

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 355/10
5290379

BETWEEN SUZANNE MICHELLE
LOGAN
Applicant

AND VETS ON WAIHEKE
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: J Robertson, counsel for applicant
R Parmenter, counsel for respondent

Investigation Meeting: 1 July 2010

Further submissions received: 6 July 2010 from applicant
7 July 2010 from respondent

Determination: 12 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Suzanne Logan says her former employer, Vets on Waiheke Ltd (VWL), dismissed her constructively and unjustifiably.

[2] Ms Logan says further that she has a personal grievance on the ground that VWL affected her employment to her disadvantage by its unjustified actions in: failing to provide a written individual employment agreement; failing to keep a 'valid' wage and time record; and failing to act in good faith by unilaterally altering terms and conditions of employment, failing to provide a safe working environment or to respond to concerns about safety, failing to respond to concerns about employment and failing to pay wages on time.

[3] Finally Ms Logan seeks penalties for breaches of the employment agreement and of ss 4, 65 and 130 of the Employment Relations Act 2000.

[4] VWL says Ms Logan's employment ended with her resignation. Ms Logan was not dismissed. It also denies the unjustified actions alleged and denies any liability for penalties.

Background

[5] Susan Crow and Brian Gartrell are veterinary surgeons. They, together with their spouses Denny Crow and Gael Gartrell, are VWL's directors and shareholders. The company was registered in the companies office on 13 August 2009, and carries out business as a veterinary practice on Waiheke Island.

[6] The practice was new. Preparation for its opening began some months before the company was registered. When staffing requirements were being considered Mrs Crow thought of Ms Logan, who is a veterinary nurse, and whom Ms Logan considered a friend. Mrs Crow asked Ms Logan if she would be interested in working as a veterinary nurse for the new practice and in using her administrative expertise in assisting to set up the practice.

[7] Ms Logan sought a change in her working life and was interested. In early May 2009 she travelled to Waiheke Island to meet Mrs Crow and Mr and Mrs Gartrell in order to further discuss the possibility of her employment. The parties took a 'getting to know each other' approach, exchanging information about their backgrounds as well as their views of how the practice would be run. As the other veterinarian who would be working with Ms Logan but who did not yet know her, Mr Gartrell gave an indication of his expectations with a view to an assessment of whether he and Ms Logan could work together. He told Ms Logan that he was used to carrying out most procedures without nurse assistance.

[8] Regarding the running of the practice, the intention was that that the practice be open for 7 days a week, one veterinarian be on duty at a time, and Ms Logan be the sole veterinary nurse as well as having responsibility for administrative support and

over-the-counter assistance. Her experience in setting up management systems for new clinics would also be relevant.

[9] Mr Gartrell said in evidence that the importance of front of house reception skills was also raised. He said these are among the most important and highly valued aspects of veterinary nursing, and that this aspect was discussed at some length. Ms Logan responded that she loved the 'shop' aspect of the job, was good at knowing what would sell, and gave some examples. Mr Gartrell commented that the imparting of information to clients is initially done by a veterinary nurse at reception, and there was never any mention that the practice intended to employ a dedicated receptionist. Mr Gartrell said the practice wanted a nurse/receptionist, and that was what was discussed. This account was not materially disputed and I accept it.

[10] For her part Ms Logan said in evidence that she expected to do everything from reception to cleaning, laundry, ordering stock and a number of other tasks which she listed. Some of the tasks were relatively menial, some were clerical and administrative, and some concerned animal and customer contact. Aside from Ms Logan's describing the position as nurse/practice manager it did not appear to me that anything in that account differed materially from VWL's expectations.

[11] In addition there was a discussion about Ms Logan's special interests. The discussion covered Ms Logan's private dog training business and ways in which that might be used in the practice, as well as the importance Ms Logan attached to being involved in 'technical' aspects of the veterinary work. This was a reference to her wish to be directly involved in aspects of the medical and surgical treatment of the animals. One example Ms Logan gave was the insertion of intravenous catheters in animals, with Mr Gartrell indicating he would be pleased to have a nurse capable of carrying out such tasks.

