IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA170/10
5159900

	BETWEEN	JODIE KIDSTON Applicant
	AND	FEDERATED PACIFIC LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Max Whitehead for Applicant Bruce Murray for Respondent
Investigation Meeting:	2 December 2009
Determination:	14 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 24 November 2008 Jodie Kidston was told that her position as a designer and merchandiser for Federated Pacific Limited's clothing design and manufacturing business was to be disestablished.

[2] Her employment agreement required three months notice of redundancy and FPL's directors Warwick and Kim Owen made arrangements for Mrs Kidston to serve the notice from 24 November on a 'garden leave' basis rather than attend work throughout that period.

[3] By letter the next day FPL asked Mrs Kidston to take her annual leave entitlement and lieu days during that notice period. The leave was said to total 30 days: 21 days of accrued annual leave, four lieu days and a further 5 days of annual leave that would accrue during the notice period. Six of these days were to be taken

as part of a 'close down' over the Christmas and New Year period with FPL requesting the other 24 days be taken before 24 February 2009.

[4] Mrs Kidston consulted her family solicitor who prepared a letter to FPL questioning, firstly, the process followed in making the redundancy decision, secondly, the request for her to take her remaining leave during the notice period, and thirdly, arrangements for payment of both a summer bonus and a winter bonus which formed part of Mrs Kidston's remuneration package. FPL's letter of 25 November had said the summer bonus would be paid in December but made no reference to a winter bonus.

[5] There is a conflict of evidence over whether Mr Owen received or saw the solicitor's letter. He wrote to Mrs Kidston again on 12 December 2008 about the leave arrangements without referring to that letter. Mrs Kidston did not reply to Mr Owen's letters because she says that she thought matters were being dealt with through her solicitor. In what Mr Owen says was an absence of any reply to his letters of 25 November and 12 December, he then sent a further letter to Mrs Kidston on 20 January 2009 saying she was required to use her remaining leave before 24 February 2009. He relied on the provisions of s19 of the Holidays Act 2003 that allow an employer to give an employee 14 days notice of a requirement to take annual holidays where they have previously been unable to agree about when leave will be taken.

[6] Shortly before being told of the redundancy of her position at FPL Mrs Kidston had found she was pregnant and this news had been passed on to Mr and Mrs Owen before they told Mrs Kidston of FPL's decision. Having worked for FPL since May 2006 Mrs Kidston would have been eligible for paid parental leave (PPL) if she had remained employed there until closer to the time that her baby was due. However Mrs Kidston says being made redundant and then having to spend the three months notice period on garden leave meant she could not get another job with a different employer in time to accumulate the six months service necessary to again generate the entitlement to PPL.

[7] Following the expiry of her notice period Mrs Kidston raised a personal grievance with FPL. The substance of her grievance was that FPL failed to properly

consult with her about the prospect of redundancy and should have paid her for three months in lieu of notice rather than require her to spend that time on garden leave. Her claim for remedies included seeking payment for holiday entitlements which FPL had required her to use during the notice period and compensation for the loss of 14 weeks PPL.

[8] As lodged in the Authority Mrs Kidston's application alleged FPL had (i) breached the terms of her employment agreement by placing her on garden leave, (ii) unjustifiably dismissed her by carrying out the redundancy in an unfair manner, and (iii) breached the Holidays Act 2003 by requiring her to take leave in the notice period and not paying her for two public holidays worked in 2007. Remedies sought included payment of the winter bonus, compensation for the equivalent of 14 weeks paid parental leave, payment of her full annual leave entitlement without deduction for leave required to be taken during the notice period, payment for work on two public holidays, and compensation for hurt and humiliation.

[9] FPL denies acting in an unjustified manner or breaching Mrs Kidston's employment agreement or rights to holiday pay. It denies she was entitled to the winter bonus or that it should compensate her for the equivalent value of the statutory PPL payments.

Issues

[10] The issues for resolution by the Authority are:

(i) Was how FPL acted in deciding and telling Mrs Kidston about the redundancy of her position justified; and

(ii) Did FPL breach Mrs Kidston's terms of employment by arranging for her to serve the notice period on garden leave rather than paying her for three months in lieu of notice; and

(iii) Was FPL entitled to require Mrs Kidston to take leave during her notice period in the way that it did; and

(iv) Should FPL have paid the winter bonus to Mrs Kidston; and

(v) Should FPL compensate Mrs Kidston for the equivalent of PPL she might otherwise have received?

Investigation

[11] Written witness statements were provided by Mrs Kidston, her husband Terry Kidston, Mr Owen, Mrs Owen, FPL accounts manager Angela Mancer, FPL head of design Jane Brook and FPL national sales manager Nick Floyd. Each witness confirmed their statement under oath or affirmation at the investigation meeting and, where asked, answered questions from the Authority member and the parties' representatives. The representatives also provided oral closing submissions speaking to written synopses.

[12] In preparing this determination I have closely reviewed the written and oral evidence, relevant documents and the parties' closing submissions about that evidence and the relevant legal principles. In accordance with s174 of the Act, I have not needed to set out all evidence and submissions received but only those findings of fact and law necessary to the conclusions expressed on the issues for determination.

Was the redundancy fairly carried out?

[13] Mrs Kidston accepts FPL had genuine commercial reasons to choose to make her position redundant. However she says the redundancy was carried out in an unfair way, particularly without adequate consultation with her about the need for the decision and the selection of her position.

[14] She says she was given inadequate notice of a meeting on Friday, 21 November with Mr and Mrs Owen and was not properly informed about the prospect or risk of redundancy. She similarly asserts that notice given to her later on 21 November for a further meeting on 24 November did not properly inform her of the purpose of that further meeting so that she was not able to adequately prepare for it, including by arranging to have a legal representative attend with her.

[15] I prefer FPL's submissions that it met the general obligation of fairness in carrying out the redundancy of Mrs Kidston's position and did so in a way that she must have been, and in fact was, aware of its likelihood and given an opportunity to have input into FPL's restructuring process before that decision was made.

[16] That process began with a staff meeting on 17 October, attended by Mrs Kidston, at which there was discussion of the need for changes if the business was to survive. A receptionist role was made redundant that day. Mrs Kidston also had access to two emails to all staff sent on 20 October about that redundancy and the need for reduction in overheads. One email included the comment that "*tough times call for tough measures*". An email on 17 November announced a round of staff interviews to discuss ideas about "*financial efficiencies*" and a further email on 21 November announced the redundancy of a customer service representative position.

[17] Mrs Kidston was called to a meeting on 21 November at which she was asked for her thoughts on how FPL could save money. She was also advised that her position was at risk of redundancy.

[18] In that context, and with experience of having been made redundant from previous jobs, Mrs Kidston must have understood the purpose of the invitation issued to her on 21 November to attend a further meeting on 24 November and to bring a support person. When she indicated that she might want more time to arrange a support person, Mr Owen responded that FPL was "*more than willing to be flexible on timing*". Mrs Kidston chose to go ahead with the meeting on 24 November with her husband as her support person. In the intervening weekend she and Mr Kidston had discussed the prospect of the redundancy of her position being announced at the meeting.

[19] Notes made by Mrs Owen during the 24 November meeting record Mrs Kidston as saying she was "*not surprised*" by the redundancy decision – a comment she accepts making. Those notes confirm Mr Owen explained that the decision to make the position redundant was "*purely financial*" and not related to Mrs Kidston's performance of her work. Mrs Kidston was offered assistance contacting a recruiting agent and encouraged to telephone Mr and Mrs Owen with any questions but responded that she "*will be OK*".

[20] Accordingly I find FPL did properly consult Mrs Kidston about the prospect of redundancy, did provide an opportunity to prepare for the 24 November meeting, and was considerate in conveying the decision.

Was FPL entitled to have notice served as garden leave?

[21] Mrs Kidston says FPL breached the terms of her employment agreement by requiring her to serve a three month notice period on "*garden leave*". Instead she says FPL was obliged to pay her three months pay in lieu of notice if it did not want her to attend work during that time.

[22] The notice provision in her written employment agreement (clause 11.1) required three months notice and referred to "*full benefits being paid up to the date of termination only*". A redundancy clause (11.3) refers to being "*entitled to notice of termination of your agreement or payment in lieu thereof in accordance with*" the following clause:

> *Where the employee's employment is declared redundant by the employer, the employee shall receive not less than 3 months notice of the termination of their employment. In lieu of such notice an employee shall receive 3 months pay.*
>
> *Where the employee is given notice or voluntarily terminates his/her employment before the expiry of the notice period, the employee shall not be paid for the unworked period of notice or receive redundancy compensation.*
>
> *Except where provided within this clause, the parties hereby agree the employer shall not pay to the employee any redundancy compensation.* …

[23] Mrs Kidston submitted case law supports the proposition that she was entitled to be offered work in those circumstances. However I prefer FPL's submission that the cases relied on can be distinguished from the present matter. One example will suffice. Mrs Kidston submitted *McAulay v Sonocco New Zealand Limited*[1] establishes FPL could not use garden leave, in the absence of an express contractual provision, to prevent her working. Rather the employer had a positive obligation to provide work. However Mrs Kidston was not in the position Mr McAulay faced in that case where his employer was effectively found to be using garden leave over a much longer period to prevent him starting work for a competitor, that is as a *de facto* restraint of trade.

