainly there was no evidence from Parnell Laboratories as to the criteria used to select Ms Kain for redundancy and no evidence has been provided to justify her selection over that of any other sales representative. Had there been such consultation there may well have been a different outcome. In particular another employee with lesser service and a lesser number of key accounts may have been selected for redundancy before Ms Kain. I find therefore that Parnell Laboratories has failed to show that Ms Kain's redundancy was genuine.

[25] Even if there was a genuine redundancy situation, I am not satisfied that how Parnell Laboratories acted at the time was what a fair and reasonable employer would have done in all the circumstances. Ms Kain was met with an ultimatum without reasonable opportunity to get advice, be represented, or comment on the proposed new structure.

[26] It follows that Ms Kain was unjustifiably dismissed and she has a personal grievance.

Did Parnell Laboratories breach its employment agreement by failing to provide written notice of redundancy?

[27] The employment agreement between the parties required Parnell Laboratories to provide notice in writing. Ms Kain says the company failed to do this. At the time of Ms Kain's dismissal she was not provided with notice in writing. However, after having this omission raised by Ms Kain's legal representative, and on 14 January Parnell Laboratories provided a further one months notice, this time in writing, of the termination of Ms Kain's employment.

[28] I am satisfied the terms and conditions of Ms Kain's employment agreement with respect to written notice for redundancy has been met.

What, if any commission and bonus payments or annual holiday payments remain outstanding?

Commission and bonus payments

[29] On 11 April 2008 Ms Kain was advised that Parnell Laboratories had reviewed all remuneration packages and rather than increase base salaries Ms Kain's package would be significantly enhanced through the addition of a commission scheme which would approximate to 5% of her base salary, plus the addition of including the sales team in the Corporate Bonus Scheme which equated to 10% "On-Target-Earnings.

[30] On 13 October 2008 Mr John Reynolds, the Director of Sales and Marketing advised Ms Kain and others, that the September and later commissions for the third and fourth quarter would be suspended until the further results for the year were known. This decision had been made due to the poor sales results in New Zealand. In his email Mr Reynolds advised that the outlook at that stage, was that the business would fail to meet the plan by more than \$AUD500,000 leaving a hole in the profit result.

[31] Ms Kain has provided the Authority with a copy of the terms and conditions of the Bonus and Commission Scheme for 2008. Eligibility to participate in the Bonus and Commission Scheme was subject to Ms Kain successfully meeting the requirements of the Parnell Sales Performance Process. The document states:

Quarterly Company Bonus

Your bonus will be calculated quarterly based on the performance of the Parnell Company based on **Consolidated Sales** (AUS, NZ, International) **vs. Plan** and **Operating Profit vs. Plan** (Sales – COGM-Operating Expenses=Operating Profit). The sales and profit targets have a 50:50 weighting in the bonus calculation. Your bonus will be calculated as a percentage of your gross base salary.

Commission

A 0.5% sales commission will be paid monthly based on all direct and indirect sales of Parnell promoted brands to veterinary clinics in your territory – **CUE Injection, CUE Bullets, OVsynch, Kefamast and Key Injection**. Commissions will be calculated on the net sales value after any free stock or discounts have been taken into account. Direct sales to wholesalers are not included in the commission calculations.

All sales must be conducted in accordance with Parnell's sales policy including but not limited to adherence to the pricing policy.

CONDITIONS

Given the variability of the sales environment and promotional campaigns, Parnell New Zealand Ltd withholds the right to vary the *Bonus & Commission Scheme* at any time. This is to ensure that significant over performance or under performance that is due purely to forecast error does not unfairly impact upon staff or the company.

[32] In an email to Ms Kain on 6 January 200 Mr Reynolds confirmed that Ms Kain's commission payment due for the September to December period was \$2,194.85. In its statement in reply Parnell Laboratories claims commission payments were not required to be made as they were entirely discretionary.

[33] I find that Ms Kain is entitled to receive commission payments for the period September to December 2008. As advised to Ms Kain the Bonus and Commission Scheme was a change to her remuneration package and therefore formed part of her terms and conditions of employment. While the Scheme provides for Parnell Laboratories the discretion to vary the Scheme, because the scheme formed part of Ms Kain's terms and conditions of employment, Parnell Laboratories had a statutory obligation to consult in good faith with Ms Kain prior to any decisions being made to vary or withhold payments

[34] Further, the basis for the calculations of commission payments had to take into account the consolidated business results from Australia, New Zealand and International. There is no evidence from Parnell Laboratories to show that the requirements of the Bonus & Commission Scheme had not been met. Ms Kain is entitled to receive the outstanding commission and bonus payment.

Parnell Laboratories New Zealand Limited is ordered to pay to Ms Kain \$2,194.85 pursuant to section 131 of the Employment Relations Act 2000.

Outstanding Annual Holidays payment

[35] Ms Kain seeks payment of \$1,764.11 being holiday pay due but not paid at termination date. In an email dated 9 January from Mr Reynolds, Parnell Laboratories set out Ms Kain's annual leave balance. This email shows that Ms Kain was entitled to payment for 28.87 days. She was paid for 23.77 days. Parnell Laboratories have

provided no evidence to show why Ms Kain was not paid for all 28.87 days. I am satisfied Ms Kain has established her claim on the balance of probabilities.

