

BETWEEN NICKY McFARLANE
 Applicant

AND CHARLIE'S TRADING COMPANY LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Anthony Drake and Natalie Finn for Applicant
 Stephen Langton for Respondent

Determination: 13 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mrs Nicky McFarlane ("Mrs McFarlane") says she has a personal grievance for unjustifiable disadvantage. She also says that her employer Charlie's Trading Company Limited ("Charlie's") has breached its employment agreement with her. She asks the Authority to investigate and resolve the problems in her favour by making formal orders including reimbursement, compensation, interest, and arrears of wages.

[2] The parties were unable to resolve the problems between them by the use of mediation.

The facts

[3] Mrs McFarlane is employed by Charlie's as its National Sales Manager. The terms of her employment are recorded in an individual employment agreement dated 5 July 2004 ("the Agreement").

[4] The Agreement has these terms:-

*5.1 You will be paid a salary of \$95,000 (gross) per annum. Your salary is in full consideration of the requirements of the position. **Your salary may be reviewed annually but any review may not necessarily result in any increase to your salary.***

- 5.3 *You will receive a bonus of up to \$20,000 (gross) per annum if certain Key Performance Indicators ("KPI") are met. KPI's will be negotiated between us at the completion of your first three months of continuous service with Charlie's. KPI's will then be reviewed annually or more often as may be required by changing business circumstances.*
- 5.4 *You will have the use of a car (to be chosen by you from a selected range) for business and full personal use (within reason). Charlie's will pay for the costs of the car. You must ensure that the car is properly maintained and clean. The car must not be overloaded and must be roadworthy.*

The emphasis is added. The salary has since increased by \$10,000.

[5] There is also a *Charlie's Employee Handbook* which refers to remuneration reviews and performance incentive or bonus scheme.

[6] Mr Stefan Lepionka, Managing Director and Chief Executive Officer of Charlie's Group Limited ("Mr Lepionka") of which Charlie's Trading Company limited is a subsidiary, says Mrs McFarlane raised the issue of her "salary review" with him in July 2005. He asked Mrs McFarlane to prepare KPI's for discussion as part of "the review".

[7] On 1 August 2005 Mrs McFarlane wrote to Mr Lepionka by email asking for KPI's from him:-

Hi Stefan

I was thinking about my review on the way home and was wondering if you can give me a list of KPI's or topics under which you will be reviewing me so I can prepare beforehand?

As per the form I have been using with my team, it is usual to provide headings for me to review myself and then we jointly agree at the review.

Will you also be reviewing my salary at this meeting or is that separate?

I am keen to be well prepared.

[8] On 5 August 2005 Mrs McFarlane wrote to Mr Lepionka by email stating:-

Please find attached my review form complete with suggested KPI's. Let me know if they cover all key aspects my role, or if you would like to add anything.

[9] On 8 August 2005 Mr Lepionka responded:-

Hi, Thanks Nicky, A couple of things I would like added. 1. Sales- Your focus and style towards sales generally, your role as NSM growing the business top-line. 2. Company profitability.

[10] The same day Mrs McFarlane responded:-

Is number one not covered in the "general attitude" KPI? And number two in "CBM performance to budget and AC Nielsen performance" KPI? If they do not cover what you mean, can you please add them to the KPI column and send it back to me so I can prepare for our meeting?

*Given the points you are looking to add, **we definitely need to clarify and agree measures.** As this comes back to my initial question when we discussed budgets, "what is most important, profit or sales"? Also, I would have thought CBM a better measure of my performance than overall company profitability, as I can not control the expenses of the entire company. Perhaps, as with the sales team this could make up a small part of my measure? The sales team have 5% I am not sure I am looking forward to this meeting*

The emphasis is added.

[11] Again the same day, Mr Lepionka responded:

Hi Nicky, Don't be worried This is to be a positive experience but I guess there will be some good discussions. I agree with your points below and I think we can discuss my points raised under point 1.

[12] On 12 August 2005 the parties met to review Mrs McFarlane's performance.

[13] On 15 August 2005, Mrs McFarlane wrote by email to Mr Lepionka:-

As promised, please find attached my performance review. I have added a few comments in line with our discussions, but you need to fill in the blanks. We also need to agree a rating for the numbers now you have the information requested. Let me know when we should reconvene?

We also need to decide on my incentive measures.

The emphasis is added.

[14] On 28 August 2005 the parties met again. Mrs McFarlane's performance was assessed between 80 – 85% and she was given a salary increase of \$10,000.00. Mrs McFarlane says there was no agreement reached on performance measures or ratings. Mr Lepionka disagrees and says that Mrs McFarlane herself had complied the ten KPI's she was assessed on and which they discussed. He says the KPI's were agreed. The issue was not raised again until many months later.

[15] On 31 January 2006 Mrs McFarlane met with Mr Lepionka. Mrs McFarlane says Mr Lepionka told her the Board were looking at making changes and she would have no control over

them, and that her position of National Sales Manager may no longer exist and could become a Regional Sales manager role. She says that he advised her the Board were already looking in the marketplace for suitably qualified personnel to fill newly planned key roles. She says that when she protested about not being consulted, Mr Lepionka said if she did not like it she should not have got pregnant. She says that he then offered her four months salary in a lump sum to resign from her job and "go home, put her feet up and get out of the way while they made changes they needed to make".