[12] Finally, the directors' roles were discussed. The veterinarians would provide the veterinary services, while their spouses would assist in the clinic in the weekends as well as having input in their own specialist areas. Mr Crow, for example, had IT expertise, while Mrs Gartrell had expertise in business administration and accounts. Otherwise all would work as a team and assist each other as necessary.

[13] There was a second meeting in or about June or July. Similar matters were discussed. By then a rate of pay of \$25 per hour had been agreed, but premises had not yet been obtained for the practice and no start date was discussed.

[14] Premises were secured in or about August. Ms Logan began her employment on 14 September, before preparation of the premises had been completed, and the practice opened for business later in September. Also by late September a school leaver had been recruited as a trainee, and was to begin her employment in or about late October.

[15] There was no written employment agreement as at the commencement of Ms Logan's employment. However an approach had been made to an arm of the New Zealand Veterinary Association requesting an agreement suitable for the practice, and a response was awaited. In addition Mrs Gartrell was working on sourcing a payroll system compatible with the accounting system to be used in the practice. The payroll system, too, was not in place as at the commencement of Ms Logan's employment so an alternative and largely manual system was introduced as an interim measure.

Events leading to the termination of employment

[16] Unfortunately the relationship between Mr Gartrell and Ms Logan did not proceed smoothly. There were professional disagreements between them about matters such as the method of taking a urine sample from a cat (in the course of the associated incident the cat reacted and bit Ms Logan's finger), a disagreement over whether clippers being used to shave an animal were blunt, and a disagreement over training a puppy.

[17] Mr Gartrell characterised the disagreements, including Ms Logan's reactions to the disagreements, as the result of Ms Logan's efforts to have procedures in the practice carried out her way. He was also concerned that she was demonstrating an unwillingness to assist with general reception duties including answering telephones.

[18] Ms Logan considered the disagreements involved evidence of unsafe procedures at the clinic, and that Mr Gartrell's conduct towards her amounted to

requiring her to carry out duties at a lower level than she had agreed to while preventing or diminishing her involvement in the 'technical' aspects of the practice.

[19] On 20 October Mr Gartrell sought an off-site discussion with his fellow directors in order to discuss his reservations about Ms Logan. It was not clear from the evidence whether Ms Logan also spoke to Mrs Crow on 20 October in order to raise her own concerns, but nothing turns on this.

[20] On or about Wednesday 21 October there was an incident while Ms Logan was assisting Mr Gartrell with a cat undergoing a dental procedure. The procedure had been completed but the cat was still under an anaesthetic when both Ms Logan and Mr Gartrell began attending to its fur. Mr Gartrell said he began to groom the cat, which is something he does regularly. Instead of waiting for him to finish, Ms Logan took another comb and began grooming the cat too. In the process, and according to Ms Logan, Mr Gartrell raked Ms Logan's hand with the comb he was using. Ms Logan said she had waited for Mr Gartrell to finish, while Mr Gartrell denied 'raking' Ms Logan's hand. Ms Logan said further that, in response to her query, Mr Gartrell informed her that he was used to doing everything by himself.

[21] Ms Logan raised the incident with Mrs Crow, who was not on duty that day. Ms Logan sought a meeting to discuss her difficulties, and Mrs Crow replied that the partners were meeting that night to discuss job descriptions among other things. Ms Logan expressed a concern that matters would be decided in her absence, but I do not accept the concern was well-founded as the partners were entitled to discuss their approach to possible employment issues before proceeding to any meeting with Ms Logan. Mrs Crow indicated she would meet with Ms Logan on Friday 23 October.

[22] Either that day or the previous day Ms Logan also expressed to Mrs Crow her concern that Mr Gartrell was asking her to carry out minor errands, and had an unfriendly demeanour. She asked Mrs Crow to clarify her role, because it seemed Mr Gartrell wanted only a receptionist. Mrs Crow attempted to reassure her, and agreed to clarify the job description or as a fall back to arrange Ms Logan's hours so that she worked mostly when Mrs Crow was on duty.

[23] By the afternoon of 21 October Ms Logan was still upset about the incident with Mr Gartrell, and said that is why she made an error dispensing an antibiotic. She discovered the error almost immediately and took steps to correct it.

[24] The partners' meeting went ahead that evening. Although they were already in the process of preparing a job description, they agreed an accurate description would be written in order to assist in clarifying Ms Logan's role. They also discussed other concerns, including the error in dispensing the antibiotic. They decided that Mrs Crow would speak to Ms Logan, and while Mrs Crow would point out there were some weaknesses in Ms Logan's performance the overall aim would be to resolve the parties' differences.

[25] Mrs Crow was on duty on Thursday 22 October, but was absent on a farm call when Mr Crow visited the clinic at about 8.30 that morning. From the accounts of Mr Crow and Ms Logan I consider it likely their conversation proceeded as follows.

[26] Ms Logan was anxious and asked what had happened at the meeting the previous evening. Mr Crow replied that he did not wish to discuss the matter as Mrs Crow would be doing so, but Ms Logan pressed him for an answer. Ms Logan should have waited for Mrs Crow and should not have pressed for an answer, while Mr Crow should not have allowed himself to be drawn into the unfortunate conversation that followed.

[27] The conversation turned to the previous day's events, before moving onto a discussion about the veterinary nurse's role. The partners had formed a view that Ms Logan was unwilling and resistant to carrying out duties other than nursing duties, and in particular was resistant to carrying out reception duties. These duties had been discussed with her, and were part of her role. Because of that view Mr Crow commented to Ms Logan that the primary duty was one of customer service, and that the manning of reception and the telephone system was crucial. Ms Logan did not accept that she sought to carry out nursing duties only, and listed in evidence a number of other essentially administrative duties which she had carried out. Even her evidence, however, indicated a less than enthusiastic approach to lower level customer service duties Mr Crow considered important. She accepted that her response to Mr

Crow's comment about customer service was to say she did not want the job then, and that she told Mr Crow she was hired as a veterinary nurse not a receptionist.

[28] Communication deteriorated to the point where Mr Crow thought Ms Logan was insisting on not being required to carry out critical customer service duties, while Ms Logan thought she was being required to carry out only customer service duties. Ms Logan became distressed.

[29] Mrs Crow returned to the clinic and noticed Ms Logan's distress. Ms Logan advised that she was upset about her role, to which Mrs Crow replied that the problems could be talked through. That a meeting would go ahead the next day was again discussed. Ms Logan resumed her duties, while Mr Crow began preparing a written job description.

[30] Ms Logan felt too ill to attend work the next day. At about 7 am on 23 October she sent a text message to Mrs Crow saying she felt unwell and could not come in to work. Mrs Crow replied saying 'feel better soon. Let me know if you need anything'.

[31] During the day Ms Logan concluded that the job she was doing was not the job she was offered, and believed the problems could have been avoided if she had a job description. She did not wish to do the job she believed Mr Crow had outlined as being her job, and she had no alternative but to resign. She also said in evidence she was hurt by Mr Crow's conduct the previous day and felt she could not trust anyone. She decided she 'could not work with these people'.

[32] Accordingly at 6 pm on 23 October Ms Logan sent a text message to Mrs Crow saying: "I have had a bit of a think about things 2day sue & I would like to resign giving a weeks notice. If this txt does not serve that purpose pls let me know & I will drop off a formal letter 2m. Monday is a public holiday so I will be in Tuesday and finish up next Friday afternoon. Rgds sue."

[33] On Sunday 25 October Ms Logan joined Mr and Mrs Crow on their boat. An attempt was made to keep the outing on a social footing, although Mr and Mrs Crow attempted to explain that Mr Crow's comments of 22 October had been made only because he was trying to help sort things out.

[34] Ms Logan reported to work the following week. On 27 October she found the written job description Mr Crow had worked on the previous Thursday, but which had not been presented to her. She believed the description was aimed at her.

[35] The document opened by referring to the boutique nature of the practice and the need for flexibility, and noted that the requirements were different from those of a large city or emergency practice. It emphasised customer service. Although the first sentence under that heading began: 'it is the first duty of the nurse/receptionist to take responsibility for fielding phone calls' it went on to provide considerably more and I do not accept that it had quite the limited effect for which Ms Logan contends. The remainder of the duties listed do not focus on the particular duties of a veterinary nurse, except that there was also a heading 'secondary duties' which read:

"In addition to the above duties (and always at the discretion of the on-duty veterinarian) the Nurse/receptionist may be required or encouraged to perform other veterinary nursing tasks. This may include such things as surgical nursing, bandaging, IV line placement, grooming, dental care, design and implementation of new procedures and protocols, ongoing training and courses, and various medical procedures as seen fit by the Veterinarian Partners."

[36] These duties were in essence the duties Ms Logan expected to carry out, and she was concerned to see them described as 'secondary duties'. Overall the contents of the description as she read it reinforced her view that she was expected to do a job other than the one she had been led to believe would be hers. However this did not affect her decision to resign as the decision had already been made.

[37] For his part Mr Crow said, and I accept, that the document was a draft for discussion purposes. It was not the final description for Ms Logan. It was intended to be adapted following discussion both for her position and as appropriate for that of the trainee who was soon to start.

Whether Ms Logan was dismissed

[38] A termination of employment which on its face is effected at the initiative of an employee can amount to a constructive dismissal if it falls within one or more of the following categories:

- (a) the employee is told to resign or be dismissed; or
- (b) the employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
- (c) a breach of duty on the part of the employer caused the resignation, and the breach was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing.¹

[39] Ms Logan relied on the third of these categories. In further support, the following passage from **Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW**² was cited:

“... in such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach ...”

[40] The alleged breach of duty concerned the offer of the position of veterinary nurse/clinic manager, followed by an arbitrary change in the position to one of nurse/receptionist. There were associated submissions that the parties' employment agreement had been repudiated in that VWL had demonstrated that it did not intend to be bound by the terms of the agreement, in particular the job description as Ms Logan understood it.

[41] There was an underlying consensus between the parties regarding the duties Ms Logan was to perform, although their emphasis on the duties and their approaches to performing them differed. In reality the parties' difficulties concerned the way in which Mr Gartrell and Ms Logan interacted, and a possible incompatibility between them. For example Mr Gartrell acknowledged that he had not worked with the assistance of a nurse before, while Ms Logan was eager to apply her considerable

¹ See: **Auckland Shop Employees IUOW v Woolworths (NZ) Limited** [1985] 2 NZLR 372 and **Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW** [1994] 2 NZLR 415, [1994] 1 ERNZ 168.

² [1994] 1 ERNZ 168, 172

practical nursing experience at a relatively high level. There was a gulf in the approach they took to their working together which needed to be addressed.

[42] I do not consider problems of that kind were the product of uncertainty about, let alone a unilateral change in, the job description or a repudiation of the parties' agreement. I also consider it unlikely that the availability of a written job description at the commencement of employment would have made any difference to the problems that developed.

[43] Further it would be premature to conclude at such an early stage of the employment relationship that, for example, Mr Gartrell would not allow Ms Logan to carry out any of the technical nursing duties she craved or that the duties were not to be made available to her. I do not believe Mr Gartrell intended to withhold access to the duties, only that he and Ms Logan needed to find a way to work together. There was certainly no suggestion that Mrs Crow would not be making technical nursing duties available. Finally not only had the employment relationship lasted only a few weeks, but the practice was so new that relatively little technical work had become available.

[44] To the extent that Ms Logan's 22 October conversation with Mr Crow was relied on as evidence of a unilateral alteration of the job description, I find inconsistency in Ms Logan's insistence on the one hand that Mr Crow and Mrs Gartrell were not her employers, and on the other with her attempt to press Mr Crow about the partners' meeting then to rely on what he said about her job. On her approach she could not, for example, have thought Mr Crow had any authority to instruct her that she was only to answer the telephones. Moreover such a limit on her duties would have been obviously unworkable, particularly once the trainee had commenced her employment.

[45] As far as the arrangement the partners had made for addressing the problem was concerned, Mr Crow spoke out of turn. Unfortunately the conversation pre-empted the arrangement under which Mrs Crow was to speak to Ms Logan and attempt to resolve the parties' difficulties in discussion.

[46] Finally, I do not consider the draft job description is evidence of a unilateral change in Ms Logan's job description or of an intention no longer to be bound by it. The document was no more than a draft. Ms Logan's resignation pre-empted any attempt to discuss and finalise it.

[47] For these reasons I find there was no breach or unilateral alteration of Ms Logan's job description and her employment ended at her initiative by her resignation. There was no dismissal.

Whether there was unjustified action causing disadvantage

1. Failure to provide a written employment agreement

[48] Ms Logan says she has a personal grievance on the ground of VWL's failure to provide a written employment agreement. Section 65 of the Employment Relations Act was cited in support. The section requires the individual employment agreement of an employee whose work is not covered by a collective employment agreement to be in writing, and to include provision for certain specified matters.

[49] I accept that in particular cases the presence of a written agreement could prevent a problem from arising. In going further to say the absence of a written agreement can found a personal grievance Mr Robertson cited a decision of the Employment Court in **The Wellesley Limited v Adsett**.³

[50] There the problem concerned a reduction in the employee's hours of work followed by advice to the employee that there would be no more hours available to him at all, against background issues of whether the employee was a casual or permanent employee and whether he was employed as a manager or not. These were the actions of the employer for which it was taken to task in a personal grievance setting. The penalty also awarded was for the failure to provide a written employment agreement, which was a different matter. The liability to a personal grievance and to a penalty is not concurrent. The court's comment on the effect of the lack of a written agreement was a reason why it ordered the payment of a penalty

³ Employment Court Auckland, Judge Shaw, WC 31/07, 3 December 2007

for breach of the Act, not a finding that the employer had engaged in an unjustified action amounting to a personal grievance.

[51] Similarly here, for the purposes of a personal grievance it was relevant to address the employer's actions in the course of the relationship, and the justification for them, rather than the different question of whether there was a written employment agreement. Those actions have not been made a part of this grievance.

[52] In any event I have already found it unlikely that the presence of a written employment agreement would have made any difference to the parties' difficulties here. I do not accept that the absence of a written agreement was the cause of any disadvantage Ms Logan suffered in her employment.

[53] For these reasons I do not accept that Ms Logan has a personal grievance on this ground.

2. Failing to keep a 'valid' wage and time record

[54] Ms Logan says she has a personal grievance on the ground of VWL's failure to keep a valid wage and time record. Section 130(1) of the Act requires an employer to keep a wage and time record containing the details listed in the section. A similar approach to that above applies to a personal grievance based on an alleged failure to keep such a record.

[55] Again the employer's actions are relevant, rather than the simple question of whether or not there was a wage and time record complying with s 130. Again the actions themselves, and the justification for them, have not been made a part of this grievance, and the disadvantage to Ms Logan caused by those actions has not been identified in that context.

[56] To the extent that relevant actions might be identified, I accept that a fully compliant system had not yet been implemented at VWL. However Ms Logan kept a manual record of her hours and days of work and there was a record of the payments she received. While it would have been preferable to have a compliant system

available at the commencement of employment, the practice was a small business start up, the matter was under action, and an attempt to maintain a record was being made.

[57] Beyond alleging the absence of the record required by s 130, the particular disadvantage relied on in support of Ms Logan's grievance was not specified. To the extent a disadvantage can otherwise be identified, concerns were expressed about the fact that the temporary payroll system in place meant that, on some 3 occasions, payments received a day late meant Ms Logan's overdraft limit was exceeded and a bank fee was incurred. There was also a concern about Ms Logan's uncertainty about the number of hours she had worked at times during her employment.

[58] The first of these is arguably no more than a breach of an obligation to pay on a specified date, which was explained by the timing of the receipt of details of Ms Logan's hours and by the delaying effect of the processing of the payment through the banking system. The second was not the result of an action of the employer's as Ms Logan herself was to keep track of her hours.

[59] For these reasons I do not accept that Ms Logan has a disadvantage grievance on this ground.

3. Failing to act in good faith

[60] The first element of the grievance based on the alleged failure to act in good faith concerned the alleged variation in Ms Logan's terms and conditions of employment, namely the variation in the job description. For the reasons discussed in addressing the dismissal grievance I do not accept there was a variation in Ms Logan's terms and conditions of employment.

[61] Secondly, the alleged failures to provide a safe working environment or respond to concerns about safety appear to arise out of Ms Logan's view of aspects of Mr Gartrell's veterinary practice, and because she received a minor injury of the kind I have described. These matters were not developed in any detail in the Authority and were expressly not relied on in support of the dismissal grievance, although they were set out in Ms Logan's detailed written complaint to the New Zealand Veterinary

Council. Since the complaints concerned aspects of veterinary practice, I was not asked to make a finding on their merits.

[62] Further, the concerns about safety were not raised as a disadvantage grievance in their own right, rather as an aspect of the failure to act in good faith. How this was so was not developed, but to the extent that the failure to act in good faith concerns Ms Logan's view of her interaction with Mr Gartrell in particular I do not accept that the disagreements about aspects of practice, and the unfortunate encounters that resulted, amounted to failures by the employer to act in good faith.

[63] Thirdly, Ms Logan alleged that VWL failed to respond to her concerns about her employment. I do not accept that was so on the facts. Attempts to respond were made, particularly by Mrs Crow, but the parties were unable to resolve the concerns.

[64] Finally on the facts as I have found them I do not accept that the occasions on which wages were paid a day late amounted to a breach of good faith on the part of VWL.

[65] For these reasons I do not accept that Ms Logan has a personal grievance on this ground.

Penalties

1. Breach of employment agreement

[66] The alleged breaches of the employment agreement were not identified in the statement of problem and were not addressed in submissions in the context of the claim for penalties. To the extent that inferences about the breaches relied on can be drawn from the foregoing, I do not accept there were any breaches. There will be no order for the payment of a penalty.

2. Breach of the good faith obligation s 4 of the Act

[67] In the present circumstances a penalty for breach of s 4(1) of the Act is payable if there was a failure to comply with the duty of good faith which was:

deliberate, serious and sustained; or was intended to undermine an individual employment agreement or an employment relationship.⁴

[68] For the reasons discussed above I do not accept on the facts that there was a breach of good faith at all, let alone a breach which meets the criteria for the payment of a penalty. There will be no order.

3. Breach of s 65 of the Act by failing to provide written employment agreement

[69] Liability to a penalty for breach of a provision in the Act is attracted only if the provision in question also provides for penalties.⁵ Section 65 does not contain a penalty provision.

[70] Section 63A also addresses written employment agreements and contains a penalty provision. However that section has not been relied on. There will be no order.

4. Breach of s 130 of the Act by failing to keep wage and time record

[71] In the circumstances described above I am not satisfied there was a failure to keep a wage and time record such that a penalty is warranted. There will be no order.

Costs

[72] Costs are reserved.

[73] The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority

⁴ s. 4A

⁵ s. 133(1)(b)