Parnell Laboratories New Zealand Limited is ordered to pay to Ms Kain \$1,764.11 pursuant to section 131 of the Employment Relations Act 2000.

Was an unlawful deduction made to Ms Kain's final pay?

[36] Ms Kain produced a document which shows her final payment on 31 January 2009. That document indicates a deduction of \$509.96. In the letter giving notice of her dismissal, dated 14 January, Ms Kain is advised that her final pay would be paid less any monies owing to the company pursuant to clauses 6.7 and 15.6 of the employment agreement.

[37] Clause 6.7 of the employment agreement provides for vehicle expenses to be met by the company as far as they relate to business use. Clause 15.6 provides express consent to the company to make reasonable deductions from salary, including holiday pay on termination, for the value of any unreturned or damaged company property, holiday pay paid in advance, or any other debt owed to the company. The clause requires Parnell Laboratories to give written notice of its intention to make a deduction, setting out the reason for the deduction and the amount that will be deducted.

[38] Parnell Laboratories have failed to notify Ms Kain of the amount and reason for the deduction. In the absence of any evidence to the contrary, I find that the deduction was in breach of the employment agreement.

Parnell Laboratories New Zealand Limited is ordered to pay to Ms Kain \$509.96 pursuant to section 131 of the Employment Relations Act 2000.

Interest

[39] Ms Kain seeks payment of interest on the amounts awarded for outstanding commission and bonus payments, outstanding holiday pay and the deduction made from her final pay.

[40] I have exercised my discretion pursuant to clause 11(1) of the Second Schedule of the Employment Relations Act 2000 and order Parnell Laboratories to calculate and pay interest, on the commission and bonus of \$2,194.85, outstanding

holiday pay of \$1,764.11 and the reimbursed deduction of \$509.96 from 31 January 2009 until the date of payment at the rate of 4.5%.

Remedies

[41] Because of the view I have taken as to the lack of genuineness of the redundancy, the suddenness of the redundancy and the way it was carried out I am satisfied Ms Kain has suffered lost remuneration. Ms Kain lost 5 months salary which totals \$31,104.65 and which is to be reimbursed.

[42] Ms Kain also seeks reimbursement for the value of the company car which she did not have access to during her one month's notice period. I find it is just to award Ms Kain reimbursement at the rate of \$1,083.33 for the month.

[43] Ms Kain seeks a payment of \$20,000 for loss of dignity, humiliation and distress. Ms Kain gave compelling evidence as to the hurt and humiliation she suffered as a result of the dismissal. Another employee who had been employed for only eight months and had worked in the same territory as she had previously been working in, was retained by Parnell Laboratories without any explanations or opportunity to contest the position. Also, following her dismissal Parnell Laboratories made threats of possible police involvement and accusations that Ms Kain had breached her employment agreement.

[44] I find that Ms Kain was considerably distressed by the conduct of Parnell Laboratories toward her and I regard an appropriate award in all the circumstances to be \$10,000.

Summary of orders

[45] Parnell Laboratories Limited is ordered to pay to Ms Kain within 28 days of the date of this determination:

- **Outstanding commission and bonus payments in the sum of \$2,194.85 gross pursuant to section 131 of the Employment Relations Act 2000 plus interest at the rate of 4.5% calculated from 31 January 2009 until the date of payment;**
- **Unpaid holiday pay in the sum of \$1,764.11 gross pursuant to section 131 of the Employment Relations Act 2000 of the Employment Relations Act**

2000 plus interest at the rate of 4.5% calculated from 31 January 2009 until the date of payment;

- **Reimbursement of \$509.96 nett pursuant to section 131 of the Employment Relations Act 2000 of the Employment Relations Act 2000 plus interest at the rate of 4.5% calculated from 31 January 2009 until the date of payment;**
- **Reimbursement of wages lost as a result of the dismissal in the sum of \$31,104.65 gross pursuant to section 123(1)(b) of the Employment Relations Act 2000;**
- **Reimbursement of \$1,083.33 being the value of the company car during the notice period pursuant to section 123(1)(c)(ii) of the Employment Relations Act 2000.**
- **Compensation in the sum of \$10,000 for distress and humiliation pursuant to section 123(1)(c)(i).**

Costs

[46] I have received submissions on costs from Ms Kain and a response from Parnell Laboratories. Ms Kain seeks costs of \$6,888.75 plus disbursements of \$123.75. Ms Kain submits that her costs are reasonable given the extent to which she had to respond to the extensive counter-claim made by the respondent in its statement in reply.

[47] The usual reliance on hearing time is not appropriate in circumstances where a respondent has failed to attend an investigation meeting. Ms Kain has still been exposed to costs for her own preparation with regard to her claims and in preparation as much as she could, with respect to the counter-claim, for which no evidence was provided.

[48] In her submissions Ms Watson refers to letters of offer made throughout the process. The fact that these offers were made was confirmed in the respondent's reply to the submissions on costs, however, the respondent has not presented any copies of such offers. I have therefore been unable to consider whether those offers, for the purposes of setting costs, were reasonable or not.

[49] In the circumstances of this case, and taking all matters into consideration I conclude that a fair and reasonable award is the sum of \$4,000. I am not satisfied this is a case where a full award of costs should be made.

Parnell Laboratories New Zealand Limited is ordered to pay to Ms Kain \$4,000 being costs.

Vicki Campbell
Member of Employment Relations Authority