[16] She says Mr Lepionka told her she would need to take at least six weeks off work before her baby was born and that she would not want to return after it was born. She says she told him she intended to work right up until her baby was due, then take maternity leave and eventually return to work. She says Mr Lepionka then told her she would change her mind once her baby was born and that a 9 to 5 job did not suit her. He said to her taking his offer would free her to pursue her housing projects.

[17] Mrs McFarlane says she told Mr Lepionka it was her decision what she chose to do regarding her maternity leave. She says she asked what her role would have been if she had not been pregnant. She says Mr Lepionka told her she would have been driving the changes. She also says that several times during this discussion he said he was excluding her from the changes because she became pregnant. She says he said he was offering her a way out. She concludes that it was clear to her that Mr Lepionka saw her pregnancy as an obstacle to her advancement with the company. She says they reached an agreement:-

The agreement at this meeting was that Stefan would put his offer for my resignation to me in writing by the following Friday.

[18] Mrs McFarlane says Friday passed with no confirmed offer from Mr Lepionka.

[19] As one would expect, Mr Lepionka presents a differing account of the meeting on 31 January 2006. He says Mrs McFarlane was speaking disparagingly about a colleague. He says she then raised her pregnancy and said she did not know what she would do. He says she is independently very wealthy and financially self-sufficient. He says she said she could work from home doing her property investment and that she was not sure if she wanted to come back to work for Charlie's. He says that given these comments, he asked her what she wanted to do. He says she repeated she could move to her parents in Levin and work from there. He tells the Authority he then commented that "we all have options and that everyone is replaceable" and that if she did not want to here she

did not have to be. He says he told her the company was looking at restructuring post acquisition of Phoenix Organics Limited. He says he told Mrs McFarlane he was not sure of the effect on her role but it could become an issue. He says in his evidence to the Authority:-

I did not however, say to Nicky that the company would pay her four months' salary to resign. What I discussed was that given that there was an element of uncertainty going forward about her; the fact that she was not sure whether she wanted to come back to work; and that she was due to go on maternity leave in four months' time; one option if she wanted to leave was that we could look at coming to some sort of arrangement with regard to her resigning. That was the choice. I did this because of her comments that she was unsure about whether she wanted to remain with the company. I thought it might help to give her some options, if this was to be her decision.

At no time during the conversation did I say that I was excluding Nicky from changes because she was pregnant, nor did I indicate that her pregnancy was an obstacle to her advancement within the company. These statements by her are wrong. The whole discussion arose out of Nicky's comments that she was not sure whether she wanted to come back and work for the company.

[20] The evidence corroborates Mrs McFarlane's version of events. She wrote by email to Mr Lepionka on 13 February 2006 as follows:-

Hi Stefan

It is now at least a week since you were going to have written details of the offer you made me and confirmation of our conversation of 13/01.

The lack of detail or consultation over changes alluded to in the conversation has caused me substantial stress and concern over the past 10 days. Particularly, your communication that I am to have no control over or input into those changes.

Can you please clarify your position in regards to our discussion as soon as possible.

[21] Mr Lepionka emailed Mrs McFarlane on 15 February 2006. He materially stated:-

...

So on that basis, I am not entirely sure that I can be specific right now in regards to your role or how the business changes will impact specifically on your role, and therefore, what this means for you personally. I realise that you would like a little more certainty in the short term with regard to potential changes etc, but I can only reiterate that Charlie's is moving forward as quickly as possible to ensure minimal disruptions to both businesses and obviously with as little impact as possible on revenue generation.

To give you an idea of timeframes, we expect to have recommendations to the board within the next 2-3 weeks with regard to proposed structure of the business, with a transition plan and change management plan in place in a similar timeframe. I am utilizing the HR services of Matrixone to assist with the planning and change management process and feel confident that we will manage the changes as smoothly as possible, but also ensuring that people impacted by any proposed changes are consulted and have the opportunity to voice their views and provide input. In any change process of this nature there is always a tension between people who are impacted wanting to gain certainty on their short term future as soon as possible, and the need for the business to ensure adequate and appropriate consultation takes place with all those affected – which can elongate the timeframe for final decisions a little more than we might want.

I am sorry that you have been feeling under pressure and stress at the moment. I do not want to add to this in any way and have in fact been trying to alleviate some of that stress by providing you with information at our meeting in late Jan to indicate there will be changes in the business and that some of those changes may impact on your current role. My intent in doing that was simply to put you "in the picture" so you were up to date and informed of the business events. It would appear in hindsight that the conversation we had at that time may have in fact contributed to your current concerns. However, please be under no illusions that you will be consulted on proposed changes; your input and feedback will be sought and considered as we go through the change process. You are a key member of the Charlie's sales management team and I value your opinion.

...

[22] Mrs McFarlane wrote again by email dated 16 February 2006:-

Hi Stefan

Thanks for the detailed response. However, you have not mentioned the offer you made to me in regards to the next 4 months. Can you please confirm your intentions in regards to this so I can consider my options with all the information at hand?

[23] Mr Lepionka replied on 17 February 2006:-

Hi Nicky

At this stage I am not in any position to be able to make you any offers with regard to the short term future. As I mentioned below, there is a business change management process in place and we need to ensure we go through the process logically and methodically to get the best result for the business and for all individuals who may be affected by proposed changes.

Therefore, whilst I would like to be able to provide a greater degree of certainty for you, at this stage I am going to have to ask you to be patient and wait until we are in a better position to understand how any proposed changes are likely to impact on your role, and you personally. As mentioned below, the timeframe for progressing is as quick as we can, and we hope that in the next 2-3 weeks we will have some further clarity on the proposed shape of the new combined organisation.

[24] Mrs McFarlane replied that same day:-

Thank you for your response. The offer to which I refer is that you made me in our conversation on 31/0. In which you offered me the next 4 months salary in a lump sum to, and I quote, "stay at home, put my feet up and get out of the way so we can make the changes we need to". We left this meeting with you agreeing to put the offer in writing so I could consult with my family and consider my options, then get back to you with a response.

I am still to see any information in writing. This is the matter on which I am seeking clarification?

[25] Mrs McFarlane says and the Authority accepts, that after her third email Mr Lepionka phoned her and asked whether she would be interested in meeting with one Ms Vicki Wilson, a human resource consultant from Matxione ("Ms Wilson") for an "informal catch up" but he did not elaborate any further.

[26] Mrs McFarlane did meet with Ms Wilson on 22 February 2006. I prefer Mrs McFarlane's evidence of this discussion.

[27] On 15 March 2006 Mr Lepionka wrote to Mrs McFarlane as follows:-

Thanks for the positive manner in which you have approached our discussions to date. I thought it helpful to put our discussions on paper to ensure we have both the same understanding with regard to handing over your current duties and responsibilities; and proposed activities to be undertaken by you for the period remaining at work before you commence extended leave.

As has already been discussed with you, Charlie's is concerned that the medical advice you have received from both your doctor and obstetrician has indicated that current work pressure and demands are placing potential risks to your health and that of your unborn baby. Your medical advisers have requested that your employer takes all required steps to ensure you remain healthy and rested up to the birth of your first child.

It is with considerable concern that you appear to have disregarded the advice provided by your medical advisers to take time off work and to rest. It has come to my attention that over the past few days you have had to take additional time off work due to back pains, and to attend a physiotherapist to assist with recurring back pain.

It is on the above basis that Charlie's has determined in the best interests of both yourself and your baby that we will take the following steps to act upon advice from your doctor and obstetrician:

1. *You will hand over all current responsibilities you hold as that of National Sales Manager (which you currently occupy), to Sheree Cassin (who will assume the role during your maternity leave);*
2. *The handover will commence on Monday 20th March and be concluded no later than Friday 31 March;*
3. *The handover will cover all aspects of the role, including team management, customer relationships and all work in progress;*
4. *Sheree will attend all performance, remuneration and any other staff related reviews (from Monday 20th March), to ensure she is brought up to speed with all relevant people related issues;*
5. *No remuneration, salary or bonus increases for your team will be signed off by me, unless prior approval has been granted;*
6. *Your title remains that of National Sales Manager, for the purpose of ensuring you return to a role of a similar nature at Charlie's in July 07;*
7. *You will be assigned other tasks and duties for the period 1 April to 2 June that enable you to gain greater flexibility over your working hours and periods of time spent at the office;*
8. *It is my expectation that these duties will cover aspects of sales analysis, review of market data and other information (full details will need to be developed in conjunction with Sheree Cassin and myself);*
9. *I anticipate that where possible, you will be free to work from home, assuming you deliver the information and business requirements in a timely and professional manner;*
10. *Your last day at work is 2 June 2007;*
11. *You will keep your vehicle, cell phone and laptop for your use during the period 1 April - 2 June 2006. However, all company equipment, vehicle etc must be returned to Charlie's prior to you taking leave as at 2 June;*
12. *Your current base remuneration of \$105,000 per annum will be paid in full to you during the period you are conducting 'alternative duties' from 1 April - 2 June;*

13. *No incentive component will be calculated and paid for the period 1 April - 2 June 2006; and*
14. *Your commission for the financial year 1 April 2005 - 31 March 2006 will be calculated during April once the full year numbers are confirmed.*

Nicky, I am aware that this may not fully meet all your expectations. However, I cannot in any degree of conscience allow you to continue to place your health and the health of your baby at risk. Therefore, I believe the above acts in the best interests of both you and of Charlie's.

Obviously I am aware you have been carrying a considerable workload over the past 3 - 6 months and I apologise for the additional pressure this has placed on you. As you well know, Charlie's operates in a very tight market against aggressive competition, which does necessitate that as a business we remain constantly alert to potential dangers and able to respond quickly and effectively to meet all new challenges.

Now that we are proceeding with the integration of the newly acquired Phoenix business, it is likely that the even greater workload will place further pressure on the incumbent in the role of National Sales Manager. Moreover, it is less than three months until you commence your extended leave and it is imperative that I have an individual in the role now that can carry through all the required integration activities, manage customer relationships, etc for the next 12 months or more.

Finally, Nicky I wish to ensure that the next three months are positive and productive for all concerned. On that basis, I want to ensure that all messages to staff, customers and colleagues are positive and proactive. It is in all our best interests to ensure the business moves forward and embraces change.

*Yours sincerely
Stefan Lepionka*

[28] On 5 May 2006 Mrs McFarlane wrote to Mr Lepionka by email as follows:-

Hi Stefan

I am due to have my baby in little over 4 weeks, hence am trying to tidy up a few ends, one of which is the payment of my incentive for the 12 months to 31 March 06 and holiday pay due in June 06. I sent Megan an e-mail to confirm what she would be paying me for May and June, to which I received an aggressive response from Nicky H accusing me of requesting Megan to authorize unusual payments?

Can you please authorize Megan to pay my incentive in with my May salary? Then authorize her to advise how much I will be paid in June and how she calculated it, as holiday is paid at different rate to my monthly salary, and I need paying for three days in June also.

I have discussed incentive payments and holiday pay with Megan on numerous occasions, so I am not sure why this is suddenly such a big deal??

[29] On 8 May 2006 Mr Lepionka wrote to Mrs McFarlane by email in reply:-

Hi Nicky

We are in the process of calculating your incentive payment which unfortunately will not be completed until mid next week. Sorry Nicky any incentive that you may be entitled to will not be paid in the May salary payment but will be paid as a separate one off payment after it has been calculated.

I am away overseas until 30th May and if you wish to discuss calculation of your incentive I will be available on this date alternatively you can discuss with Vicki.

I will ensure that Megan shows a full calculation of your holiday pay and payment for June, upon payment in the June salary run we will not be preparing your June salary or holiday pay in May.

[30] Mrs McFarlane responded by email the same day:-

Thanks for your response Stefan. I will need to have a meeting with you about my incentive as am not sure how you intend calculating it with no measures having been set?

[31] On 11 May 2006 Mr Lepionka responded by email:-

As stated previously I return from annual leave on the 30th May and I am happy to have a meeting to discuss your Annual Performance Review and your entitlement to your annual incentive on the 31st May @ Charlie's.

*Prior to this meeting you will need to complete your section of your annual performance review for us to ascertain your entitlement to your incentive. The result of your performance review is the measurement for your entitlement to your incentive for 2006, **as it was in 2005.***

Please forward your Performance Review to Vicki and me by 24th May for the period April 2005 – March 2006.

As discussed in your performance review last year (12 August 2005) your KPI's remain unchanged for the next year (I have attached a copy of last years NSM performance review) so you have a copy of the measures for your role.

(emphasis added)

Mr Lepionka tells the Authority that in hindsight, the emphasised phrase is not correct.

[32] Mrs McFarlane responded the same day by email:-

Hi Stefan

I am happy to complete an annual performance review with you, hence have completed the attached form. However, I am scheduled to have a caesarean on 6 June, assuming I don't go into labour before then, so 31 May for my review is leaving it a bit late. Also given my last performance review, I am reluctant to put myself in a potentially stressful situation that late in my pregnancy.

At this stage, I feel it important to clarify, a few points:

The measures in this form are for a performance review, not measures for my incentive. If you refer to an e-mail to you on 15 August 05 in relation to my last performance review, you will see this clarified

Incentive measures need to be objective and have a measurement scale set, neither of which applies to these performance KPI's. There is no set payout scale for these measures and what if we can not agree on a rating, as was the case the last time? How are you going to measure ACN share performance with not targets identified?

As I did for the reps and RSM's, clear incentive measure should have been set, discussed with me and agreed, this has not happened

You will recall in my last review that we never concluded the assessment and definitely did not agree on the measures or incentives, eg. I did not agree distribution should be a measure of an NSM's performance and again, no targets were set.

My incentive payout for 2005 was not based on this review, I was paid 100% based on the fact that no measures had been set. My incentive was paid in April 05 and this review not conducted until 12 and 25 August 05

This annual review only took place in late August, our financial year started 1 April, hence these KPI's were not even discussed until 5 months into our financial year

I am disappointed this has not been addressed sooner as you were aware of my pending deadline and your maternity letter advised it would be sorted once April was closed off. Let's start with the review, but I would suggest the measures for my incentive need further discussion.

I assume the meeting on 31 May will be with you and me only?

I am a little confused by your final paragraph?? The measures refer to which year?

[33] The correspondence eventually culminated with Mrs McFarlane rating her own performance as 42 out of 50 and Mr Lepionka rating her performance as 28.5 out of 50.

[34] Mrs McFarlane again met with Ms Wilson on 22 May 2006. I prefer Mrs McFarlane's evidence of this discussion. There was no resolution of the issues between the parties.

[35] A performance review meeting was arranged for 31 May 2006 but Mrs McFarlane declined to attend. The matter has remained unresolved.

[36] Mrs McFarlane took annual leave from 2 June 2006 until 3 July 2006. From 4 July 2006 she took parental leave.

A. Bonus 1 April 2005 – 31 March 2006

[37] Key Performance Indicators are referred to as KPI's and I shall use that same reference. No KPI's were negotiated by the parties at the completion by Mrs McFarlane of three months continuous service. I do not understand either party to be critical of the other for this omission.

[38] However, after her ninth month of service, Charlie's paid to Mrs McFarlane a bonus of \$15,000 for the period to 31 March 2005. Mr Lepionka says this is eight months but I say it is nine months (5 July 2004 to 31 March 2005). Mr Lepionka says Mrs McFarlane had done a good job reintegrating the sales department to deserve this payment. Because of this payment and because the parties had not agreed KPI's, Mrs McFarlane claims the full bonus for the period 1 April 2005 to 31 March 2006. Charlie's has declined to make payment on that basis.

[39] Mrs McFarlane stated her position on this claim in an email she wrote to Ms Wilson dated 23 May 2006:-

No incentive measures or payout scale was set for the period of 1 April 05 to 31 March 06, hence numbers and results are now irrelevant Incentive measures can not be set retrospectively after the conclusion of the measured period My incentive to 31 March 05 was paid out in full (100%) under exactly the same circumstances, ie. No measures were set I have given 100% to everything I have done at Charlie's over the past 12 months and believe I have more than earned my incentive For these reasons, I am expecting a 100% payout of the \$20,000 incentive. If I have come across as aggressive in regards to this incentive payment it is because I have had to fight for everything in my time at Charlie's and, it seems, I was corrects in assuming this would be no different.

[40] Although not specified, both parties accepted the bonus period ran from 1 April to 31 March. They also refer to clause 5.3 as an incentive, but that is strictly not correct. The clause refers to a "bonus". The bonus clause is very simple, probably too simple. It gives an entitlement to Mrs McFarlane to a maximum bonus of \$20,000.00 each year. The benefit is hers in the form of the entitlement, the burden is Charlie's in terms of a liability to pay. The only uncertainty each year is the quantum. The clause does not specify when the year runs from or how the KPI's are to be applied. It prescribes, as an imperative, that KPI's will be negotiated between the parties.

[41] "Negotiate" does not mean "agree" and there is somewhat of an ellipsis in that the clause takes for granted that the said "negotiations" will ultimately result in concluded or agreed KPI's. As this case clearly demonstrates, assumptions are dangerous. I conclude that it is necessary to read the word "negotiate" in the clause as also requiring agreement. KPI's were never negotiated between the parties at the completion by Mrs McFarlane of three months continuous service. The time for satisfaction of the requirement is now long passed.

[42] However, the clause does refer to KPI's being reviewed on two distinct occasions. Firstly at least "annually" and then additionally, more often *as may be required by changing business circumstances*. It is arguable that KPI's must already exist for only that which exists can be reviewed. If this is correct then it would follow that the bonus clause could never operate because there was only one time when KPI's could be set and when that did not occur, they could never be set at any later time. That is a very strict literal interpretation arising because of the word "review". It is also an interpretation which is contrary to what the parties now seek to achieve. Neither of them deny an entitlement of some kind and they participate now to achieve resolution of quantum. I proceed giving effect to that intention and adopting a liberal interpretation that "review" permits the parties to compose or establish KPI's for the very first time, outside of that set contractually.

[43] Mr Lepionka says Mrs McFarlane asked about her "salary review" in July 2005. His evidence is that he asked her to prepare KPI's for discussion as part of "the review". What then

followed was a process about salary review and so I find that the parties then proceeded to conduct themselves in a salary review pursuant to clause 5.1.

[44] I find that Mr Lepionka considered the KPI's for salary review purposes the same KPI's for bonus purposes. Mrs McFarlane clearly held a very different view and she made it clear she considered the two processes quite different. On 15 August 2005 she advised Mr Lepionka:-

We also need to decide on my incentive measures.

[45] Mrs McFarlane's view that the two processes were separate and independent was clear to Mr Lepionka from this point. Prior to this advice, her position had been that the KPI's (irrespective of purpose) were not sufficiently objective in the sense that they were not "measurable".

[46] Mrs McFarlane had initiated the process for "negotiation" and the next step was Charlie's. I find that Mr Lepionka did nothing to challenge her view and he did not reject it. It was not until many months later on 11 May 2006 that he wrote:-

The result of your performance review is the measurement for your entitlement to your incentive for 2006, as it was in 2005.

[47] He has now resiled from that final phrase, and it was equally as wrong then as it is now. I find Mr Lepionka knew it was incorrect and he chose to communicate this position to Mrs McFarlane knowing it was incorrect. Charlie's was obliged to deal with Mrs McFarlane in good faith and fairly and reasonably. It was obliged to be responsive and communicative. The failure to communicate its rejection of Mrs McFarlane's position was not responsive or communicative. It was a contrary to the duty of good faith and the implied terms of employment owed to Mrs McFarlane.

[48] The salary review process is not prescribed as that required to ascertain Mrs McFarlane's bonus entitlement. The quantum of bonus is determined by qualifying criteria as negotiated between the parties, but there is nothing prescribed about how the KPI's are applied to yield the entitlement. The assessment of how much to pay may be called a "review" and I find that it is Charlie's prerogative to determine the quantum according to the agreed criteria. Charlie's has a discretion about how much to pay and Mrs McFarlane has no place in that "review" process. She has a part only in the formulation of the criteria.

[49] While Mr Lepionka tells the Authority KPI's for bonus purposes were agreed with Mrs McFarlane I do not agree. It is clear that Charlie's considers that the KPI's for bonus purposes must logically be the same as those for salary review (determined by performance review), so that when Mrs McFarlane participated in the salary performance review she would have appreciated the performance review served two purposes - to assess both her salary review and bonus entitlement. I have two views about that.

[50] Firstly, salary review and assessment of bonus are not necessarily the same and nothing in the Agreement says they are and so it is not to be assumed they are. Secondly, the review process in determining the quantum of the bonus is an entirely different exercise from the composition of qualifying criteria or KPI's. The formulation of the criteria and the assessment of quantum according to those criteria should not be a contemporaneous process. The bonus criteria must be established before review so that they are able to influence performance. This the Authority finds is the reason why the Agreement provides as an imperative that the KPI's were to be agreed after the first three months of continuous service - so that they would be relevant and known for future performance and to have an influence on it. Perhaps the point is best made this way – the rules are best sorted out before the game is played. It is a completely futile exercise to make the rules of the game after the game has been played. I agree it is unfair to attempt to agree criteria retrospectively. In my view, that is where these parties presently find themselves.

[51] It may well be that Mrs McFarlane could be taken to have agreed KPI's for salary review purposes, but her agreement as to qualifying bonus criteria is quite another. There was no agreement as to KPI's for that purpose. Nor for that matter is there any evidence that she agreed that KPI's for salary review purposes would be employed for bonus purposes also. While I find that this is what Mr Lepionka now contends, I find that Mrs McFarlane had never agreed.

[52] I find that Mrs McFarlane tried to settle the rules earlier "in the game" on 15 August 2005. I also find that Mr Lepionka was fully aware of Mrs McFarlane's desire to negotiate and agree KPI's for bonus purposes. I find that he elected to ignore Mrs McFarlane and did nothing about the situation she presented to him. That inaction was sufficient in my assessment to put the bonus out of Mrs McFarlane's reach. It also constitutes a failure to negotiate which is a breach of the express term. It is also contrary to Charlie's statutory duty of good faith and the implied terms of employment owed to Mrs McFarlane. This is not a situation where the parties negotiated and could not agree. It is a situation where Mrs McFarlane initiated discussions to negotiate but which

Charlie's did not see fit to engage in. That was inaction and a failure to negotiate which caused Mrs McFarlane a loss of opportunity.

[53] It may be that the parties may have failed to reach agreement on the KPI's for bonus even if they had turned their focus to that task. But Mrs McFarlane was not given that opportunity because of Charlie's breaches of duty. These breaches of duty caused loss to Mrs McFarlane in the form of the bonus. She is entitled to have the loss remedied. But how much is her loss? Is it the \$20,000.00 she claims? I do not accept it is on the grounds she says. If she believed she was entitled to the full \$20,000.00 she conducted herself as though her entitlement was assessable.

[54] Ms McFarlane may well have succeeded to the full \$20,000.00 or she may not have. But only losses which are proved are recoverable. So how much has Mrs McFarlane lost? The law courts have not shied away from assessing damages where the issue is complicated. They have regarded themselves as bound to do so however difficult the task. Cases where the courts are asked to assess hypothetical outcomes affecting either the plaintiff or a third party in relation to damages are known as loss of chance cases. In these cases the damages are intended to compensate for the loss of expectation. The award of damages on loss of chance principles proceeds on the basis that where it is established that there is liability and harm, there is a duty to assess compensation. *Schilling -v- Kid Garrett*¹, the Court of Appeal stated:-

... the loss of an opportunity, to which a person is entitled by contract, to obtain or retain employment or some profitable connection is recognised as a proper head of damage for breach of contract.

[55] The Authority has applied loss of chance principles in previous determinations². But the law is by no means clear and the rules are uncertain. The New Zealand Court of Appeal in *Miller v Poulgrain*³ has said of the law in the area:-

[44] Uncertainty can be addressed in two ways; either on what is often described as an "all or nothing" basis by reference to the balance of probabilities standard of proof, or, alternatively, on a proportionate (or loss of a chance) basis according to the Judge's assessment of the probabilities. The law as to when Judges should take "all or nothing" or a "loss of chance"

¹ [1977] 1 NZLR 243 (CA)

² *Dorset v Chemcolour Industries (NZ) Ltd* AA, unreported, 8 April & 2 June 2004, 117/04 and AA 117A/04, Alastair Dumbleton. *Gardner-Lee & BOC Ltd* unreported, AEA569/04, A Dumbleton, *Hemopo & Arai Te Uru Kokiri Centre Inc* Unreported, CA102/05, 27 July 2005, H Doyle, *Mortland & Mandalay Technologies Ltd*, unreported, AA67/05, 23 February 2005, Y S Oldfield

³ [2005] 1 NZLR 66 (CA)

approaches to causation and damages is, to say the least, difficult. The cases are not easy to reconcile. Where reconciliation is attempted the distinctions drawn are often artificial.

[56] Mrs McFarlane was entitled to a bonus for the period from 1 April 2005 to 31 March 2006. She initiated negotiations in August 2005 which her employer failed to acknowledge or respond to. Charlie's breached its duties owed to Mrs McFarlane and she was not paid any bonus at all. She is entitled to be compensated for her loss. I incline to the view that Charlie's would not have regarded her performance as faultless as the performance review process demonstrates and also having regard to the present state of the relationship. Because of these factors which I regard as realities, I adopt a discounted approach to remedies rather than an all or nothing approach.

[57] I have regard to the performance review process assessment between 80-85% and also Mrs McFarlane's evidence of discussions with Ms Wilson. I award Mrs McFarlane 90% of \$20,000.00 in the gross taxable sum of \$18,000.00. **Charlie's Trading Company Limited is ordered to pay to Nicky McFarlane the sum of \$18,000.00 as arrears of wages.**

B. Bonus 1 April 2006 – 30 June 2006

[58] Mrs McFarlane claims \$5,000.00 as the bonus due to her for the period from 1 April 2006 to 30 June 2006. That follows her claim for the full entitlement of \$20,000 for the preceding twelve months as identified earlier. I have earlier said Mrs McFarlane cannot sustain the entitlement on this basis because she conducted herself as though the entitlement was assessable. That is sufficient to dispose of this claim too.

[59] Mr Lepionka's advice in the letter of 15 March 2006 *that No incentive component will be calculated and paid for the period 1 April - 2 June 2006* was wrong and in breach of the Agreement. Mrs McFarlane is entitled to a bonus in respect of this period. The quantum of that entitlement is to be determined by the parties in the manner provided by the Agreement. But it is not the sum now claimed by Mrs McFarlane. **There are no orders in relation to this claim.**

B. Holiday pay

The finding in relation to Mrs McFarlane's entitlement to bonus above will impact on Mrs McFarlane's holiday pay. **The parties are to attempt to reach agreement as to any holiday pay entitlement arising and in the event they cannot agree they may seek further assistance from the Authority but within 28 days of the date of this Determination.**

C. Motor car

[60] Mr Lepionka's letter of 15 March 2006, informed Mrs McFarlane she was required to return her motor car before she commenced her annual leave. She duly returned the motor car on 1 June 2006 but she is aggrieved and claims that Charlie's request is unjustifiable.

[61] Charlie's says Mrs McFarlane never raised any issue in relation to the motor car following the advice of 15 March 2006. It says that Mrs McFarlane pursues the matter out of time, and as a matter of law, she is not entitled to any remuneration while she is on parental leave.

[62] A technical approach is not called for. I accept Mrs McFarlane did not have the use of her motor car for the month of June 2006 when she was on annual leave. She is contractually entitled to full personal use "within reason".

[63] Mr Langton resists this claim and refers the Authority to the contractual qualification of full personal use "within reason". It is submitted that the particular period of annual leave is distinguishable from other periods of annual leave because it followed a complete handover to a replacement. The submission has it that in these circumstances full personal use is not then "within reason".

[64] I do not accept the submission because I consider the qualification "within reason" relates to the degree of the personal use not the fact of it. While she was employed, including periods of leave, Mrs McFarlane is entitled to full personal use of a motor car. That remunerative element is not suspended by periods of leave. Her personal use must always be reasonable but her entitlement to it while on leave is never in question.

[65] Mrs McFarlane values the loss of one month's use of her motor car in the amount of \$2,000.00 which she bases on a *2005 Swann Group FGC Marketing and Sales Salary Survey*. I consider Mrs McFarlane is entitled to be reimbursed the loss of her remuneration. **I order Charlie's Trading Company Limited to pay to Nicky McFarlane the sum of \$2,000.00 as arrears of remuneration.**

D. Stress and Distress

[66] Mrs McFarlane claims compensation for stress and distress she says Charlie's has caused her.

[67] She says an unreasonable amount of pressure was placed on her by Charlie's during her pregnancy. While she was pregnant, between 25 November 2005 and 31 March 2006 she

performed her own role as well as the duties of the departed Auckland regional sales manager. As well as this work, Mrs McFarlane says she was integrating Phoenix products into Charlie's sales team product portfolio, organising a national launch conference, taking over head office management of Red Bull products, and new projects such as a V8 race and new customers. She says that despite this work continuing to pile up, her repeated requests for relief failed. Matters came to a head when on 7 March 2006 she was asked to produce a budget for the following year. She went home unwell. Her doctor deemed her unfit for work for seven days. She saw her obstetrician the following day who provided a medical certificate stating Mrs McFarlane needed to reduce her workload and stress levels. Mrs McFarlane says she was only permitted to take two days leave. She wrote to Mr Lepionka by email of 8 March 2006, but does not raise any grievance:-

Hi Stefan,

I had an appointment with my doctor yesterday, she diagnosed that I am suffering physical symptoms of exhaustion and stress. As a result, I have an out of cycle appointment with my obstetrician today to check everything is ok with baby.

The doctor has given me a note to take 7 days stress leave. However, at this stage I will just be taking today off work.

I think it is important to make clear here, I am confident I can continue to perform my own role for Charlie's until my planned leave date. However, as discussed, I can not continue to take on additional tasks whilst still fulfilling the function of both the NSM and RSM roles. I have now been performing the RSM role as well as my own since the end of November when Luke left, without either suffering. This would have been a big ask to cover both these roles even without the added strain of pregnancy.

My doctor has also suggested working from home to reduce my driving time, limiting my time sitting in front of a computer and generally reducing my workload as ways to assist with my back pain. I know your feeling on working from home, but perhaps you could reconsider? As Vicki said the other day, I now need to think about what is best for me and the baby.

[68] Mrs McFarlane also points to these additional stresses:-

- (a) the manner in which she was treated by Charlie's during her pregnancy;
- (b) the suggestion that she might not have a job to come back to after her parental leave;
- (c) the revoking of her ability to work from home;
- (d) the very clear communication that her pregnancy was an obstacle to Charlie's despite all her hard work.

[69] She says it is unacceptable that her health and that of her unborn child were put in jeopardy before any assistance was given to her, despite her numerous requests. These stresses have placed huge stress on Mrs McFarlane's finances and caused her many sleepless nights. She supports her family and has had to revert to her savings to meet her legal costs. She concludes that she has a strong sense that Mr Lepionka has wanted to punish her for becoming pregnant.

[70] She says she is concerned about how she will be treated when she returns to work in July later this year. She says she does not deserve to be treated the way she alleges she has been when she has given 100% to Charlies and at this particular time in her life is a real kick in the teeth.

[71] Mrs McFarlane submits that she has raised a personal grievance in relation to disadvantage arising out of stress. It is submitted that the grievance was raised by her lawyers in a letter dated 22 June 2006 as follows:-

Mrs McFarlane has suffered considerable stress as a result of the appalling way in which she has been treated by the company. The company placed significant and unreasonable pressure on Mrs McFarlane during the term of her pregnancy. Since giving birth, the company has continued to cause Mrs McFarlane to suffer further stress as a result of its unjustified actions. The company has manifestly failed to act in accordance with the obligation of good faith owed by it to Mrs McFarlane and it appears that the company has also discriminated against Mrs McFarlane's employment by reason of her pregnancy and subsequent childcare responsibilities.

The stress that Mrs McFarlane is currently suffering as a result of the company's actions is having an adverse effect on her health. We are extremely disappointed that the company has treated Mrs McFarlane in a manner which has put her own, and her child's, health at risk.

...

If the company does not meet its obligations as set out above by 30 June 2006, we have instructions to file personal grievance proceedings in the Employment Relations Authority in respect of these matters. In the event that Mrs McFarlane is put to the cost and trouble of issuing legal proceedings in order to recover her entitlements and enforce her right not to be discriminated against, our client will also seek compensation for the distress that she has suffered as a result of the company's actions.

[72] I have little doubt that Mrs McFarlane has worked very hard for Charlie's. I have no doubt at all she is capable and competent.

[73] On 8 May 2006 she wrote that her doctor had recommended she take 7 days stress leave. Mrs McFarlane did not raise any criticism of her employer. She advised her own decision that she would take only one day off work "*The doctor has given me a note to take 7 days stress leave. However, at this stage I will just be taking today off work.*"

[74] I do not consider my investigation has shown any evidence of Charlie's exerting undue pressure on Mrs McFarlane or causative of undue stress in breach of her terms of employment. I see only one request on 6 May 2006 for assistance, but there is no reference to any sense of grievance or dissatisfaction.

[75] Mrs McFarlane makes very serious allegations against Mr Lepionka arising out of a meeting on 31 January 2006. She says *Mr Lepionka saw her pregnancy as an obstacle to her advancement with the company*. She says that when she protested about not being consulted in relation to proposed restructuring that Mr Lepionka said if she did not like it she should not have got pregnant. I find that Mrs McFarlane rejected those statements and elected to continue her employment.

[76] Mrs McFarlane appeared to the Authority as someone who is forthright and confident and at times aggressive by her own admission. I find that the alleged grievances for discrimination and stress are raised out of time, and further, there are not grounds for granting leave to pursue those grievances out of time. I have reached the same conclusion in relation to the contended grievances arising out of treatment during pregnancy and statements made in the meeting held on 31 January 2006 which I particularly find in any event, were rejected by Mrs McFarlane. **There will be no orders in relation to the claims of personal grievance.**

The continuing relationship

[77] These parties have a continuing employment relationship. That relationship is deserving of every endeavour to ensure it continues and that it remains productive.

[78] I appreciate that the parties will shortly be confronted with the bonus for the year ended 31 March 2007. There are difficulties with the bonus clause in its present form and while this Determination decrees a resolution in respect of the present impasse, there is a real potential for future difficulties. Where the parties are unable to agree having conducted negotiations, it is not for the Authority to impose an agreement upon them.

[79] Bonus clauses are too often drafted insufficiently as to assessment and disagreement. For instance, the parties are obliged to review the KPI's at least annually, but the clause makes no provision for disagreement. So too if the parties are unable to reach agreement on what the KPI's should be. These are matters which require good faith negotiations conducted with a view to ensuring the relationship continues in the future. I urge the parties to attend to clarifying this aspect of their relationship.

[80] I trust this Determination deals with all matters but if there is a requirement for further assistance, either party may make application in writing to the Authority within 14 days of the date of this Determination.

Costs

[81] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Drake is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Langton is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority