

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kim Larsen (Applicant)
AND Parfums Christian Dior (New Zealand) Limited (Respondent)
REPRESENTATIVES Anthony Drake for the applicant
Ross France for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 7 March 2006
DATE OF DETERMINATION 27 April 2006

DETERMINATION OF THE AUTHORITY

Mrs Larsen's employment relationship problem

1. The applicant, Mrs Kim Larsen, says that her employer, Parfums Christian Dior (NZ) Ltd (Dior) unilaterally removed some of her duties without consultation or justification, failed to provide her with a safe workplace and excluded her from parts of the business, to the point where she resigned. She says that this resignation amounted to a constructive dismissal. Mrs Larsen also says that following her resignation her employer required her to leave her position without working out her notice and that this amounted to an unjustified dismissal. In addition Mrs Larsen claims that she was entitled to receive a bonus payment of \$5120.00, rather than the \$2181.00 offered by Dior.
2. In response Dior say that the reduction in her duties was agreed to by Mrs Larsen and was, in any event, of a temporary nature. They say that Mrs Larsen resigned from her position and that as she was taking a position with a competitor it was not considered appropriate that she continue to work for Dior during her notice period but was paid for this time. Dior says that Mrs Larsen's bonus was correctly calculated based on her performance and in terms of the company's bonus scheme.

Background

3. During the course of my investigation I heard a good deal of evidence regarding Mrs Larsen's employment with Dior and the circumstances which, she says, led her to resign. In the interests of brevity, and I hope without diminishing the import of the evidence I have heard, the following paragraphs set out only an outline of that evidence. I wish to reassure parties that I have taken note of all of the evidence in reaching my conclusions in this matter.

4. Mrs Larsen commenced her employment with Dior in April 2003, with the title of Business Development Manager. She says that she took the job because it contained a formal training component and that she had always wanted to be a trainer. She says that she had undertaken several training programmes to give herself a better opportunity for advancement in this area. The position description for the position contained three major components: In field coaching i.e. non - formal training time in the field coaching beauty consultants, formal classroom training and event management. There is some dispute regarding the level of each of these components. Mrs Larsen says that the coaching comprised approximately 70% of the role whereas the position profile suggests 90%. Mrs Larsen says that the formal training component comprised approximately 10% of her role.

5. According to Mrs Larsen the first year of her employment with Dior went well. However the absence of other staff resulted in Mrs Larsen picking up additional duties to cover temporary vacancies. During July and August 2004 a number of organisational/logistical errors occurred for which Ms Larsen believes she was held accountable, even though for the most part they were not within her area of responsibility.

6. On 20 August 2004 Mrs Larsen met with Ms Mary Bagatella, the Dior Training and Development Manager for Australasia, and Mr Gregory Fly, the company's New Zealand General Manager. At this meeting the parties discussed Mrs Larsen's workload and performance, in particular as this related to formal training sessions. All parties agree that the question of alterations to Mrs Larsen's job specification was not discussed at this meeting.

7. Ms Bagatella says that several days after the meeting of 20 August she contacted Mrs Larsen by telephone and proposed several alterations to her job responsibilities. She says that this involved removing most of the formal training to allow Mrs Larsen to concentrate on informal coaching. She says that she subsequently discussed these proposals with Mrs Larsen and with Mr Fly and Mrs Larsen agreed to the alterations. Mrs Larsen insists that she was stunned by the removal of the formal training component and that Ms Bagatella had demanded rather than proposed the changes. She says she did not immediately say anything in response as she was completely disheartened. She accepts that in a conversation with Mr Fly she did indicate that she was "relieved" by the changes but that this "relief" was because of the stress she had been under because of Ms Bagatella's close scrutiny.

8. On 17 September 2004 Ms Bagatella e-mailed Mrs Larsen an amended job description. This new job description was entitled Performance Development Consultant. On 22 September Mrs Larsen responded to this new job description saying:

*Dear Mary,
Thanks for the updated job description, it does give much clearer direction for 2005.
Why the title change, I was assured that this was not a demotion, but more in the way of clearer direction.*

Ms Bagatella immediately responded:

*Hi Kim, welcome back!
The is no change to your title, you are doing a great job out there! You are absolutely right the purpose was to have a more focused and clear direction.
I used the wrong cover page, it was the one I was working on before we decided on what your job title would be.
Sorry about this, I will amend it on Friday and send you the correct copy.*

Mrs Larsen says she did not immediately object to the new job description as she wished to run a formal training school beginning on 27 September 2004 to prove her ability in the training area. She successfully conducted this training and was complimented by Ms Bagatella on how well she had preformed.

9. During the latter part of 2004 Mrs Larsen says that several incidents occurred which made her feel increasingly stressed. These incidents included:

- The tabling of her new job description at a staff meeting with the incorrect job title. (Ms Bagatella insists that this was merely a mistake on her part)
- The removal from her of the issuing of certificates to successful sales staff (the company says that this was to relieve Mrs Larsen of an administrative burden)
- Another staff member was given the responsibility for running a Dior event at Sky City in October 2004.
- Ms Larson says that the number of e-mails she received dropped dramatically that she felt *frozen out* of the Dior management team. (the company produced a range of e-mails to demonstrate that this was not the case)
- Immediately prior to Christmas Mrs Larsen and Mr Fly had a public confrontation regarding whether or not Mrs Larsen should complete a shift at the Dior counter at Manukau City.

10. In November 2004 Mrs Larsen says that she was under increasing stress over the way in which the company was treating her. She approached her doctor due to chest pains and migraine headaches and was referred to a specialist cardiologist. She says she was very depressed. Between 9 and 16 January 2005 she says that she was in and out of accident and emergency due to respiratory distress and that her doctor suggested that she leave her job with Dior for the sake of her health.

11. 18 January 2005 Mrs Larsen returned to work from sick leave and advised Mr Fly that she was resigning to take up a new position. She says that while this new position was a “step backwards” she felt she needed to remove herself from the unhealthy environment at Dior. When she first advised him of her resignation she says that Mr Fly indicated that she could continue to work until 11 February 2005. However that evening Mr Fly telephoned her at home and advised her that he had consulted with (the Australian) head office. They had advised that because she was going to a competitor she should come in the next day, hand over her car and cell phone and that she would be paid for the balance of her notice but would not be required to work. She says she was humiliated by being so unceremoniously removed from her position and felt she was being dismissed.

12. Surprisingly, given her subsequent claim of constructive dismissal, on 19 January Mrs Larsen sent an e-mail to Ms Bagatella saying:

Dear Mary, As I am sure you are now aware, I have decided after much deliberation to move on in my working career.

Mary, I wish to take this opportunity to thank you for the help and encouragement in the past with the training role...again, thank you for everything and hopefully we will meet again in the future.

Regards always

Kim

13. After her departure from Dior Mrs Larsen’s husband contacted Mr Fly seeking payment of his wife’s bonus entitlement. After some delay the company advised Mr Larsen that a bonus of \$2181, of a potential of \$5,160, would be paid. Mr Fly provided a breakdown of the reasons for this level of bonus but, Mrs Larsen says she does not consider that the breakdown provided properly reflects her performance. Mrs Larsen contends that she should be paid the full bonus (\$5,120). She says

that for the year end 31 December 2003 she was paid the full possible bonus. She argues that as she was not given a proper opportunity to comment on or contest the level of payment offered she should be entitled to the full possible bonus for 2004. Dior argue that they have properly assessed Ms Larsen's performance during the 2004 year against her agreed performance criteria and that the bonus calculated is correct.

The issues for determination

14. There are three questions to be determined in this matter.

- Did the actions of her Mrs Larsen's employer, including in particular the removal of some of her duties and the alleged failure to provide a safe workplace, when taken as a whole, create such stress and pressure on Mrs Larsen that she had no option but to resign i.e. was the termination of her employment by way of constructive dismissal rather than resignation.
- Was the insistence by Dior that Mrs Larsen not work out her period of notice, and/or the manner in this was carried out, amount to an unjustified dismissal.
- Was Mrs Larsen entitled to receive a full performance bonus for 2004.

Constructive dismissal?

15. There is no doubt that some of Mrs Larsen's duties were removed. What is in dispute is the extent of the duties removed, whether or not the removal was temporary and whether or not Mrs Larsen agreed to these changes. Mrs Larsen says that she did not agree to the removal of these duties and that the duties removed were an important component of the overall position. She says that the company was aware of her strong desire to increase her training skills. On the other hand the company says that formal training was a relatively minor part of the role and that the change amounted to the removal of only 12 days of formal training sessions. The company says that Mrs Larsen was clearly not coping with the full range of duties and was struggling to fulfil other aspects of her role. They say the changes meant that Mrs Larsen could focus on the key areas of her job description, in particular coaching beauty consultants in the field.

16. The evidence of the respective witnesses regarding whether or not Mrs Larsen agreed to the alterations to her job description are diametrically opposed. On behalf of Mrs Larsen Mr Drake pointed out the Employment Court statements that, when assessing the credibility of conflicting witnesses, contemporaneous written notes may be determinative. He points to notes in Mrs Larsen's diary as evidence that Mrs Larsen challenged the removal of these duties with Mr Fly. However, more telling contemporaneous evidence lies in the exchange of e-mails at the time between Mrs Larsen and Ms Bagatella. Mrs Larsen thanked Ms Bagatella for the updated job description stating that it *give(s) a much clearer direction for 2005* and queried the change in job title saying that she had been ensured that the change was *not a demotion but more in the way of a clearer direction*. In her response Ms Bagatella reassured Mrs Larsen that she was *doing a great job* and that the purpose of the change was *to have more focus and clear direction*. It may be that Mrs Larsen was *stunned* by the removal of some of her duties and that this added to the stress she was under. However this exchange of emails suggests that the changes were the result of a discussion and that Mrs Larsen understood and accepted the need for the change. Mrs Larsen was (by her own admission) under stress. Dior readjusted her duties, with her knowledge and agreement, at least in part as an attempt to alleviate some of that stress.

17. Mrs Larsen also claims that, in addition to the removal of some of her duties, she was subject to a large amount of stress and that this stress affected her health to such an extent that she had no option but to resign from her position with Dior. This stress, Mrs Larsen says, included a heavy workload, the way in which she was treated by Ms Bagatella and, in the later stages of her employment, being “frozen out” of the management team. In response to questions during the investigation meeting, Mrs Larsen accepted that the increase in workload had been at least partially due to her voluntarily covering other positions over relatively short periods of time. I accept that, at times, Ms Bagatella may, from Mrs Larsen’s perspective treated her unfairly, but this is not reflected in the exchange of e-mails set out above. While I have no doubt that the relationship between Mrs Larsen and other members of the management team was at times tense, Dior, by the production of a number of e-mails, was able to demonstrate that she was not excluded from day to day interactions.

18. Evidence was produced to the Authority that Mrs Larsen had been approached regarding another position prior to Christmas 2004 i.e. several weeks before her final resignation. Clearly her confrontation with Mr Fly over hours of work immediately before Christmas and the illness she suffered over the Christmas break contributed to her decision to accept the new position. However there is no evidence that she approached Mr Fly to indicate that she was considering resigning unless her concerns were addressed. She presented Mr Fly with her resignation and shortly afterwards thanked Mrs Bagatella for her assistance and support.

19. Under all of the circumstances outlined above I do not accept that Mrs Larsen had no option but to resign. She accepted, albeit reluctantly, relatively minor changes to her job description. While she was certainly under some stress, and this stress contributed to her illness, not all of the stress was due to the actions or inaction of her employer. She chose to resign to accept an alternative position. Mrs Larsen does not have a personal grievance for unjustified constructive dismissal.

Actual dismissal?

20. Mrs Larsen says that Dior’s insistence that she not work out her notice amounted to an unjustified dismissal. She says that Mr Fly initially indicated that she could work out of her notice but, that evening, phoned her at home and told her she was to clear her desk by 11am the following morning and return her work car and cell phone at the same time. She says that, after clearing her desk as instructed she was left having to pay the cost of a taxi to get home. She says she was extremely humiliated and felt she was being dismissed. Mr Fly says that, after consulting with Dior’s Sydney office, he rang Mrs Larsen at home and suggested that because she was going to a competitor she should not work out her notice and should come in the next day to clear her desk etc. He says that Mrs Larsen did not appear unduly upset either at the time or the next day when she came into the office.

21. Dior point out that in her letter of resignation Mrs Larsen said that she would *work until 11 February or sooner whatever the Company policy deems*. Dior argues that Mrs Larsen did not challenge the company decision at a time, and was paid for the un-worked notice. On behalf of Dior Mr France points to the Employment Court decision in *Dimond Industries v Dravitzki* 13 November 1998, Travis J, W70/98 (unreported) and argues that, in this instance Mrs Larsen agreed to a waiver of the notice period and therefore there was no dismissal.

22. I do not accept that Mrs Larsen agreed to waive the period of notice. Dior was unable to point to other instances where employees have been required to vacate their positions because they were taking up a position with a competitor. It would have been a simple matter, if such a conflict of interests was likely to arise, for Mr Fly to have met with Mrs Larsen in person, explained the situation to her, and arranged for a more dignified exit including a proper opportunity for a formal,

agreed, announcement of her departure. Instead she was unceremoniously told to clear her desk, and return her car and phone. On the other hand Mrs Larsen suffered no financial loss from this inability to work out her notice. Mrs Larsen has a personal grievance for her unjustified dismissal in this regard. However any remedies to which she is entitled for this grievance must be restricted to those relating to the hurt and humiliation she suffered.

Bonus entitlement?

23. Shortly after her departure from Dior, Mrs Larsen's husband approached the company enquiring as to details of her bonus. After several exchanges Mr Fly advised Mr Larsen that Mrs Larsen was to be paid a bonus of \$2181 from a total possible bonus of \$5,160 (i.e. 10 percent of her salary). Mrs Larsen argues that she is entitled to receive a full bonus. Her basis for this argument is that

- For the year ended December 2003 she received the full possible bonus.
- She was given no opportunity to discuss how her bonus was calculated.

The company argues that the bonus calculation was based on their assessment of Mrs Larsen's achievements of her key performance indicators. Mr and Mrs Larsen were advised of the calculation of the bonus, including a breakdown of the key performance indicators, on 4 March 2005 and Dior assert that this represents an accurate assessment of her performance and the applicable bonus.

24. Mrs Larsen's employment agreement provides for the payment of *a performance bonus of 10% of base salary... on the achievement of the key performance indicators to be advised to you annually*. The company have provided Mrs Larsen and the Authority with details of the assessment of her performance during 2004 compared with her agreed key performance indicators. They point out that in her self-assessment in December 2004 Mrs Larsen accepted that *not all of the KPIs were met due to staffing changes and a slow retail year*. Because of her insistence that a full bonus be paid, there appears to have been little real communication between the Company and Mrs Larsen regarding the level of her bonus. Mrs Larsen's response to the company's advice regarding the proposed level of bonus was an e-mail from Mr Larsen on 4 March 2005 stating:

*In light of happenings between yourself and (Mrs Larsen) I think it would be advisable to pay the maximum bonus as soon as possible...
...I have taken legal advice on this matter and there have (been) some major mistakes made in the way that you have handled this whole affair.*

And on 7 March 2005:

Is this your final offer because if it is it bears no relation to facts and figures etc that we have...

25. Although there is no requirement in her employment agreement that Mrs Larsen and her employer should agree on the level of bonus to be paid, it is inherent in such agreements that a reasonable level of consultation take place and that, in the absence of agreement, a fair assessment be made. It is regrettable that Mrs Larsen appears to have been convinced that only a full bonus would be a fair outcome. Clearly the possibility of some lesser payment was envisaged by the employment agreement and, in this instance, justified. In the absence of any evidence to the contrary I accept that the level of bonus payment offered by Dior is a reasonable calculation based on their assessment of Mrs Larsen's performance.

26. Mrs Larsen is entitled to receive a bonus payment of \$2181. If this payment has not yet been made Dior should make this payment to her as soon as possible and in any event not more than 28 days after the date of this determination.

Remedies

27. As set out above I have found that Mrs Larsen has a personal grievance against her former employer, Parfums Christian Dior (New Zealand) Ltd, in that she was unjustifiably dismissed by the company's insistence that she not work out her formal notice period. I have also found that she is entitled to compensation for the hurt and humiliation she suffered as a result of Dior's action in this regard. Section 124 of the Employment Relations Act requires that I assess whether or not Mrs Larsen's actions *contributed in any way towards the situation that gave rise to (her) personal grievance*. The action by the company in terminating Mrs Larsen's employment prematurely (albeit with payment in lieu of notice) was unilateral. Mrs Larsen cannot be said to have contributed in any way to that action and it is therefore not appropriate to reduce the remedies to which she is entitled. However the remedies which are applicable are for the hurt and humiliation caused by the action of Dior in terminating her employment prematurely - not for any stress or illness which Mrs Larsen may have suffered prior to that point. Bearing in mind the relatively narrow nature of this grievance, I assess the appropriate level of compensation due to Mrs Larsen is \$2500. **In terms of section 123(1)(c)(i) the Employment Relations Act, Parfums Christian Dior (New Zealand) Ltd Dior is to pay Mrs Larsen \$2500 without deduction.**

Summary

28. By way of summary of the findings and orders set out above:

- The applicant, Mrs Kim Larsen, was not constructively dismissed from her employment with Parfums Christian Dior (New Zealand) Ltd.
- Dior did not breach its duty to provide Mrs Larsen a safe workplace and Mrs Larsen does not have a personal grievance in this regard.
- In not allowing Mrs Larsen to work out her notice, Dior unjustifiably dismissed her from her employment and she is entitled to compensation for the hurt and humiliation that that unjustified dismissal caused her.
- In compensation for the hurt and humiliation caused to her by her unjustified dismissal Dior to pay Mrs Larsen \$2500 without deduction.
- Mrs Larsen is entitled to be paid a bonus payment of \$2181 (as calculated by Dior) and not the \$5,120 she is seeking.

Costs

29. Costs are reserved and the parties are urged to attempt to settle this issue themselves in the first instance. If they are unable to do so Mrs Larsen may file and serve an application for an award respect to costs.

James Wilson
Member of Employment Relations Authority