[24] More importantly I accept the evidence of Mr and Mrs Owen that garden leave was not imposed on Mrs Kidston. Although Mr Owen's letter of the next day refers

[1] [1998] 2 ERNZ 225.

to the garden leave as "*requested*" by FPL, notes taken by Mrs Owen in the meeting of 24 November suggest it was an option put to Mrs Kidston and one which she accepted. Given a choice of serving her notice period by coming into the office to work or staying at home, she chose the latter option. Significantly the letter of her solicitor dated 28 November takes no issue with being on garden leave for that period. Rather Mrs Kidston was content to wait out the notice period at home and – as noted in Mr Kidston's witness statement – take no further action until after her final pay on 24 February.

[25] Neither, in those circumstances, was there any breach of the specific terms of her employment agreement. The requirement for payment in lieu of the notice period would only apply if FPL wanted to immediately end the employment relationship.

Was FPL entitled to require Mrs Kidston to take holidays while on leave?

[26] On the day after being told of her redundancy, FPL sent Mrs Kidson a letter confirming the "*consequences*" of her redundancy. It included some information about her leave entitlements. Some 25 days of holiday (being 4 days in lieu and 21 days of annual leave) were identified as already due to her with a further five days calculated to accumulate during the notice period. The letter said six of those leave days were to be "*taken*" as a closedown during the Christmas period with all the 24 other days to be taken before her three month notice period ended on 24 February.

[27] A further letter on 12 December referred to 16 days of leave having been used – 5 days for some half days in November and December, 6 days for the Christmas office December shut-down, and 5 days for a period from 19 to 23 January. There is no real dispute about those days. A letter from Mrs Kidston's family solicitor on 28 November referred to agreement about the use of leave "*already booked*" for some part-time days in November and early December, the annual office closedown and some leave in January.

[28] What remains hotly contested is whether FPL was entitled to insist on the the remaining 14 days of leave entitlement being used between 4 February and 24 February 2009. It expressed this requirement in a letter on 20 January 2009, giving the 14 days notice required by s19 of the Holidays Act 2003.

[29] I find FPL was not entitled to extinguish Mrs Kidston's remaining leave entitlement in that way and she is entitled to be paid for those 14 days. I do so for the following reasons.

[30] Firstly, FPL chose to place Mrs Kidston on garden leave rather than work out her notice. It was a period in which she remained under her obligations as an employee to FPL and was, theoretically at least, subject to be called up or called in to work if required. While she was not 'working' while on garden leave, neither was she entirely free such that she was provided with the opportunity for rest and recreation as contemplated in the purpose of the Holidays Act (see s3(a)).

[31] Secondly, Mrs Kidston did not consent to serving her notice on garden leave on the basis that this would extinguish all her leave entitlement. She did not contest part of that entitlement being used for periods already applied for or agreed before she was told of the redundancy of her position – some half days in the weeks that her daughter started at school and a week's holiday in January. She and other staff had been properly notified in August of the compulsory Christmas closedown. However if Mrs Kidston had been told upfront that all her leave would have to be used in the notice period, she may well have preferred and sought the opportunity to work rather than be on garden leave.

[32] Thirdly, some of those leave days required to be taken were those accumulating actually only during the notice period. FPL was effectively requiring Mrs Kidston to take five days of leave during the period of service in which she was earning an entitlement to that leave. While an employer can agree to allowing annual holidays to be taken in advance – s20 of the Holidays Act – I do not read that or other provisions as allowing an employer to require such leave to be taken in advance of earning the entitlement to it.

Was Mrs Kidston entitled to be paid the winter bonus?

[33] FPL paid a bonus to staff twice a year based on "written" business – that was sales orders received for each fashion season. The size of the bonus was based on a percentage of sales target achieved. A summer bonus was nominally due in

September but usually paid near year's end. A winter bonus was nominally due in March but usually paid as late as May or June.

[34] Mrs Kidston was paid the summer bonus in December 2008 but FPL says it was not required to pay her the winter bonus due in March 2009. Mr Owen's evidence was that Mrs Kidston was not entitled to the winter bonus because she did not carry out tasks required to get the product to market once the orders were in. He said those tasks would typically be done in the winter season production period from November 2008 through to February 2009. Because of what he called Mrs Kidston's "*enforced redundancy*", other staff did those tasks in that period.

[35] Mrs Kidston had asked in the meeting on 24 November about the effect of her redundancy on the payment of bonuses but was told this would be addressed in writing. By letter the next day FPL confirmed the summer bonus would be paid, likely in December, but made no reference to the winter bonus.

[36] I find Mrs Kidston was entitled to payment of the winter bonus. She had worked on generating sales orders and was still at work in the earlier part of the production period referred to by Mr Owen. Putting aside January leave taken by her and other staff either by approved application or on a compulsory basis, her absence from work for the later part of that period was at FPL's instigation and not agreed to by her on the basis of foregoing the winter bonus payment. I accept that if she had known this was FPL's expectation she would have been more likely to have opted for working out the notice period as it would have added around $6000 to the total value of her remuneration over that three month period.

[37] However I also find that the bonus due to her is $5840, based on the actual sales as reported in Mr Owen's witness statement, rather than the $6280 she had claimed based on earlier sales figures available to her.

Should FPL compensate Mrs Kidston for missing out on paid parental leave?

[38] Mrs Kidston has what is essentially a "but for" argument that FPL is liable to make good the amount she might have received in PPL if she were not made redundant. But for having to serve out her notice period, she could have found a new

job in the early stages of her pregnancy and stayed working there long enough to qualify for PPL from that job.

[39] That argument fails on two levels. Firstly, there was nothing illegitimate about having to serve out the notice period with FPL. The three month notice period was a term of the employment agreement she had signed. She served the notice on garden leave but FPL could also have required her to work during that period. It was not required to pay her in lieu of notice so she could start work elsewhere.

[40] Secondly, PPL is a benefit provided by the state to people who meet the statutory criteria. It is not a benefit of employment which – if the redundancy had not occurred – would have been provided by the employer. Consequently payment for the value of that lost benefit could not be awarded as a remedy for a personal grievance under s123 of the Act.

[41] The reasoning and case law on this latter point was reviewed in the Authority's determination in *Huntley v Maataa Waka Ki Te Tau Ihu Trust.*[2] The case law includes the Employment Court decision in *Mackintosh v Carter Holt Harvey Ltd*[3] where Judge Travis found that the provision on remedies for loss of benefit, now at s123(1)(c)(ii) of the present Act, "*contemplates benefits arising out of the employment relationship and not benefits payable by the State*".

Determination

[42] For the reasons given above I find that:

(i) FPL's actions in deciding and telling Mrs Kidston about the redundancy of her position were justified; and

(ii) FPL's actions in having Mrs Kidston serve her notice period on garden leave did not breach the terms of her employment agreement; and

(iii) FPL was not entitled to require Mrs Kidston to take 14 days of holiday entitlements during the period of garden leave; and

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[2] ERA, CA74B/08, 22 September 2008, Member Doyle. See *Viegas v The Flower House Limited* (ERA, AA 193/07, 27 June 2007, Member Oldfield) at para [22] and *Green & Ors v Rendevous Hotels* (NZ) Limited (ERA, AA235/07, 6 August 2007, Member Urlich) at [70] for a similar conclusion and *Chiu v New Deli & Cafe Ltd* (ERA, AA394/08, 18 November 2008, Member Dumbleton) at [162]-[164] for a contrary view.

[3] Unreported, EC, AC2A/01, 11 July 2001, Judge Travis at [20].

(iv) Mrs Kidston should have been paid the winter bonus due in March 2009; and

(v) Mrs Kidston was not entitled to compensation for PPL she might otherwise have received.

[43] Accordingly, FPL is ordered to pay, within 28 days of the date of this detemination, the following amounts to Mrs Kidston:

(i) $5840 as a winter bonus; and

(ii) 14 days holiday pay at the appropriate rate.

Costs

[44] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, Mrs Kidston may lodge and serve a memorandum on costs no later than 28 days after the date of this determination. From the date of service FPL would then have 14 days to lodge a reply. No application will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority