

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 255
5383120

BETWEEN CHRISTINE SINTON
Applicant

A N D BURNS & FERRALL
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: David Prisk, Advocate for Applicant
No appearance for Respondent

Investigation meeting: 17 July 2012 at Auckland

Date of Determination: 26 July 2012

DETERMINATION OF THE AUTHORITY

- A. Burns & Ferrall Limited (B&F) is liable to pay Ms Christine Sinton a bonus of \$5,000 for the 2011/2012 year;**
- B. Ms Sinton's employment was not affected to her disadvantage by B&F's failure to respond to her email requesting a meeting to discuss her concerns about Mr McRobb's behaviour;**
- C. B&F breached its implied obligations of good faith to Ms Sinton under s.4(1A) of the Employment Relations Act 2000 (the Act) in failing to disclose to her the true nature of Kent's role.**
- D. Ms Sinton was unjustifiably dismissed by B&F on 7 March 2012. B&F is ordered to pay Ms Sinton the sum of \$15,530 gross being reimbursement of wages lost by Ms Sinton as a result of the dismissal, pursuant to s.123(1)(b) of the Act. B&F is ordered to pay the sum of \$10,000**

compensation to Ms Sinton for humiliation, loss of dignity, and injury to feelings suffered by her as a result of her unjustifiable dismissal.

Non appearance of the respondent

[1] B&F failed to file a statement in reply, failed to file witness statements and failed to attend the investigation meeting.

[2] Being satisfied that B&F had been properly served with the statement of problem and subsequent correspondence from the Authority together with a notice of investigation meeting, I proceeded to investigate the matter in the absence of B&F.

Issues to be determined

[3] The issues to be determined include:

- (a) Is Ms Sinton entitled to payment of the bonus of \$5,000 by B&F?
- (b) Was Ms Sinton's employment affected to her disadvantage by B&F's failure to respond to her email request for a meeting about the behaviour of the technical manager, Mr McRobb?
- (c) Was B&F in breach of its implied obligations of good faith under the Act in failing to disclose the true nature of Kent's role at B&F?
- (d) Was Ms Sinton's dismissal by B&F on 7 March 2012 justifiable on the grounds of genuine redundancy and was it carried out in a procedurally fair manner?

The first issue

Is Ms Sinton entitled to payment of a bonus of \$5,000?

[4] In late January/early February 2011, Ms Sinton was interviewed for the position of national service delivery team leader at B&F by the then General Manager, service delivery and projects, Gerhard Nagele. Ms Sinton was provided with a copy of the job description for the role and she and Mr Nagele discussed the role. Mr Nagele told Ms Sinton at the interview B&F was just about to install a new computerised tracking system which would provide statistical data for tracking jobs in

the service department. Ms Sinton understood that this was to occur very soon. Shortly after the interview Mr Nagele telephoned Ms Sinton and offered her the position.

[5] During the course of this telephone conversation Ms Sinton inquired about the salary level and was informed that it was \$65,000 gross per annum. Ms Sinton thought the salary level to be a little low. Mr Nagele and Ms Sinton agreed that Ms Sinton would be paid a \$5,000 bonus in February each year which would bring her salary up to \$70,000 gross if she achieved set KPIs. Ms Sinton was happy with that arrangement and accepted the offer of employment. Shortly after the phone call, Mr Nagele emailed an individual employment agreement to Ms Sinton which included four KPIs which Ms Sinton would have to achieve in order to obtain the \$5,000 bonus. The reports to be produced by Ms Sinton demonstrating achievement of the targets specified in each of the KPIs was dependent on the installation of the new computerised tracking system.

[6] Ms Sinton commenced employment with B&F on 15 February 2011 and each week had a catch up meeting with Mr Nagele. At one of these weekly meetings about three months after starting at B&F, Ms Sinton raised the fact that the new computerised tracking system had not been installed. Because the new system had not been installed Ms Sinton had been manually tracking her KPIs and believed she was achieving them. Ms Sinton and Mr Nagele discussed her KPIs at the meeting and Mr Nagele told Ms Sinton that it was not her fault the new system had not been installed and she would be paid her bonus.

[7] The new computerised tracking system was never installed and Ms Sinton understands has still not been installed by B&F.

[8] Mr Nagele left B&F in mid-December 2011 and his position of General Manager, service delivery and projects was not replaced.

[9] At the meeting on 7 March 2012, at which time Ms Sinton was dismissed for redundancy, she asked Mr George about the bonus and was promised that he would look in to it and get back to her. Mr George did not get back to Ms Sinton. On 13 March 2012, not having heard from Mr George, Ms Sinton sent him an email asking about payment of her bonus, there was no reply. On 15 March 2012,

Ms Sinton sent an email to Ms Claudine Nelio in payroll/HR asking that she follow the bonus up with Mr George as he was not responding to her requests. Ms Nelio responded to Ms Sinton by email later the same day saying:

Hi Christine,

Spoke to Chris, we had a look over the contract and he advised that none of the 4 kpis stipulated in your contract has been met, therefore no bonus is due.

[10] Clause 9 f of Ms Sinton's individual employment agreement provides as follows:

The employee will be required to deliver a minimum of four company defined KPI's per annum. The KPI's that will be set are designed to propel the company forward and by that [sic] very nature are challenging but commercially achievable. Each KPI must be delivered to the complete satisfaction of the GM Service Delivery & Projects and each KPI achieved will result in the employee being entitled to a gross KPI achievement bonus of gross \$5000. Each year the KPI's will be set and appended to the employment contract once they are duly executed by both parties.

[11] The employment agreement included a schedule setting out each of the 4 KPIs to be achieved by Ms Sinton and attaching a value of \$1250 to each. The KPIs relate to tasks set out in Ms Sinton's job description. It is my understanding of the evidence that Ms Sinton achieved the KPIs set for her but could not provide the type of report specified in each KPI because the new computerised tracking system had not been installed. Mr Nagele accepted this and was satisfied the bonus was to be paid.

[12] I find that B&F is liable to pay Ms Sinton the sum of \$5000 as a bonus.

The second issue

Was Ms Sinton's employment affected to her disadvantage by B&F's failure to respond to her request for a meeting about the behaviour of the technical manager, Mr McRobb ?

[13] Mr McRobb was employed by B&F in late 2011 in the role of technical manager. He performed some of the technical aspects of the role Mr Nagele had performed but the role was different from the position held by Mr Nagele.

[14] Not long after Mr McRobb commenced at B&F, he and Ms Sinton clashed. Ms Sinton was not sure why but put it down to an incident which occurred within a

few months of Mr McRobb commencing. Ms Sinton received an email from Mr McRobb asking her to explain why four of the technicians:

... were sitting around drinking coffee in the canteen from 07h30 until 08h00? They are supposed to be out on the road earning money for the company whilst on the clock, not having a coffee and a chat. This sort of tardiness is unacceptable and I do not want a repeat of this, especially when other staff members question why they are sitting around not working.

[15] Ms Sinton was not responsible for the technicians and forwarded the email to Bob Lopesi who managed the technicians' work. Mr Lopesi forwarded the email to the technicians who became very upset about the email and confronted Mr McRobb. Ms Sinton believes that it was that incident that led Mr McRobb to "have it in for her". Ms Sinton described every contact with Mr McRobb following that incident as being awful. Ms Sinton gave some examples. On one occasion Ms Sinton says she left a post-it note on one of the invoices that Mr McRobb had been working on asking if he could check some of its details. When Mr McRobb saw the note, he went into Ms Sinton's office, stood over her and threw the invoice on her desk. He then walked out of the office and slammed the door. Ms Sinton says when corresponding with her over work matters, Mr McRobb's emails were rude and discourteous.

[16] It was following a customer complaint about one of B&F's technicians in Christchurch that Ms Sinton decided she needed to take the matter of Mr McRobb's behaviour towards her to the CEO, Mr Chris George. Ms Sinton received an email from Mr McRobb on 20 February 2012 concerning a Christchurch technician. Ms Sinton described the email as being rude and she did not like its tone. Ms Sinton received the email late in the day and was so upset she logged off and went home to think about what she should do next. Ms Sinton says she rang her daughter who was overseas and talked to her about what she should do. Her daughter suggested that she keep the emails from Mr McRobb as she may need them. Ms Sinton says she decided she would raise the issue of Mr McRobb's behaviour with the CEO, Mr George.

[17] Ms Sinton says she returned to work on Wednesday, 22 February and sent a reply to Mr McRobb's email about the customer complaint and copied both the CEO and the national manager, Tony Broome. Ms Sinton wanted Mr George to be aware of the type of behaviour that she had been dealing with. Ms Sinton says that she then emailed Mr George separately requesting a meeting with him as soon as possible to

discuss Mr McRobb's behaviour towards her. Ms Sinton did not receive a response to her email from either Mr George or Mr Broome, nor did she receive a response from Mr George to her request for a meeting. Ms Sinton did not follow the matter up with Mr George again, but in any event two weeks after sending the email, Ms Sinton had been dismissed from her employment.

[18] As I understand it, Ms Sinton claims Mr George's failure to respond to her email requesting a meeting to discuss Mr McRobb's behaviour towards her constitutes unjustifiable action by B&F which affected her employment to her disadvantage.

[19] Section 103 of the Act provides as follows:

(1) *For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employer's employer or former employer because of a claim –*

...

(b) *That the employee's employment, or one or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; ...*

[20] From the evidence provided to the Authority by Ms Sinton, Mr McRobb's behaviour was rude, dismissive and discourteous. Ms Sinton quite rightly asked for a meeting with Mr George to discuss it. When Mr George did not respond, she did not take the matter further and continued working as normal. Mr George's failure to respond to Ms Sinton's email raising Mr McRobb's behaviour does not, in my view, constitute unjustifiable action by the employer which affected Ms Sinton's employment to her disadvantage. Mr George should have responded to Ms Sinton's request for a meeting to discuss Mr McRobb's behaviour but he did not do so and there were no reasons given for this. It could have been for many reasons. Ms Sinton only made one request for a meeting and did not follow it up. There is insufficient evidence for me to make a finding that Mr George's failure to reply to the email request constituted unjustifiable action in the circumstances. Ms Sinton continued to work as usual and there was no evidence her employment was affected to her disadvantage as a result of B&F's failure.

[21] It is my finding that Ms Sinton's employment was not affected to her disadvantage by any unjustifiable action by B&F.

The third issue

Was B & F in breach of its implied obligations of good faith under the Act in failing to disclose the real nature of Kent's role at B&F?

[22] On about 10 or 11 December 2011, Ms Sinton and one of her colleagues, Bob Lopesi, were called into the board room where Mr George and Mr Broome were sitting with another man. Mr George said to both Ms Sinton and Mr Lopesi that there was someone he wanted them to meet. The man in the board room was introduced to Ms Sinton and Mr Lopesi as Kent. Mr George told both Ms Sinton and Mr Lopesi that Kent was a student who was doing a thesis on service departments. Mr George asked that they answer all and any questions that he may have of them. Ms Sinton and Mr Lopesi were told that Kent would be floating in and out of the office and that they were to give him all the information that he needed and they were to provide him with access to everything that he needed for his thesis. Mr George asked that they answer any of Kent's questions about the service department honestly and openly. Ms Sinton felt that it was a little unusual for someone to be doing a thesis on service departments but she had no reason to believe otherwise. The meeting at which Kent was introduced to Ms Sinton and Mr Lopesi lasted about three minutes.

[23] Kent began spending time in the office for the rest of that week. He asked questions of Ms Sinton's fellow colleagues, Mr Lopesi and Julia, and spent some time with Ms Sinton asking questions about work flow, the technicians, jobs, invoicing. Kent was given access to and looked at the department's files and processes, how work was charged to a customer and asked Ms Sinton questions about the work flow. Ms Sinton was on leave from 16 December 2011 to 8 January 2012 and her next contact with Kent was when she returned to the office on 8 January 2012.

[24] Ms Sinton asked Kent about his study and was told by him that when he finished she would be very interested in the results. Ms Sinton agreed that she would be interested in the result of his research. Ms Sinton continued to work as usual and to provide Kent with information as requested up until the 7 March 2012 at which time she was requested by Mr George to attend a meeting with him. The outcome of that meeting was Ms Sinton's dismissal for redundancy.

[25] At the meeting, Ms Sinton was told for the first time by Mr George that Kent was a consultant who had been employed by B&F to look at the service department and recommend changes and that Kent was handling those changes. Ms Sinton says this was complete news to her as she believed Kent was at B&F to research the service department for his thesis. She was not aware that there were to be any changes to the service department.

[26] It is my view that Ms Sinton was led to believe that Kent was undertaking research for a thesis on service departments. While she thought it was unusual, she had no reason to believe that this was not the case. In fact, Kent was a consultant engaged by B&F to review the service department, recommend and implement changes to the department. I consider the conduct of Mr George to be deliberately misleading and deceptive. Ms Sinton cooperated with Kent and willingly showed him the systems in the department and answered his questions honestly and openly as she had been requested to do, on the understanding that he was undertaking research for a thesis. Instead, he was reviewing her department without her knowledge and recommending changes which, when implemented, meant the loss of her position.

[27] Section 4(1A) of the Act sets out clearly the duties of good faith on parties to an employment relationship. The duty of good faith:

... requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...

[28] I find that B&F breached its duty of good faith towards Ms Sinton. Ms Sinton did not bring an action for a penalty for breach of good faith under the Act and there is no jurisdiction for the Authority to make an order for a penalty in such circumstances. However, I find that B&F's breach of its good faith obligations is relevant to Ms Sinton's claim that she was unjustifiably dismissed.

The fourth issue

Was Ms Sinton's dismissal by B&F on 7 March 2012 justifiable on the grounds of genuine redundancy and was it carried out in a procedurally fair manner?

[29] Ms Sinton received a one line email from Mr George on the morning of 7 March 2012 asking her to attend a meeting at 3.30pm that afternoon and to bring a

support person. Ms Sinton was not told the purpose of the meeting and assumed it was to talk about Mr McRobb and his behaviour towards her. Ms Sinton did not feel that she had time to arrange a support person nor did she feel she needed one because she thought the meeting was about Mr McRobb's behaviour towards her.

[30] Ms Sinton attended the meeting at 3.30pm on her own. Upon her arrival, she was told by Mr George that another person would be joining the meeting. He did not say who.

[31] Kent came into the meeting and sat next to Ms Sinton which was a surprise to her. Mr George said to Ms Sinton, "*as you know the company is making some changes in the service area*" and proceeded to tell her that Kent would be responsible for making the changes. This was the first that Ms Sinton knew of the true nature of Kent's role and that changes were proposed to the department within which she worked. I have found this misleading conduct by Mr George on behalf of B&F to be in breach of its good faith obligations.

[32] Mr George proceeded to tell Ms Sinton that her position was being made redundant and that she was to be placed on "*garden leave*" immediately. Ms Sinton was shocked and asked Mr George if this was performance related and was told it was not. The meeting lasted no more than 10 minutes.

[33] Section 4(1A) of the Act provides:

The duty of good faith in subsection (1)-

without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-

access to information, relevant to the continuation of the employees' employment, about the decision; and

an opportunity to comment on the information to their employer before the decision is made.

[34] B&F did not comply with this section of the Act. Ms Sinton had no idea that B&F proposed making a decision which would adversely affect the continuation of her employment and so did not seek to have access to the information relevant to that proposed decision. Similarly, because of Ms Sinton's ignorance of B&F's proposed

decision, she did not ask for an opportunity to comment on the information. Presumably Kent had presented information to B&F before the decision to make Ms Sinton's role redundant was made. This is a further breach by B&F of its duty of good faith to Ms Sinton and is relevant to the issue of whether the decision to dismiss Ms Sinton for redundancy was justifiable

[35] There was no evidence before the Authority of reasons for the review of the service department, no evidence of the reasons why changes were required or why Ms Sinton's role should be made redundant. It is accepted that whether to make a role redundant is part of management's prerogative, see *GN Hale & Son Ltd v Wellington Caretakers IUOW*¹. However, the decision must be genuine. There is no evidence that the decision by B&F to make Ms Sinton's role redundant was genuine and in the absence of information substantiating the decision, I find the dismissal not to be for genuine reasons of redundancy.

[36] There was no consultation with Ms Sinton over any changes to the department which may affect her ongoing employment and she was not given any notice whatsoever that her employment may be in jeopardy. Ms Sinton was informed for the first time at the meeting on 7 March 2012 that she was to be dismissed for redundancy and that she was to be immediately placed on garden leave. Consultation is essential in most cases where redundancy is contemplated, see *Coutts Cars Ltd v Baguley*.² The breaches of good faith referred to above, the failure to consult with Ms Sinton or provide her with any notice of proposed redundancy are serious procedural flaws in the process undertaken by B&F in dismissing Ms Sinton. Ms Sinton's dismissal was not carried out in a procedurally fair manner.

[37] Ms Sinton was required to leave the building immediately following the meeting on 7 March 2012 which was very hurtful and humiliating for her. Kent, who up until that day she believed to be a student researching her department, was charged with ensuring she removed her belongings and left the building. Ms Sinton was not given the opportunity to farewell any of her colleagues nor was any explanation given to them as to her immediate removal from her employment. Ms Sinton when giving this evidence was visibly upset by the way in which she was treated.

¹ [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA)

² [2001] ERNZ 2 NZLR 533 (CA)

[38] Ms Sinton's dismissal for redundancy was unjustified. Ms Sinton is entitled to reimbursement of loss of wages as a result of her dismissal. Ms Sinton's gross weekly salary totalled \$1250.00. Ms Sinton did not find another job until 29 May 2012, her loss of wages from 9 April 2012 until 25 May 2012 totals \$12,140. Ms Sinton started a new job on 29 May 2012 and earned a total of \$5,360 gross up until 13 July 2012. Ms Sinton would have earned \$8,750 gross if she had remained at B&F for that period. Ms Sinton suffered a loss in wages for that period of \$3,390 gross. Ms Sinton's total loss of wages amounts to \$15,530 gross and I order reimbursement to her by B&F pursuant to s.123(1)(b) of the Act.

[39] Ms Sinton suffered humiliation, loss of dignity, and injury to feelings as a result of her unjustifiable dismissal. I order B&F to pay Ms Sinton compensation in the sum of \$10,000 pursuant to s.123 (1)(c) of the Act.

Costs

[40] B&F is ordered to pay Ms Sinton the sum of \$1,750 being the notional tariff for a half day investigation meeting in the Authority.

Anna Fitzgibbon
Member of the Employment Relations Authority